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 FOR RESPONDENTS

BETH A. BURTON
Deputy Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

CLINT C. MALCOM
Assistant Attorney General

CHRISTOPHER M. CARR
Attorney General

STEPHEN J. PETRANY
Solicitor General
Counsel of Record

ROSS W. BERGETHON
DREW F. WALDBESER
Deputy Solicitors General

OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square, SW, Atlanta, Georgia 30334
(404) 458-3408; spetrany@law.ga.gov

Counsel for Respondents

CAPITAL CASE
QUESTIONS PRESENTED

1. Petitioner Michael Nance asserts that he cannot be lawfully executed by lethal injection under the Eighth Amendment. Georgia law requires that capital inmates be executed by lethal injection. Given that Nance's suit would legally prevent his execution, are his claims cognizable only in habeas?

2. Assuming Nance's claims must be raised via habeas petition, is such a filing a "second or successive application," 28 U.S.C. § 2244(b), when Nance already litigated a habeas petition in federal court, seeking relief from the same judgment?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Petitioner Michael Nance wants to stop his execution. And after decades of unsuccessful state and federal post-conviction review, he now wants to sidestep the rigorous procedures of habeas law by *labeling* his latest challenge a § 1983 complaint regarding Georgia's "method of execution."

Nance is mistaken. Where a prisoner seeks to bar his execution, he seeks habeas relief. An execution is a form of state-authorized custody, and this Court has long held that where a prisoner challenges custody as unlawful, § 1983 is unavailable. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). If a claim challenges only the conditions of custody without seeking *relief* from custody—like claims for kosher food or better medical care—then § 1983 is proper. But when a prisoner seeks to establish the "unlawfulness of the State's custody" *itself*, only a habeas petition is available. *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005). Here, Nance asserts that any lethal injection would be unconstitutional, and Georgia law requires that capital prisoners "shall suffer [death] by lethal injection." Ga. Code Ann. § 17-10-38(a). If Nance succeeds, his execution would be unlawful, so he challenges the *fact* of custody.

In response, Nance relies on variations of a single, remarkable argument. He reasons that, because the Georgia legislature might be able to make his preferred punishment available (by enacting a statute allowing death by firing squad), he could theoretically be executed *someday*, so he is not really challenging his execution *now*. But that is not the test for whether his

lawsuit sounds in habeas. What matters is that if this challenge were to succeed, Nance's custodian could not lawfully execute him *now*, so Nance seeks to prevent his execution. After all, neither federal courts nor Nance's custodian have power to alter Georgia law. Moreover, to allow Nance to evade habeas review—on the theory that a State might statutorily *change* his punishment—would erode basic principles of federalism. States have the sovereign power to define their own punishments. Prisoners can challenge them, but they cannot do so without complying with Congress's habeas statutes, which emphasize "comity, finality, . . . federalism," and respect for state sovereignty. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citation omitted).

Next, Nance's recharacterized filing must be dismissed as a "second or successive habeas corpus application." 28 U.S.C. § 2244(b). Nance's petition seeks relief from the same judgment as a previous filing, *Magwood v. Patterson*, 561 U.S. 320 (2010), and it is not a continuation of the previous filing, *Slack v. McDaniel*, 529 U.S. 473 (2000). Nance asks this Court to ignore his previous federal habeas petition and declare his current filing a "first" application because it raises claims that were (supposedly) previously unripe, but the Court should reject his offer to re-write the statute. Besides, Nance's claims *were* previously ripe, so he would lose even on his own theory.

Nance repeatedly protests that unless the Court creates an atextual exception for his filing, it will "close the courthouse doors" for capital prisoners, Pet.Br.38,

but that is not remotely true. Prisoners can raise challenges to lethal injection in their first federal habeas petition (as Nance, in fact, did), in state court (as Nance also did), on certiorari to this Court (which Nance *also* did), and elsewhere. What they cannot do is co-opt federal habeas law in service of yet another "dilatory tactic[] to prolong . . . incarceration and avoid execution." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). The Court should affirm the decision below.

STATEMENT

A. Georgia's Lethal Injection Procedures.

Like all "States and the Federal Government," Georgia "has altered its method of execution over time to more humane means." *Baze v. Rees*, 553 U.S. 35, 40–41 (2008). "From 1735 to 1924 the legal method of execution in Georgia was hanging," which the General Assembly then abolished in favor of electrocution. Office of Planning and Analysis, *A History of the Death Penalty in Georgia*, State of Georgia Department of Corrections (2015), http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Standing/Death_penalty_in_Georgia.pdf (last visited Mar. 28, 2022). Electrocution remained the statutorily prescribed punishment until 2000, when Georgia adopted lethal injection, as every State had done or would do. *See* Death Penalty—Execution By Lethal Injection, 2000 Ga. Laws 947; *Baze*, 553 U.S. at 41.

While Georgia law specifically declares that "persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall

suffer such punishment by lethal injection," the procedures are left to the Commissioner and other administrative officials. Ga. Code Ann. § 17-10-38; *id.* § 42-2-6; *id.* § 42-2-11; *Hill v. Owens*, 292 Ga. 380, 380, 382 (2013); *see also* Ga. Code Ann. § 17-10-44. And although the Commissioner has published the ordinary administrative procedures for executions, *see* Georgia Dep't of Corr. Lethal Injection Procedures, CA11 Appendix at 35–57 ("*Procedures*"), they are not regulatory or "legally-binding," *Hill*, 292 Ga. at 389.

These (non-binding) protocols are flexible, similar to procedures this Court has already affirmed as constitutional. *Compare Procedures with Baze*, 553 U.S. at 45. For instance, there are multiple options for preparing the prisoner for execution. The default is that the IV team "provide[s] two (2) intravenous accesses." *Procedures* at 4; *cf. Baze*, 553 U.S. at 45 (technicians established "both primary and secondary peripheral IV sites"). But if "the veins are such that intravenous access cannot be provided, a Physician will provide access by central venous cannulation." *Procedures* at 4. "Central venous cannulation entails inserting a catheter into a central vein located either in the groin, or above or below the clavicle." Pet.App.95a. And if that method does not succeed, the physician can use another "medically approved alternative." *Procedures* at 4.

The execution itself is carried out with care. The protocols call for the use of pentobarbital, along with saline to "ensur[e] a steady, even flow." *Id.* at 5; *cf. Baze*, 553 U.S. at 45 (execution team "flush[es]" the IV lines with saline to "prevent clogging"). Throughout the

process, an "IV Nurse will monitor the progress of the injection in the Execution Chamber." *Procedures* at 5; *cf. Baze*, 553 U.S. at 45–46 (warden and deputy warden "watch for any problems with the IV catheters and tubing"). If the nurse observes any problems, he or she informs the physician, who decides whether "using an alternative intravenous access is appropriate." *Procedures* at 5. If, after a "sufficient time for death to have occurred," there are any "visible signs of life," the injection procedure is repeated. *Id.*; *cf. Baze*, 553 U.S. at 45 (new dose administered if prisoner continues to show signs of life).

B. Nance Is Convicted of and Sentenced to Death for Murdering Gabor Balogh During a Failed Bank Robbery.

On December 18, 1993, Petitioner Michael Nance stole an Oldsmobile and drove to the Tucker Federal Savings & Loan. *Nance v. State*, 272 Ga. 217, 217 (2000). He entered the bank "wearing a ski mask and gloves and carrying a .22 caliber revolver," ordered the bank tellers to stuff money into two pillowcases, and declared: "I'm going to come back and kill you all if the dye thing goes off." *Id.* Nevertheless, the tellers included two dye packets with the money, and they did indeed go off in the stolen Oldsmobile, "emitting red dye and tear gas." *Id.*

Nance abandoned the compromised vehicle and ran to a nearby liquor store parking lot. *Id.* Gabor Balogh was backing his car out of a parking space when Nance "yanked open the front driver's-side door." *Id.* Balogh "scream[ed]" and said "[n]o, no," as Nance

shot him with the .22 caliber revolver. *Id.* at 218. Nance then pointed his gun at a pedestrian and demanded car keys. *Id*. When the man ran away, Nance fired another shot; he missed. *Id.* The police apprehended Nance soon after, but Balogh died before help could arrive. *Id.*

After trial, "a jury convicted [Nance] of 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 on September 26, 1997." *Nance v. Warden*, No. 1:13-cv-04279, 2017 WL 6597934, at *1 (N.D. Ga. Aug. 7, 2017). Based on two aggravating factors, the jury sentenced Nance to death. *Nance v. State*, 272 Ga. at 217.

C. Nance Challenges His Conviction and Sentence (Including Lethal Injection) in Direct and Post-Conviction Proceedings.

After sentencing, Nance embarked on a twenty-year journey to test the judgment against him, repeatedly raising challenges to lethal injection along the way.

1. State Proceedings. Nance first moved for a new trial and asserted, among various claims, that execution by electrocution (at the time, Georgia's prescribed capital punishment) violated the Eighth Amendment. *Nance*, No. 1:13-cv-04279, Doc. 13-30 at 9–10. The trial court denied the motion, but on appeal, the Georgia Supreme Court vacated Nance's sentence because one juror should not have been qualified. *Nance v. State*, 272 Ga. at 224. Nance was then resentenced: the jury returned a verdict that he be "sentenced to death by lethal injection," and the judge

entered a sentence of death. *Nance*, No. 1:13-cv-04279, Doc. 14-17 at 98–101. (Georgia had switched to lethal injection in the interim.)

In the wake of his resentencing, Nance again moved for a new trial, now challenging lethal injection as unconstitutional under the Eighth Amendment. *Nance*, No. 1:13-cv-04279, Doc. 16-16 at 10–11. Again, Nance was rebuffed, and this time his sentence was upheld on appeal. *Nance v. State*, 280 Ga. 125, 131–32 (2005). In rejecting his various claims, the Georgia Supreme Court specifically held that the State's lethal injection procedures were constitutional. *Id.* at 127. Nance sought certiorari, again challenging the specific lethal injection drug protocol. *Nance*, No. 1:13-cv-04279, Doc. 16-25 at 35–38, 42. This Court denied review. *Nance v. Georgia*, 549 U.S. 868 (2006).

Nance then turned to state post-conviction review. His state habeas petition included claims that his trial counsel were ineffective for failing to challenge the use of lethal injection, "in part due to [Nance's] history of intravenous drug use," and that execution by lethal injection was directly unconstitutional because of, *inter alia*, "[Nance]'s own unique characteristics." *Nance*, No. 1:13-cv-04279, Doc. 17-43 at 12, 57. The trial court vacated Nance's sentence based on an unrelated ineffective assistance claim, but that ruling was overturned on appeal. *Humphrey v. Nance*, 293 Ga. 189, 190 (2013). This Court denied review. *Nance v. Chatman*, 571 U.S. 1177 (2014).

2. Federal Proceedings. With his state post-conviction litigation concluded, Nance filed a federal

habeas petition under 28 U.S.C. § 2254. *See Nance*, No. 1:13-cv-04279, Doc. 1. Nance included an extraordinary number of claims, with over 80 variations on ineffective assistance of counsel, as well as claims of misconduct by the prosecution, the jurors, and various legal errors. *Id.* Nance again raised several claims of error relating to lethal injection. Though not directly raising an as-applied challenge to lethal injection, he claimed his counsel were ineffective for "failing to argue that Georgia's lethal injection protocols are unconstitutional, in part due to Petitioner's history of intravenous drug use." *Id.* at 23. (Nance began regular intravenous drug use in junior high school. *Nance*, 13-cv-04279, Doc. 43 at 24, 29.)

Despite filing a 240-page brief in support of his petition, *id*., Nance failed to pursue his lethal-injection claims and the district court deemed them abandoned, *Nance*, 2017 WL 6597934, at *2. The district court denied his remaining claims and was affirmed on appeal. *Nance v. Warden*, 922 F.3d 1298, 1307 (11th Cir. 2019), *cert. denied sub nom. Nance v. Ford*, 140 S. Ct. 2520 (2020).

D. Nance Files a § 1983 Complaint Seeking to Enjoin His Execution.

Nance next turned to 42 U.S.C. § 1983. In January 2020, Nance filed a complaint in federal court seeking to enjoin his execution. Pet.App.103a. In his complaint, Nance asserts that "around May 2019, a medical technician at the Prison" told Nance that to execute him by lethal injection, the "execution team would have to cut his neck" because they could not otherwise obtain

intravenous access. Pet.App.93a. And, supposedly, an anesthesiologist told him that his forearms and "lower extremities" lacked visible veins. Pet.App.94a.

Nance now claims that execution by lethal injection is unlawful as applied to him. He alleges that he is at a high risk for "blown" veins if a normal IV procedure is used. *Id.* And if the State turned to the alternative method of central venous cannulation, Nance alleges that it is a "complicated medical procedure" which, "[i]f done incorrectly," could result in a "torturous and botched execution." Pet.App.95a. Nance also asserts, "upon information and belief," that the State might alternatively try a "cutdown procedure," supposedly a "painful, bloody, and complicated medical procedure that is rarely used by modern medical professionals." Pet.App.96a. He next alleges that his use of the drug gabapentin—which he has been taking since 2016—might diminish pentobarbital's effects such that it fails to render him unconscious. Pet.App.96a–97a. Finally, Nance takes issue with the execution protocols generally, including the length of tubing for injections, the secrecy in the sourcing of drugs, and supposedly inappropriate monitoring. Pet.App.89a–102a; *but see Baze*, 553 U.S. at 45–46.

Nance asserts that death by firing squad—unauthorized and never previously performed in Georgia—is a "feasible and readily implemented" alternative to lethal injection. Pet.App.101a. According to Nance, "[i]f *performed properly*," a firing squad would "eliminate the substantial risk of severe pain." Pet.App.102a

(emphasis added); *but see* Pet.App.95a (central venous cannulation is problematic if "done incorrectly").

E. The Eleventh Circuit Dismisses Nance's Complaint as a Second or Successive Habeas Petition.

The district court dismissed Nance's complaint because it was untimely and he failed to state a claim, Pet.App.47a, but on appeal, the Eleventh Circuit vacated and remanded with instructions to dismiss for lack of jurisdiction, Pet.App.1a. The Eleventh Circuit asked whether Nance's complaint was actually a challenge to his sentence and thus not cognizable under § 1983. Pet.App.4a. After argument, the court held that Nance's complaint was properly a habeas petition, since it "attacks the validity of his death sentence." Pet.App.19a. If successful, Nance's challenge would preclude execution, because state law requires lethal injection. Pet.App.18a. And, since Nance had already filed a federal habeas petition, his recharacterized petition was barred by 28 U.S.C. § 2244 as second or successive. Pet.App.19a–25a.

This Court then granted review of the questions whether Nance's complaint should be recharacterized as a habeas petition and, if so, whether it is second or successive.

SUMMARY OF ARGUMENT

The Eleventh Circuit held that Nance's complaint was properly a habeas petition and that it was "second or successive." The Court should affirm on both points. Nance challenges state-authorized custody over him (a core habeas concern, cognizable only in habeas) and he does so after having fully litigated a federal habeas petition regarding the same judgment.

I. Nance's filing is a habeas petition because he seeks to prevent his state-authorized execution. Section 1983 does not provide a cause of action where a prisoner's success would directly challenge or even "impl[y] the unlawfulness of the State's custody." *Dotson*, 544 U.S. at 81. That kind of challenge must instead be filed in habeas. *Preiser*, 411 U.S. 475. An execution is a form of custody—that is, "physical restraint," *id.* at 486—so where a prisoner seeks to bar an execution, he challenges custody. That is true even if the capital sentence is not vacated and even if circumstances could change in the future to remove the legal bar to execution.

Nance contends that he can avoid habeas procedures because Georgia could theoretically change its law and *then* the custodian could execute him, but this argument fails. Whatever might conceivably happen down the road, if Nance succeeds, his custodian could not execute him because under "present law," it would be "unlawful[]." *Hill v. McDonough*, 547 U.S. 573, 583 (2006) (citation omitted). His custodian cannot change Georgia statutory law. Nor can federal courts. They face a binary choice: prevent the execution or not. Whether a temporary bar or permanent, that is habeas relief.

Nance's argument would also eviscerate States' sovereign authority to define their own criminal punishments. Georgia has the right to define capital sentences with specificity: *death by lethal injection* rather than simply *death*. If Nance wants to force Georgia to impose a *different* punishment, he must at least proceed via habeas petition. Any other rule would be a damaging blow to state sovereignty and undermine Congress's own habeas statutes.

Finally, channeling these claims to habeas would reduce "pleading games" and confusion. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019). If the execution can lawfully "proceed . . . as scheduled" at the end of a successful prisoner challenge, *Nelson v. Campbell*, 541 U.S. 637, 646 (2004), it is a § 1983 action. If not, it is a habeas action. In addition to being correct, that rule is easily administrable and will reduce incentives to seek delay for delay's sake.

II. Because it is a habeas petition, Nance's filing must be dismissed as "second or successive." 28 U.S.C. § 2244(b). Second-in-time habeas petitions are "second or successive" unless they seek relief from a *different* judgment than an earlier petition or they are a *continuation* of the previous petition. Nance's filing does not satisfy either of those conditions, so he asserts an erroneous theory that previously unavailable "claims" are not "second or successive."

The text, history, and purposes of § 2244(b), as well as this Court's cases, reject Nance's theory. Section 2244(b) bars second or successive "applications," not *claims*, so examining claims for previous availability

already asks the wrong question. Indeed, § 2244(b) *exempts* second or successive applications that include certain previously unavailable claims, which would be pointless if previously unavailable claims were *generally* exempted. This Court, also, has specifically held that previously unripe claims do not transform an application into a first application. *Burton v. Stewart*, 549 U.S. 147 (2007). Nance points to *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007), but that decision carved out a narrow exception to § 2244(b) in the "unusual" case where a petitioner raises a *Ford* incompetency claim. Those claims are *categorically* unripe until execution is imminent. *Id.* at 946. That exception does not remotely describe Nance's filing here, and the Court should not undermine the text of § 2244(b) by extending *Panetti*.

III. Though Nance repeatedly contends otherwise, the courthouse doors remain wide open to legal challenges of all varieties. At stake is not the Eighth Amendment, but *where to file* certain Eighth Amendment claims. Nance does not like the consequences of following habeas procedures. He wants as many chances as possible to attack his execution in federal district court. But Congress's habeas statutes were designed to reduce delays and shunt claims first to state court. If Nance is "interested in avoiding unnecessary pain," he has numerous ways to do so (and has availed himself of many of them). *Bucklew*, 139 S. Ct. at 1129. This Court should not accept his clear attempt to instead prevent or "delay[ ] his execution." *Id.*

ARGUMENT

I. Because Nance Seeks to Prevent the Execution of His Capital Sentence, His Filing Is Not Cognizable Under § 1983.

For a half century, this Court has recognized that prisoners who seek to challenge state-authorized custody in federal court must do so through a habeas corpus petition. *Preiser*, 411 U.S. 475. Prisoners can challenge the *conditions* of otherwise valid custody through § 1983. But challenges to the *fact* of custody are reserved for habeas. Execution is a form of custody, so while a prisoner can complain about the administrative details of his prospective execution under § 1983, he cannot seek to prevent the execution altogether.

Yet that is what Nance seeks: if he succeeds, no one can exercise this state-authorized custody (execution by lethal injection) over Nance. Unless the State redefines its criminal punishments, the execution cannot legally "proceed." *Nelson*, 541 U.S. at 646; *cf., e.g.*, *Ramirez v. Collier*, 595 U.S. ___, No. 21-5592, slip op. at 19 (Mar. 24, 2022) (granting relief because "it is possible to accommodate Ramirez's sincere religious beliefs without delaying or impeding his execution"). Because Nance would "terminate[]" his custodian's legal right to execute him, *Dotson*, 544 U.S. at 86 (Scalia, J., concurring), his challenge sounds in habeas.

A. Prisoners Cannot Use § 1983 to Prevent Execution of a Capital Sentence, Because That Is a Challenge to Custody.

When a successful legal challenge "would *necessarily* prevent . . . execution," *Nelson*, 541 U.S. at 647, even if only temporarily, that challenge must proceed in habeas. That is because the "exclusive remedy" for a challenge to allegedly "illegal custody" is a habeas petition, and execution is a form of custody—a "physical restraint" on liberty. *Preiser*, 411 U.S. at 486–87. By contrast, § 1983, which has its roots in tort law, *Heck v. Humphrey*, 512 U.S. 477, 483 (1994), is the appropriate procedural vehicle for "claims that merely challenge the conditions" of custody, *Nelson*, 541 U.S. at 643, 647. So § 1983 would encompass a challenge to administrative details of the execution because prevailing on such a challenge would still allow the execution—the exercise of custody—to "proceed." *Id.* at 646. But § 1983 is not appropriate for a challenge that would stop the execution altogether, for any length of time.

1. A challenge to state-authorized custody is a habeas challenge. The Court first explained as much in *Preiser*, where the Court held that challenges to the deprivation of "good-conduct-time" credits were *not* cognizable in § 1983 because, if successful, the challenges would cut short the prisoners' custody. 411 U.S. at 476. The "specific" habeas statute must control over the "general" language of § 1983 wherever the habeas statute applies. *Id.* at 490. And while habeas corpus has "evolved" over the years, its "traditional scope" includes challenges to "custody," that is, allegations that

one is "unlawfully subjected to physical restraint." *Id.* at 485–87. Thus, *Preiser* explained, "[i]t would wholly frustrate explicit congressional intent" to allow state prisoners to evade habeas procedures (like exhaustion requirements) "by the simple expedient of putting a different label on their pleadings." *Id.* at 489–90.

This Court would later expand the rule of *Preiser* to include not only *direct* challenges to custody, but even complaints for damages or other relief that would "necessarily *impl*[*y*] the unlawfulness of the State's custody." *Dotson*, 544 U.S. at 81 (emphasis added). For example, a prisoner cannot file a § 1983 action for damages where success would imply his criminal sentence (and therefore his custody) was "invalid." *Heck*, 512 U.S. at 486; *see also Edwards v. Balisok*, 520 U.S. 641, 648 (1997). In other words, a challenge that directly seeks relief from custody *or* one that would only *indirectly* require relief from custody (by invalidating the underlying authorization for custody) is a habeas challenge.

The Court has long recognized that the execution of a capital sentence is a form of "custody" for these purposes. *See*, *e.g.*, *Ford v. Wainwright*, 477 U.S. 399 (1986) (granting relief in habeas proceeding on the basis that prisoner could not be executed if he was mentally incompetent). Execution is a "restraint[] on liberty." *Peyton v. Rowe*, 391 U.S. 54, 58 (1968); *cf. Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("[T]here can be no question that . . . deadly force" "restrains" someone). And it is certainly a form of physical "punishment imposed" by the State. *Edwards*, 520 U.S. at 648.

Accordingly, the *Preiser* rule applies to challenges that would legally prevent execution. Just as a prisoner may not seek "release" from prison outside of habeas, he may not seek "release" from execution outside of habeas—that is, he may not "terminate[]" custody by preventing it. *Dotson*, 544 U.S. at 86 (Scalia, J., concurring). Prevention of execution is directly analogous to prevention of (or release from) imprisonment.

Since *Preiser*, Congress has only affirmed this understanding. Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which precludes "dilatory tactics" from state prisoners hoping to "prolong their incarceration and avoid execution," *Rhines*, 544 U.S. at 277–78. AEDPA provides detailed and specific procedures for challenges to state-authorized "custody." 28 U.S.C. § 2254(d). It would "wholly frustrate explicit congressional intent" to hold that state prisoners could avoid AEDPA's new and improved restrictions through the clever use of labels. *Preiser*, 411 U.S. at 489. In short, Congress has commanded that its habeas statutes apply to challenges that would prevent execution.

And even temporary relief from custody is habeas relief. *See*, *e.g.*, *United States v. Mauro*, 436 U.S. 340, 362 (1978) (government obtains "temporary custody" over prisoner via habeas corpus *ad prosequendum*); *Caplan v. Cameron*, 369 F.2d 195, 196 (D.C. Cir. 1966) (reversing denial of habeas petition where detainee sought temporary release). To cite an example in the death penalty context, *Ford* claims are properly filed in habeas, even though they do not foreclose execution

permanently. These claims seek to prevent execution based on a prisoner's mental incompetence, *Ford*, 477 U.S. 399, but prisoners may eventually regain competence. A *Ford* claim only temporarily restrains custody in such cases; yet that makes it no less a habeas claim. *See* SG.Br.14. Thus, a legal bar against a capital sentence, even if it allows the possibility of execution someday, remains a habeas remedy.

To be sure, where a prisoner's challenge would cause only potential, "incidental delay" in implementing custody, it need not be filed in habeas. *Hill*, 547 U.S. at 583. A prisoner can challenge administrative details surrounding an execution (the type of drugs, or the length of IV tubing, for instance) under § 1983, even if there may be some "practical" delay in obtaining the necessary drugs or replacing the IV tubing. *Id*. That is because, whatever the *administrative* delay, there is no "legal" bar to execution, *id.*, so the prisoner's custodian retains authority to implement the sentence. *Cf. Ramirez*, slip op. at 19. But where a federal court order would *bar* custody, that is habeas relief, even if the prisoner could conceivably be subject to custody again in the future.

2. Importantly, challenges that would legally bar execution need not seek to *vacate* a conviction or sentence—simply preventing the custody is itself habeas relief. Nance suggests otherwise, asserting that unless a prisoner would need to be "resentenced," his challenge does not logically implicate the "validity" of his sentence. Pet.Br.27–28. Nance apparently believes that because this Court held in *Heck* that a damages

action cannot "*imply the invalidity*" of a sentence, Pet.Br.24 (citing *Heck*, 512 U.S. at 487), habeas reaches only those challenges that require vacatur or resentencing. Not so.

To start, the *Heck* rule is an extension of *Preiser*, not the other way around. The prisoner in *Heck* did not directly challenge his custody, so § 1983 would have been an improper tool only if the suit necessarily sought to invalidate his sentence and thus ineluctably *lead* to release from custody. 512 U.S. at 479–80. But custody, not sentencing, is the linchpin. In many challenges to custody (like executive detention), there is not even a sentence to vacate. *See Preiser*, 411 U.S. at 486 (providing examples); *cf., e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008). So the way to determine whether a challenge sounds in habeas is to ask whether the prisoner challenges the custodian's legal right to exercise custody, not whether his sentence must be vacated.

Regardless, a challenge that would prevent execution *is* a challenge to the "validity" of the "sentence" that authorizes that execution. *Heck*, 512 U.S. at 486–87. It is a request for "relief" from a state "judgment[.]" *Magwood*, 561 U.S. at 334 n.9 (citation omitted). A criminal sentence is not "valid" if it has no force. *See*, *e.g.*, *Valid*, Black's Law Dictionary (10th ed. 2014) ("Legally sufficient"); *Invalid*, Black's Law Dictionary (10th ed. 2014) ("Not legally binding"); *Invalid*, Webster's New Collegiate Dictionary (8th ed. 1979) ("being without . . . force in . . . law"). Few would say, for instance, that the Defense of Marriage Act is currently valid,

even though it is technically still on the books. It is invalid because it cannot be enforced. *United States v. Windsor*, 570 U.S. 744, 775 (2013) ("The federal statute is invalid."); *see also*, *e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Majority refers at least eleven times to this Court "invalidating" laws); *id.* at 687, 695, 696 (ROBERTS, C.J., dissenting) (repeatedly referring to decision as "invalidating" state marriage laws); *id.* at 736 (THOMAS, J., dissenting) (referring to decision's "invalidation of [state] laws"). Likewise, an unenforceable sentence is invalid.

In other words, Nance has the inquiry backwards: If a prisoner challenges the exercise of custody *authorized* by a state sentence, that is by definition a challenge to the validity of that sentence (whether or not there must be a resentencing or vacatur). *Preiser* itself proves the point. The prisoners in *Preiser* did not assert that their sentences had to be vacated or that they needed to be resentenced. Whether they succeeded or not, their convictions and sentences would remain undisturbed. But if successful, they would have been released from custody earlier, which meant their challenge sounded in habeas and was subject to exhaustion under 28 U.S.C. § 2254. *Preiser*, 411 U.S. at 493. The same is true where a prisoner seeks to prevent execution: that is a challenge to custody, and it must be filed in habeas.

B. Nance's Challenge Would Prevent the Execution of His Capital Sentence, Regardless of Whether Georgia Could Conceivably Impose a Different Punishment in the Future.

Because Nance seeks to legally bar his execution, his claim sounds in habeas. Georgia law declares that prisoners under a "sentence of death shall suffer such punishment by lethal injection." Ga. Code Ann. § 17-10-38(a). Nance's complaint is likewise clear: he seeks to "enjoin the Defendants from proceeding with the execution of Mr. Nance by a lethal injection." Pet.App.103a. So Nance's custodian cannot lawfully execute Nance if the § 1983 suit succeeds. Whether that legal bar is temporary or not, that should be the end of the matter.

Nance and the United States contend otherwise. In Nance's view, he does not seek to prevent his execution because Georgia could pass new legislation to provide for a different punishment, like death by firing squad. *E.g.*, Pet.Br.26–29. Nance repeatedly asserts that because he must "prove" that his execution "can be carried out" in some fashion, his sentence would remain "valid" if he prevailed. Pet.Br.19, 20, 27. Likewise, the United States asserts that Nance "would not foreclose implementation of the sentence even if [he] succeed[s]." SG.Br.18.

This argument cannot withstand scrutiny. *First*, the question is not whether Nance might *ever* be subject to execution under different circumstances, it is whether he seeks to bar his execution *right now*, which

he most certainly does. Nance's custodian has the authority to execute Nance only by lethal injection. So the custodian could *not* legally "implement[,]" SG.Br.18, that "punishment" if Nance prevailed, *Edwards*, 520 U.S. at 648. Whether or not state law might change someday, Nance would obtain *at least* a temporary reprieve from custody, which is core habeas relief. *Second*, Nance and the United States would cripple the sovereign authority of States to define their own punishments. Nance and the United States argue as if Georgia has imposed a sentence of death by any means necessary, but Georgia has specifically chosen death by lethal injection. Nance can challenge that punishment as illegal, but he must satisfy AEDPA to do so.

1. To start, Nance seeks habeas relief because he seeks *at least* a temporary legal bar against the exercise of custody. Nance's supposition that Georgia can change its laws to exercise custody rings hollow because neither federal courts nor Nance's custodian can change Georgia laws. Federal power must be exercised "directly over individuals rather than over States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (citation omitted). And the "writ of habeas corpus" acts on "the person who holds [the prisoner] in what is alleged to be unlawful custody." *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494–95 (1973); *see also* 28 U.S.C. §§ 2242–43. The custodian (usually, the warden) has no power to change Georgia statutes. Nor can federal courts edit state law. They have no intermediate option to impose a different sentence, such as death by firing squad. Their authority

here is binary: they can legally prevent Nance's execution or not. Since death by lethal injection is the *only* form of capital custody that Nance's custodian is authorized to exercise, he could not lawfully "carry out" Nance's capital sentence if Nance prevails. Pet.Br.28. Nance would have successfully barred an exercise of custody (whether temporarily or not), which is habeas relief.

An example in the prison context illustrates the point. Suppose a state court, as required by statute, imposes a sentence of ten years to be served at a specific penal institution. If the prisoner contends that "he is unlawfully confined in the *wrong* institution," that is a habeas challenge. *Preiser*, 411 U.S. at 486 (emphasis added) (citing *In re Bonner*, 151 U.S. 242 (1894)). Because the State authorized only imprisonment in a *particular* penal institution, federal courts have only two options: order the warden to release the prisoner, or not. The custodian cannot imprison the inmate elsewhere, because he is not authorized to do that (nor could a federal court order it), so this is a challenge to custody. And it remains a habeas challenge even though the State *could* alter its law to allow the prisoner to be imprisoned in a different facility. *Cf.* SG.Br.19. *Right now* the prisoner seeks release.

The same is true here, where a federal court has the binary choice of preventing Nance's execution or not. The hypothetical possibility of a change to state law in the future does not alter what Nance asks for now: relief from state-authorized custody. That is the capital case equivalent of immediate release.

Put another way, Nance seeks to invalidate custody to a certainty, and he can only speculate as to *whether* custody might become valid in the future. Nance's situation is thus the opposite of *Dotson*, on which he relies. Pet.Br.29–30. In that case, the Court held that a prisoner's challenge to parole hearing procedures was not cognizable in habeas because it would not necessarily affect his custody: maybe the prisoners would achieve earlier parole at new hearings, maybe not. *Dotson*, 544 U.S. at 82. Here, by contrast, the speculative portion is not *whether* Nance's custody would be invalidated, but only whether it might *become* valid again at some point in the future, in the hypothetical scenario in which Georgia alters its laws. Notably, in *Dotson*, the Court examined *current state law* to understand what the custodial consequences would be, *id.*; it did not speculate about whether Ohio might *change* its parole hearing procedures. *Cf. id.* at 86 (Scalia, J., concurring) (conditional writs are valid habeas relief even though a State might be able to fix errors in its custody in the future).

Nance's success would be qualitatively different than a mere "practical," administrative frustration, like having to order new drugs or develop a different type of injection procedure. *Hill*, 547 U.S. at 581, 583. If Nance succeeds, his custodian would be *legally barred* from executing Nance unless and until there is a change in a sovereign State's political consensus on how to define capital sentences (possibly even requiring constitutional amendment). By any understanding, Nance's challenge would "foreclose implementation of

the sentence," for at least some period of time (and likely for good). SG.Br.18.[1]

It is not even clear that Georgia *could* change its law as Nance desires. For instance, this Court has held that switching to a "more humane" method of execution causes no federal *ex post facto* problem, but switching to a *less* "humane" method might. *Weaver v. Graham*, 450 U.S. 24, 32 n.17 (1981). Because States seek the most humane methods available, switching to an unchosen method (such as firing squad) will at least raise *ex post facto* questions. Nance would thus have federal courts not only unravel state sentencing law but also preemptively decide *ex post facto* and other federal challenges—all as a prelude to categorizing a claim as § 1983 or habeas. That is not an exercise courts should need to engage in. The question is not what might happen *someday*, if circumstances change, but what the legal effect of Nance's challenge would be as things currently stand.[2]

---

[1] Nance and the United States repeatedly emphasize that § 1983 can be used to challenge state law, Pet.Br.29; SG.Br.16, 24, but no one has denied that. If Nance challenged a state statute by, for instance, seeking greater medical care than current appropriations allow, he could file under § 1983 because those challenges would not prevent custody. Pet.Br.27. He would not be *released* if successful. By contrast, if the State's only lawful manner of execution is barred, the prisoner is necessarily "released" from execution, at least for a time, which makes his challenge sound in habeas.

[2] Nance claims confusion as to whether state regulatory law is relevant, or only statutory law. Pet.Br.21–22, 30 n.1. The question is not implicated in this case, but it is worth noting that regulatory law is still state *law*. Federal courts and Nance's

Given these points, it is no surprise that the Court has indicated that a challenge that would preclude execution under "present law" is likely a habeas challenge. *Hill*, 547 U.S. at 583. In *Nelson*, for instance, a plaintiff challenged the use of a "cut-down procedure," and the Court held the challenge was cognizable in § 1983. 541 U.S. at 643, 645. But the Court emphasized that "[n]o Alabama statute [nor any duly-promulgated regulations] require[] use" of the challenged procedure, and that Alabama could thus have "proceed[ed] with the execution as scheduled" if it simply used another viable, legal alternative. *Id.* at 646–47. Similarly, in *Hill*, the Court emphasized that the prisoner's challenge would "not necessarily foreclose the State from implementing the lethal injection sentence under present law." *Hill*, 547 U.S. at 583. But the Court anticipated that if a challenge *would* foreclose implementation of a sentence "under present law," then "recharacterizing [the] complaint as an action for habeas corpus might be proper." *Id.* at 582–83. The Court's intuition was correct: where a prisoner seeks to bar execution altogether, it is a habeas challenge.

2. Nance's argument fails for another reason: it would critically undermine States' sovereign authority to define their own punishments. Nance's unjustified assumption (and that of his *amici*) is that the punishment imposed by Georgia is simply "death," which he

---

custodian can no more change that law than they can change statutory law (or constitutional law). By contrast, an execution that departs from merely informal or administrative protocols is not contrary to *any* state law, so a successful challenge to such protocols would *not* bar execution.

says Georgia could "implement[]" by some other means. Pet.Br.28. But this argument disregards that "it is a State's prerogative to determine how it will punish violations of its law." *Overton v. Bazzetta*, 539 U.S. 126, 140 (2003) (THOMAS, J., concurring). While the State's punishments must not *violate* federal law (e.g., the *ex post facto* bar or the Eighth Amendment), federal law does not affirmatively *define* state criminal punishments. *Id.* In fact, the federal government *cannot* make or unmake state law. *New York v. United States*, 505 U.S. 144, 178–79 (1992).

There has never been any question that States define their own criminal punishments. *See*, *e.g.*, *Holden v. Minnesota*, 137 U.S. 483, 496 (1890) ("Of course, if the statute so requires, the court must, in its sentence, fix the day of execution."); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (where "the statute prescribe[s] the mode of executing the sentence, it [is] the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual"). There might be a question as to whether, at common law, a particular type of execution was *necessarily* embodied in each individual sentence. *Compare* 4 William Blackstone, *Commentaries on the Laws of England* *179, *397–98 (1769) (a sheriff that alters the method of execution commits a felony), *with Wilkerson*, 99 U.S. at 137 (common law did not necessarily require method to be included in sentence). But there is no question that States *can*, by statute, define precise sentences and punishments.

After all, States can have a "legitimate penological reason" for deciding that a specific sort of sentence is

preferable to a more general category. *Bucklew*, 139 S. Ct. at 1125. A State might choose one-year sentences in a specific prison rather than two-year sentences in prison more generally. It might decide to impose shorter terms of imprisonment but mandate fewer privileges for the inmates. If a State makes those choices, and a prisoner challenges the specified conditions, a federal court can grant release or not, but it cannot rewrite the state punishment. Indeed, as these examples show, doing so could undermine the State's entire sentencing scheme—a shorter sentence *without* the State's other specified conditions might not be tolerable for the State. Likewise, sovereign States might believe that only a particular kind of execution is humane or have other justifiable reasons for choosing a specific form of punishment. *See*, *e.g.*, *Dawson v. State*, 274 Ga. 327, 328–36 (2001) (holding that electrocution is unconstitutional under Georgia law).

Here, contrary to Nance's assumption, Georgia has made clear that its capital sentences are not simply punishments of death by any means. Ga. Code Ann. § 17-10-38(a); *see also id.* § 17-10-38(d) (defining "participat[ion] in the execution of a death sentence" as "selecting injection sites; starting an intravenous line or lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs . . . ; inspecting, testing, or maintaining lethal injection devices; or consulting with or supervising lethal injection personnel"). In fact, Nance's jury sentenced him to "death by lethal injection." *Nance*, No. 1:13-cv-04279, Doc. 14-17 at 98–99. Even if the State

might be able to alter its laws to alter Nance's punishment (and that is no guarantee), the result would be a *different* "punishment," *Edwards*, 520 U.S. at 648, and potentially an amended sentence, *cf.* SG.Br.19 (citing *Woo Dak San v. State*, 7 P.2d 940, 942 (N.M. 1931), which holds that when the State changes its death penalty statutes it "*convert*[*s*] . . . judgments of death to be executed by hanging into judgments of death to be executed by electrocution" (emphasis added)).[3]

At the very least, before demanding that the State change its criminal punishments, federal courts must apply AEDPA—otherwise they pay *no* respect to the separate sovereignty of the States. Nance barely mentions AEDPA, and the United States never does. But it would be "anomalous" to refuse to apply the *Effective Death Penalty* Act because a prisoner asserts that a State might, someday, change statutory (or, for that matter, constitutional) law. The point of AEDPA is greater "comity, finality, and federalism," *Woodford*, 538 U.S. at 206 (citation omitted)—that is, greater respect for the "sovereign[ty]" of States, *Calderon v.*

---

[3] Nance might argue that the judge's sentencing order in this case does not itself include the words "by lethal injection," but that cannot be dispositive. State courts go back and forth between specifying that death occur "by lethal injection" or not, likely because it makes no difference, given *state law*. *See*, *e.g.*, *State v. Ledford*, No. 06CR001300, 2009 WL 10430994, at *1 (Ga. Super. Ct. May 22, 2009) ("[T]he defendant . . . shall be put to death by lethal injection."). Unless States are to be subject to detailed sentence-writing requirements, federal courts have to take punishments as they find them in state law, without assuming that States are indifferent to the aspects they have specified in their statutes.

Thompson, 523 U.S. 538, 554–56 (1998). Yet Nance would hold that he can legally halt the imposition of his sentence, demand that the political consensus of the "people and their representatives" change to allow for a different form of capital punishment, *Bucklew*, 139 S. Ct. at 1123, and do so without going through AEDPA, the whole point of which is to eliminate such "dilatory tactics." *Rhines*, 544 U.S. at 277. That cannot be right, and it is not.

C. Allowing Prisoners to Bar Execution Via § 1983 Would Increase Gamesmanship, Not Reduce Confusion.

To the extent policy arguments matter here, they do not help Nance. Pet.Br.35–39. If there is any policy concern, it is reducing "pleading games" by capital litigants, which is itself the source of almost all confusion in post-conviction challenges. *Bucklew*, 139 S. Ct. at 1128. If Nance prevails, prisoners who *could* work within a State's laws to "avoid[] unnecessary pain," *id.* at 1129, will have every incentive to cast filings broadly, to "delay . . . execution" altogether, *Rhines*, 544 U.S. at 277–78. Prisoners *already* make contradictory arguments, in filing after filing, seeking "[d]elay for delay's sake." *Middlebrooks v. Parker*, 22 F.4th 621, 625 (6th Cir. 2022) (Thapar, J., statement respecting denial of rehearing *en banc*) (prisoner challenged use of pentobarbital until it became unavailable, at which point he demanded use of pentobarbital). The Court should not encourage more of the same.

1. Directing these claims to habeas would help cut back on procedural gamesmanship. *See Bucklew*,

139 S. Ct. at 1128. In *Bucklew* itself, the Court recognized the important state interests in implementing criminal judgments, and the Court sought to avoid "increasing the delay and cost involved in carrying out executions." *Id.* at 1128, 1133–34. For prisoners, delay is often "the point." *Id.* at 1128. Nance, for example, waited until he was out of other litigation options before filing his putative § 1983 complaint, even though he knew of his drug use for years prior (and raised numerous similar lethal injection claims previously). *Supra* pp. 6–8.

Far from "vitiat[ing]" *Bucklew*, then, the proper rule would vindicate it. Pet.Br.32; *but see* Pet.Br.20 (noting that *Bucklew* left this issue "unresolved"). The *Bucklew* Court specifically recognized that the substantive pleading requirement for a challenge to execution is separate from the procedural vehicle that a prisoner must use. *See* 139 S. Ct. at 1128. The point is simply that when a prisoner seeks to nullify a state-authorized punishment, it "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority," *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation omitted), which is why AEDPA requires rigorous procedures before that happens. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 139 S. Ct. at 1133 (citation omitted). Nance would add *yet another* layer of federal litigation (and delay) onto death penalty cases, but that would undermine AEDPA and the countless decisions of this Court rejecting such tactics, including *Bucklew*.

Of course, the Eighth Amendment reigns supreme, *Bucklew*, 139 S. Ct. at 1128, and no one has suggested otherwise, *but see* Pet.Br.3, 20, 23, 32, 38. Pleading the substantive elements of a claim under *Bucklew* is no greater "burden" just because it is governed by AEDPA. Pet.Br.33. Prisoners can and do raise these types of challenges in state court and on initial federal habeas review—Nance himself raised similar lethal injection claims in his post-conviction proceedings. *See supra* pp. 6–8. Nance suggests it could be difficult to raise claims in a first federal habeas petition for lack of ripeness, but that is wrong: when a judgment is final, the prisoner can challenge the State's chosen type of execution.[4] To be sure, in the rare cases where prisoners' factual circumstances genuinely change late in the day, AEDPA might bar a second federal habeas petition, 28 U.S.C. § 2244(b), but that is a general feature of AEDPA, not unique to these claims, and prisoners will still have access to courts, regardless. *See infra* Section III.

Simply put, for inmates concerned with "avoiding unnecessary pain," it will be easy to craft an appropriate complaint or habeas petition. *Bucklew*, 139 S. Ct.

---

[4] *See Pizzuto v. Tewalt*, 997 F.3d 893, 901–02 (9th Cir. 2021) (challenge is ripe when method is set); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009) (same); *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir. 2006) ("A challenge to a method of execution may be filed any time after the plaintiff's conviction has become final on direct review."); *see also Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (challenge to method of execution "could have been brought more than a decade" before actual scheduled execution date).

at 1129. Where they are more interested in "delaying . . . execution," it will not be so easy. *Id.* That is the point. *See Preiser*, 411 U.S. at 489–90.

2. Nance's contrary policy arguments, if anything, detract from his theory. He first harps on the (non-existent) problem of States somehow manipulating their laws to force prisoners into habeas proceedings. Pet.Br.38. In Nance's view, States might write their statutes to include detailed execution procedures, so that any challenge to a "method" is actually a habeas challenge. Nance cannot show that this is a "problem" at all. His worry reflects not real policy risks but an unjustifiable "general distrust" of the States and state courts. *Allen v. McCurry*, 449 U.S. 90, 105 (1980). Given that States have spent centuries trying to *humanely* carry out executions, *Baze*, 553 U.S. at 41–42, Nance's little-disguised contempt for States is ill-founded.

Nance also overlooks the key point that States define criminal punishments with more specificity only when they have good reasons for doing so, since they risk being unable to implement a sentence *at all* if some small part of it is derailed. For example, if a State statutorily requires a certain drug for execution and use of that drug is enjoined, a prisoner would have nullified his sentence. States are not going to pass a raft of laws to shunt challenges into AEDPA, only to have the underlying sentences more easily *invalidated*.

In any event, Nance's theory would not *solve* this purported "problem." Even under Nance's theory, States could enact statutes declaring that state sentences are dependent on and immediately vacated if

the details of a particular method are enjoined. *See*, *e.g.*, *Muhammad v. Close*, 540 U.S. 749, 754 (2004) (if, as "a matter of state law or regulation," a federal proceeding would "necessarily" result in reduction in custody, it is a habeas action). Of course, States do not do that, for the same reason they do not write detailed execution procedures into their statutes; but they *could* do what Nance decries, even if Nance were to prevail.

Nor will there be "confusion" about where to file. Pet.Br.35–36. If, following a successful suit, the custodian can lawfully "proceed with the execution," *Nelson*, 541 U.S. at 646, the challenge is cognizable in § 1983. If not, it is a habeas petition. The United States raises speculative concerns about "back-and-forth rerouting" between state and federal court, SG.Br.22, but it cannot identify any real-world examples. Other than petitions specifically gerrymandered to *create* ambiguity, there will be no confusion. And the Court should not empower a kind of heckler's veto by throwing up its hands and declaring that, since clever defense counsel might try to work around the law, prisoners need not abide by it at all.

As a final point, anyone can dream up fanciful hypotheticals under the *Preiser* doctrine. The Court itself has not denied that there can be difficult questions about whether certain claims are cognizable in § 1983. *See*, *e.g.*, *Heck*, 512 U.S. at 487 n.7. But *this* case does not present a difficult question. Depending on whether Nance's challenge is successful, the custodian can either (1) execute Nance or (2) not execute Nance. That is the definition of a habeas challenge.

II. Nance's Filing Is Second or Successive Because It Seeks Relief from the Same Sentence He Already Challenged.

Congress provided in AEDPA for strict procedures surrounding "second or successive" applications. 28 U.S.C. § 2244(b). To start, a petitioner must obtain court-of-appeals authorization before even *filing* such an application. § 2244(b)(3)(A). Then, even if authorized, almost all claims in such an application are barred: the only allowable claims are those based on (1) new constitutional law made retroactive by this Court, or (2) new, previously undiscoverable factual evidence supporting actual innocence. § 2244(b)(1)–(2). Nance did not obtain court-of-appeals authorization, nor do his claims fit within those narrow exceptions, so if his filing is "second or successive," it is simply barred.

And there can be little doubt that Nance's application *is* "second or successive." The text, history, and purposes of AEPDA, as well as this Court's cases, establish that an application is "second or successive" if it seeks relief from the same judgment as a previous application and is not a continuation of that previous filing. "In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar." *Panetti*, 551 U.S. at 947.

Contrary to Nance's theory, there is no open-ended exception for filing "claims" that were previously "unripe." Pet.Br.40. Nance wholly ignores the text of the statute and tries to expand a narrow, "unusual" exception for mental-incompetence claims until it would

swallow the entire rule. *Panetti*, 551 U.S. at 945. This would return habeas law to pre-AEDPA days, when the abuse-of-the-writ doctrine held sway. But Congress specifically eschewed that doctrine, and the Court should similarly reject Nance's invitation to ignore § 2244(b)'s bar against second or successive applications.

A. Habeas Petitions Are "Second or Successive" When They Seek Relief From the Same Sentence as a Previous Petition, Even If They Include Previously Unavailable Claims.

In AEDPA, Congress replaced the "more forgiving" habeas doctrine of "abuse-of-the-writ" with a specific statutory bar against "second or successive" applications. *Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020). This Court has looked to AEDPA's text, *Magwood*, 561 U.S. at 331–32, its historical understanding, and "AEDPA's own purposes," *Banister*, 140 S. Ct. at 1706, to define the scope of "second or successive." Those sources, as well as this Court's own cases, make clear how § 2244(b) operates: an application is second or successive where it seeks relief from the same *judgment* as a previous application and is not a *continuation* of a previous application. Nance's contrary theory, that newly ripe *claims* are not second or successive, contradicts AEDPA and would subvert § 2244(b). That a filing contains a previously unavailable *claim* does not transform an otherwise second or successive *application* into a first application.

1. Unlike Nance, who studiously avoids the actual statute, "[w]e begin with the text." *Magwood*, 561 U.S. at 331. Section 2244(b) provides that a litigant cannot file a "second or successive habeas corpus application under section 2254" unless he or she obtains authorization from the court of appeals. And even if granted the right to file a second "application," only a few narrow classes of "claim[s]" can be considered. § 2244(b)(1)–(2).

The text and its statutory context make a number of points immediately clear. To start, "[s]econd" and "successive" are both broad terms denoting something coming *next* or *following* an earlier event. *Second*, Webster's New Collegiate Dictionary (8th ed. 1979) ("next to the first in place or time"); *Successive*, Webster's New Collegiate Dictionary (8th ed. 1979) ("following in . . . order"); *Successive*, Black's Law Dictionary (10th ed. 2014) (same). That is, something is "second or successive" if it comes *after* something else. To be sure, the Court has "described" "second or successive" as a "term of art," *Magwood*, 561 U.S. at 332; *cf.* Pet.Br.40, but the words themselves still retain meaning, *cf. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171–72 (2001) (although defined by the statute, "navigable waters" retains meaning of included words).

The context also establishes the relevant items of analysis: *applications* and *judgments*, not particular *claims*. *Magwood*, 561 U.S. at 334–35. "AEDPA uses the phrase 'second or successive' to modify 'application,'" not *claim*. *Id.* at 334. Likewise, an application is

second or successive if it follows a previous challenge to the same judgment: § 2244(b) imposes limits on any "habeas corpus *application* under section 2254," which is defined as an "application for a writ of habeas corpus on behalf of a person in custody pursuant to the *judgment* of a State court." § 2254(b)(1) (emphasis added); *Magwood*, 561 U.S. at 332. Accordingly, an application is "second or successive" if it *follows* a previous *application* that sought relief from the same *judgment*, regardless of the *claims* in the application.

Of course, a second-in-time *filing* is not a "second or successive" application where it is merely a "*continuation* of the original proceeding." *Banister*, 140 S. Ct. at 1710 (emphasis added). This follows from the basic textual point that only a second "application" is problematic—a second filing in support of the *same* application is not. The most obvious example is that appellate briefs or amended petitions are not "second or successive" because they are part of one ongoing application (even though they raise claims challenging the same judgment). *Id*. at 1705. Certain other procedural tools are similar, like a Rule 59(e) motion, which is a "further iteration[] of the first habeas application." *Banister*, 140 S. Ct. at 1705. And if a first application is dismissed on procedural grounds (like failure to exhaust), the Court has treated a follow-on filing as part of the same application. *Slack*, 529 U.S. 473.

The textual exceptions in § 2244(b)(2) shed further light. Even if a second-in-time filing includes claims that were not previously available, it is still a "second or successive" *application*. Any other reading

"would considerably undermine—if not render superfluous" the § 2244(b)(2) exceptions. *Magwood*, 561 U.S. at 335. Those exceptions explicitly contemplate circumstances where "a petitioner cannot be said to have had a prior opportunity to raise the claim," *id.*, including new factual predicates and new constitutional rules. If such claims require an *exception*, that means applications are necessarily "second or successive" even if they include previously unavailable claims.

The text also implies a final point: the "label[]" that a petitioner applies to a filing is not dispositive. *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). If a petitioner could simply relabel a filing, it would "circumvent[] AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* Thus, any filing that presents "new claims for relief from a state court's judgment" can be considered an "application" under § 2244. *Id.*

2. The history of the text confirms this analysis. Congress took the term "second or successive" from previous law: in particular, § 2244(b) "modifies" pre-AEDPA "abuse-of-the-writ" principles, *Magwood*, 561 U.S. at 337 (op. of THOMAS, J.). Congress replaced that "more forgiving" equitable doctrine with a strict statutory bar. *Banister*, 140 S. Ct. at 1707. Because Congress chose to pluck the phrase "second or successive" out of pre-existing rules and cases, we assume Congress meant to bring with it the previous understanding of that term. *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) ("It is a commonplace

of statutory interpretation that Congress legislates against the backdrop of existing law." (citation omitted)); *see also Banister*, 140 S. Ct. at 1707 (examining whether "courts" historically "viewed Rule 59(e) motions as successive" to determine whether they are "second or successive" under § 2244(b)).

From the beginning, analysis of the "second or successive" nature of a petition was the first part of a *two*-part test for whether a petitioner abused the writ. As this Court has explained, that doctrine "distinguish[ed] between two questions: '[a] *threshold* inquiry into whether an application is second or successive and [a] *subsequent* inquiry into whether [to dismiss] a successive application'" as abusive. *Banister*, 140 S. Ct. at 1707 (quoting *Magwood*, 561 U.S. at 336–37) (emphasis added)). And the term "second or successive" was historically used in its natural sense, to mean "subsequent" or "after."

Congress first used the term "second or successive" in 1948, with respect to federal prisoners under § 2255. *See* 28 U.S.C. § 2255 (1948) ("The [federal] sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."). In *Sanders v. United States*, 373 U.S. 1, 17 (1963), the Court interpreted this provision to apply "abuse of the writ" principles to federal prisoners, and the Court was explicit that second-in-time applications (even raising new grounds for relief) *were* second or successive: the government had to show that a "second or successive application *is abusive*." *Id.* In other words, from its earliest use, "second or successive" took

its natural meaning: a second-in-time challenge, regardless of previously availability of claims. The Court in *Sanders* blessed such filings if, for instance, there was "an intervening change in the law," but they were still second or successive filings. *Id.*

Likewise, in 1966, Congress used the term "subsequent application" to codify the abuse-of-the-writ doctrine for *state* prisoners. Again, the text was explicit that whether an application was "subsequent" was merely the *first* step of the analysis, and the second question was whether the applicant had "deliberately withheld the newly asserted ground or otherwise *abused the writ*." 28 U.S.C. § 2244 (1966) (emphasis added).

Starting in 1976, the Federal Rules for Habeas Cases also used the phrase "second or successive," and in the same manner. Habeas Rule 9(b) provided that a "second or successive petition may be dismissed" if it failed to allege new grounds or "constituted an abuse of the writ." Rule 9(b) of the Rules Governing Section 2254 Cases (1976). Here too, cases addressing Rule 9(b) were clear that even applications containing previously unavailable claims were "second or successive," whether or not they were "abuses of the writ." For instance, in *Rose v. Lundy*, 455 U.S. 509 (1982), the Court held that petitioners cannot file "mixed" petitions (petitions with exhausted and unexhausted claims). Members of the Court disagreed as to whether a petitioner who voluntarily dismisses his unexhausted claims and proceeds to adjudication on his exhausted claims "risks dismissal of [a] subsequent federal petition[]" as an

abuse of the writ. *Id.* at 521 (Op. of O'Connor, J.); *id.* at 532–33 (Brennan, J., concurring in part and dissenting in part). But they all agreed it *would be* a second or successive petition subject to abuse-of-the-writ analysis. *See id.*

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) (citation omitted). Nance tries to drag "abuse-of-the-writ" principles back into play, but that makes no sense. Pet.Br.44. If, for instance, Congress wrote a statute that referred to "unreasonable seizures," one would not assume that Congress meant to refer to "unreasonable *searches* and seizures." Instead, one would assume precisely the opposite, since Congress deliberately omitted an aspect of the phrase.

Nance argues that this Court approved the examination of previous "abuse-of-the-writ" cases in *Banister*, Pet.Br.41, but he misreads that case. The opinion recognized, repeatedly, that § 2244(b) is more "stringent" than the (discarded) abuse-of-the-writ doctrine. *Banister*, 140 S. Ct. at 1707. The Court looked to previous abuse-of-the-writ cases not because that doctrine was controlling, but because, if a Rule 59(e) petition was "second or successive," you would expect at least *some* of them to be dismissed, and yet they virtually never were. *Id.* ("[I]f courts had viewed Rule 59(e) motions as successive, there should be lots of decisions dismissing them."). But that kind of analysis is

irrelevant here, because under abuse-of-the-writ principles, by definition "previously unavailable" claims would *not* have been dismissed. *See McCleskey v. Zant*, 499 U.S. 467, 489 (1991) (petition is an "abuse the writ" if it raises "a claim in a subsequent petition that [petitioner] could have raised in his first" petition). So the fact that courts might not have dismissed applications with previously unavailable claims shows only that such petitions were not an abuse of the writ—they were still second or successive.

3. To the extent this Court looks to "AEDPA's own purposes" and the "implications for habeas practice" in understanding the phrase "second or successive," *Banister*, 140 S. Ct. at 1706 (citation omitted), those considerations all lean one way. Enforcing § 2244(b)'s text as written furthers AEDPA's goals of "reduc[ing] delays," as well as "comity, finality, and federalism." *Woodford*, 538 U.S. at 206 (citation omitted).

As written, the text reduces "delays in the execution of state and federal criminal sentences, particularly in capital cases." *Id.* Whether applications are second or successive is a straightforward question: Does the second-in-time filing regard the same judgment, and if so, is it a continuation of the earlier application? That simple analysis will rarely require extended time and will promote "finality" and respect for the "States' sovereign power." *Calderon*, 523 U.S. at 555–56 (citation omitted). Except in very rare cases, determining whether the same judgment is at issue is a one-minute exercise. And determining whether a filing is a continuation of a previous application usually

requires little more than looking at the past application to see if was dismissed on technical grounds.

Nance's rule would undermine finality and bog courts down in extensive analyses of new claims. If an application's "second or successive" status depends on the previous availability of a claim, courts will have to resolve a factual, jurisdictional dispute at the front end of every habeas petition asserting a new claim. *See Burton*, 549 U.S. at 153 (district courts lack jurisdiction to entertain second or successive applications without authorization from court of appeals). For instance, in this case, before the district court could act on Nance's filing, it would have to determine whether Nance's claim was previously unripe, because otherwise, it would be second or successive. Often, that would require jurisdictional discovery, not to mention briefing and argument. An inquiry that should take a few minutes will turn into a potentially months-long affair. Filing such applications will inevitably become yet another strategy to "drag[]" proceedings "out indefinitely." *Rhines*, 544 U.S. at 278.

4. Finally, this Court's cases confirm that a filing is "second or successive" when it challenges the same judgment as, and is not a continuation of, a previous petition. Nance tries to wring a different result out of *Panetti*, but that decision does not do what Nance wants.

The Court has been clear that it is *applications* that are (or are not) "second or successive," rather than *claims*. *See generally Magwood*, 561 U.S. 320. For instance, in *Slack*, the Court *rejected* the notion that the

petitioner's second-in-time filing (following dismissal of a previous application for lack of exhaustion) could raise only the newly exhausted claims. 529 U.S. at 487–88. "[W]hatever particular *claims* the [initial, dismissed] petition contained," the second-in-time *application* was not second or successive, so the filing could raise *any* claims. *Id.* at 488. (emphasis added).

The Court has also repeatedly held applications to be "second or successive" when they raise new claims, even if they were previously available. In *Burton*, 549 U.S. at 155, the Court unanimously held that a habeas application was second or successive even though it raised previously unripe claims. Likewise, in *Gonzalez*, the Court held that a motion under Rule 60(b) that "assert[s a] federal basis for relief from a state court's judgment of conviction" is second or successive, even if it points to previously unavailable claims. 545 U.S. at 530–32.

Nance lays all of his chips on *Panetti*, but that case is, if anything, the exception that proves the rule. In *Panetti*, the Court held that a specific category of claims (incompetent-to-be-executed claims under *Ford*, 477 U.S. 399) were not subject to the "second or successive" bar if filed in an application "as soon as that claim is ripe." 551 U.S. at 945. The Court held that it did not seem Congress intended to include this sort of claim within the "second or successive" bar because it was a class of claim that is *categorically* unripe until execution is "imminent." *Id.* at 946. So without an exception, applications containing *Ford* claims would virtually always be either unripe or "second or successive." *Id.*

That analysis is textually questionable to begin with, but regardless, *Panetti* does not stand for a rule broader than *Ford* claims. Instead, the Court went out of its way to *limit* its holding. It emphasized that *Ford* claims are an "unusual" case. *Id.* at 945. In the "usual case," by contrast, a "petition filed second in time . . . will not survive AEDPA's 'second or successive' bar." *Id.* at 947. And few, if any claims share similar characteristics to *Ford* claims—namely, a category of claims that are necessarily unripe until execution is imminent. *See supra* p. 32 n.4 (method-of-execution claims ripe when judgment is final and method is set). Indeed, because *Panetti* provides a categorical rule for *Ford* claims alone, it does not raise the administrability concerns noted above. In petitions with *Ford* claims, the "ripeness" inquiry is binary: Is the execution imminent? If so, the *Ford* claim is ripe. There need not be an avalanche of jurisdictional discovery across all cases.

This Court's other cases confirm the narrow reach of *Panetti*. To start, in *Burton*, this Court explicitly *rejected* the notion that previously unripe claims would transform a habeas petition into a "first" petition. 549 U.S. at 155; *see also Panetti*, 551 U.S. at 967–68 (THOMAS, J., dissenting) (because *Burton* "unanimously rejected" this argument, *Panetti* "stands only for the proposition that *Ford* claims somehow deserve a special . . . exemption from the statute"). And in *Magwood*, the Court reaffirmed that an application is second or successive based on whether it is a distinct, second-in-time challenge to the same judgment—no matter what *claims* are included in the application.

561 U.S. 320. Justice Kennedy lamented that the Court had "confin[ed] the holding of *Panetti* to the facts of that case." *Id.* at 350 (Kennedy, J., dissenting). Likewise, *Magwood* rejected the viewpoint that § 2244(b) was somehow simply a return to the pre-AEDPA, abuse-of-the-writ days. 561 U.S. at 337–38.[5]

The clear, textual rule is that second-in-time applications challenging the same judgment are "second or successive." Nance would expand *Panetti*'s narrow exception to abolish that rule. The Court should not let him.

B. Nance's Filing Is Second or Successive Even If His Claims Were Previously Unavailable.

With the correct understanding of "second or successive" in place, Nance's case is easy to decide. Nance undisputedly seeks relief from the same 2002 judgment that he attacked in a prior federal habeas petition. Nor is Nance's petition a "continuation" of what came before—even Nance does not suggest otherwise. His previous application was not dismissed on

---

[5] Nance suggests that if *Panetti* is not extended, habeas petitioners would have to file "unripe" method of execution challenges to preserve them. Pet.Br.44–45. That tactic would be neither required nor permissible. Mixed petitions must be *dismissed* if the prisoner wants to later file his unripe claims. *Burton*, 549 U.S. 147. To the extent that *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), blessed an anomalous procedure in the context of *Ford* claims, it shows only how exceptional *Ford* claims are. Either way, *Panetti* overtook *Martinez-Villareal*, since there is now a general exception for *Ford* claims, regardless of whether they were earlier raised.

technical grounds; it was fully adjudicated. Even his previous lethal injection claims were dismissed not because of a technical procedural failure but because he failed to *pursue* them. *Nance*, 2017 WL 6597934, at *2. So under the correct rule, Nance's petition must be dismissed as second or successive.

And even assuming for the sake of argument that *Panetti* might apply beyond *Ford* claims, it still could not rescue Nance's filing here. Nance argues his claims were not previously ripe, but *Panetti* at most stands for the idea that certain *categories* of claims are always unripe until execution is imminent. That is not the case for challenges to lethal injection.

Finally, although it should not be relevant, even under Nance's own rule his filing is still second or successive. If the Court were to extend *Panetti* to all claims, it would be extending the rule that "[t]he statutory bar on 'second or successive' applications does not apply to a . . . claim brought in an application filed when the claim is *first ripe*." *Panetti*, 551 U.S. at 947 (emphasis added). Nance's claim, by contrast, was ripe for *years* before he filed his dilatory complaint. Nance has abused drugs through intravenous injections for decades and has used gabapentin since at least 2016. So even if the Court were to run roughshod over § 2244(b) and expand *Panetti* beyond its narrow confines, Nance will obtain no relief—his filing will eventually be dismissed as second or successive.

Of course, that will take time, and for "capital petitioners," the delay is itself a form of relief, *Rhines*, 544 U.S. at 277–78. This Court need not countenance

that delay. Not for Nance, and not for the numerous petitioners who will follow in his footsteps if Nance's tactics are approved.

III. The Courthouse Doors Will Remain Wide Open for Habeas Petitioners, Nance Included.

Nance argues *ad nauseam* that the Eleventh Circuit's decision would "close the courthouse doors to meritorious claims." Pet.Br.38. Nothing could be further from the truth. Both federal court and state court remain open to those who want to challenge their executions. But AEDPA has quite a bit to say about *when*, *where*, and *how* a petitioner must file particular claims.

As an initial matter, Nance himself has had numerous opportunities, over the course of two decades of litigation, to raise challenges to lethal injection—and he did so. Nance argued in state court that lethal injection is *generally* unconstitutional, *see supra* p. 7, that Georgia's procedures are untrustworthy, *id.*, and that lethal injection would be a problem for him, specifically, due to his veins and "own unique characteristics," *Nance*, No. 1:13-cv-04279, Doc. 17-43 at 12, 57. In federal court, Nance asserted that his counsel were ineffective for failing to raise as-applied challenges to lethal injection and also argued that Georgia's protocols are too secretive. *Id*. Doc. 1 at 19, 23, 61–68. Nance is the neon advertisement for how *available* courts are to hear these challenges, including federal courts.

Nance evokes the specter of some late-breaking factual change: maybe, somewhere, there is a litigant

who could *not* raise his claim in his federal habeas petition. Pet.Br.33–34. But prisoners retain—*at least*—the ability to file in state court, with certiorari review by this Court. Under Georgia's state habeas statute, for instance, inmates are subject to no statute of limitations if they are sentenced to death. Ga. Code Ann. § 9-14-42(c). Likewise, although Georgia generally bars "subsequent petition[s]" for habeas relief, courts can dispense with that requirement where the "grounds for relief asserted . . . could not reasonably have been raised in the original or amended petition." *Id.* § 9-14-51. Or, if Georgia courts ultimately decide to direct these challenges to declaratory judgment proceedings, inmates could raise their challenges in state superior court. *Cf. Owens v. Hill*, 295 Ga. 302, 3067 (2014) (where challenging the "choice of drug[s]," proper filing is a declaratory action in state superior court). That was precisely what the Kentucky inmates did in *Baze*, 553 U.S. at 46.[6]

Neither § 1983 nor habeas statutes create a system of perpetual supervision over state criminal judgments. The assumption underlying Nance's arguments about remedies is that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Allen*, 449 U.S. at 103. But federal law "makes no such guarantee." *Id.* The Court and Congress have

[6] If a prisoner alleges he has no access to state or federal court, he can raise as-applied constitutional due process challenges. But the Court should not undermine ordinary habeas law for fear of a scenario that will likely never occur.

"emphatic[ally] reaffirm[ed] . . . the constitutional obligation of the state courts to uphold federal law, and . . . confidence in their ability to do so." *Id.* at 105.

On top of all that, Nance can still challenge virtually any aspect of a State's execution procedures via § 1983, so long as he does not seek to preclude the execution entirely. Georgia does not mandate *any* particular details regarding lethal injection, so Nance could have suggested *any* feasible lethal injection protocol. For example, Nance practically admits that central venous cannulation would be acceptable. All he can muster is that, if performed "incorrectly," it could lead to unnecessary pain. Pet.App.95a. Of course, that is true of any execution procedure (including his preferred method of firing squad). Similarly, Nance asserts that gabapentin could selectively "diminish[]" pentobarbital's effectiveness. Pet.App.96a–97a. Setting aside the wholly speculative nature of that allegation, he could have requested a higher dosage of pentobarbital or the use of another drug, but instead he tries to use this (speculative, implausible) claim to stop his execution *entirely*. It is precisely such "dilatory tactics" that AEDPA precludes. *Rhines*, 544 U.S. at 277.

* * *

States have no interest in causing unnecessary suffering. To the contrary, throughout this nation's history, they have displayed "an earnest desire to provide" the most "humane" executions. *Baze*, 553 U.S. at 51. Of course, for those who "oppose . . . capital punishment," no execution will "ever be acceptable." *Id.* at 61. That is no reason to create any atextual, ahistorical exceptions

to Congress's habeas statutes, inviting the type of "seemingly endless proceedings," *id.* at 69 (ALITO, J., concurring), that Congress foreclosed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

MARCH 2022

Respectfully submitted,

BETH A. BURTON
Deputy Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

CLINT C. MALCOM
Assistant Attorney General

CHRISTOPHER M. CARR
Attorney General

STEPHEN J. PETRANY
Solicitor General
Counsel of Record

ROSS W. BERGETHON
DREW F. WALDBESER
Deputy Solicitors General

OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square, SW, Atlanta, Georgia 30334
(404) 458-3408; spetrany@law.ga.gov

Counsel for Respondents