No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ of Certiorari to the
Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), a four-Justice plurality of this Court permitted the state of Louisiana to electrocute a Black teenager under the Eighth Amendment after it tried and failed once before. The decisive fifth vote in *Resweber* came from Justice Frankfurter and was premised on his view that the Eighth Amendment was not incorporated against the States, *see id.* at 470–71 (Frankfurter, J., concurring), a proposition rejected by the Court fifteen years later, *see Robinson v. California*, 370 U.S. 660, 666–67 (1962). Justice Frankfurter further noted how "strong" his "personal feeling of revulsion" was at the "State's insistence on its pound of flesh." *Resweber*, 329 U.S. at 471 (Frankfurter, J., concurring).

The *Resweber* opinion was released eleven years before this Court centered its Eighth Amendment jurisprudence on "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In the seventy-eight years that have elapsed since *Resweber*, this Court has never again taken up the question of whether multiple execution attempts can violate the Eighth Amendment. During the modern era of the death penalty, only two inmates have ever been executed after surviving an earlier attempt, out of more than 1,600 prisoners who have been put to death during the same period of time. In both cases, states used a different method than the one that had previously failed.

Petitioner Thomas Creech is the only American inmate since Willie Francis who has been threatened by the same execution method used against him once before. Because "*Resweber* . . . remains good law," the Idaho Supreme Court rebuffed Mr. Creech's Eighth Amendment claim in the absence of an evidentiary hearing and without any consideration of the evolving standards of decency. *Creech v. State*, 558 P.3d 723, 733 (Idaho 2024).

The question presented is:

Should *Resweber* be overruled?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are all listed in the caption.

RELATED PROCEEDINGS

United States District Court, District of Idaho
Case No. 1:24-cv-485
Creech v. Valley
Petition pending

Idaho Supreme Court
Case No. 52327
Creech v. State
Opinion denying relief issued Nov. 5, 2024

Idaho Supreme Court
Case No. 52373
Creech v. Valley
Opinion denying relief issued Nov. 27, 2024

Ada County District Court, Idaho
Case No. CV01-24-4845
Creech v. State
Petition denied, Sept. 5, 2024

Ada County District Court, Idaho
Case No. CV01-24-18351
Creech v. State
Petition Denied Oct. 30, 2024

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INTRODUCTION

Petitioner Thomas E. Creech respectfully petitions this Court for a writ of certiorari to review the judgment of the Idaho Supreme Court.

OPINION BELOW

A copy of the Idaho Supreme Court opinion below is attached as Appendix A, App. 1–18, and is available at *Creech v. State*, 558 P.3d 723 (Idaho 2024).[1]

JURISIDICTIONAL STATEMENT

On November 5, 2024, the Idaho Supreme Court issued an opinion denying Mr. Creech relief. *See* App. 1–18. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). On January 15, 2025, Justice Kagan extended the time by which Mr. Creech could file a certiorari petition to April 4, 2025. The petition is timely filed.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

In 1981, Thomas Creech pled guilty to murdering fellow inmate David Jensen and he was sentenced to death for the offense in Idaho state court. *See Creech v. Richardson*, 59 F.4th 372, 376 (9th Cir. 2023). Mr. Creech's criminal proceedings

[1] In this petition, unless otherwise noted, all internal quotation marks are omitted, all emphasis is added, and all citations are cleaned up.

are not relevant to the issue presented here. Instead, the certiorari petition is focused on Idaho's attempts to execute Mr. Creech.

Those attempts began in earnest on January 30, 2024. That day, Idaho obtained a death warrant for Mr. Creech, setting his execution for February 28, 2024. App. 45. After the warrant was issued, Mr. Creech was moved to a cell at F-Block, the freestanding building at the Idaho Maximum Security Institution that houses the execution chamber. *Id*. While under warrant, Mr. Creech had to make a number of arrangements for his death. For example, prison staff asked Mr. Creech what his autopsy plans were and how he wished to dispose of his property. App. 46. Mr. Creech was also asked to select witnesses and a spiritual advisor to attend his execution. *Id*. On February 7, 2024, the Warden escorted Mr. Creech to the execution chamber to give him a "tour." *Id*. There, the Warden showed Mr. Creech the spot where his wife of more than twenty-five years, LeAnn Creech, would be sitting and watching her husband be killed. *Id*. The day before his execution, virtually all of Mr. Creech's property was removed from the prison and taken to the offices of his legal team. *Id*.

On the day and night leading up to the scheduled execution, Mr. Creech was visited by members of his legal teams and by his wife. *Id*. During those visits, Mr. Creech had in-person goodbyes with thirteen different members of his legal teams, including attorneys, investigators, and paralegals. App. 46–47. On the morning of the execution, Mr. Creech said a final goodbye to the members of his legal team on

the phone after they advised him that all of his requests for stays of execution had been denied. App. 47.

At 10 AM on February 28, 2024, Mr. Creech was brought into the execution chamber on a gurney and strapped to a table. *Id.* Fourteen people had been assembled to watch Mr. Creech die. App. 47–48. Mr. Creech could see his wife's face from the execution table, where he detected a look of "total devastation." App. 48. For nearly an hour, the executioners prodded Mr. Creech's body with needles while they searched unsuccessfully for a vein in which to pump the lethal chemicals. App. 49. Every time he felt a prick, Mr. Creech believed the drugs were being pumped into his body. *Id.* At approximately 10:58 AM, the Warden announced that the execution was being called off. App. 50.

Since the failed execution, Mr. Creech has dealt with severe anxiety and paranoia. *Id.* He suspects the prison is trying to poison his food or planning on orchestrating his killing by another inmate. *Id.* Every evening, he has nightmares. *Id.* In them, he is sometimes strapped to the execution gurney. *Id.* Other nightmares revolve around an image of his late wife's face and the way it looked during the execution. *Id.* The world now feels unreal to Mr. Creech, and he often believes he actually did die at his execution. App. 51. He is drawn to the window overlooking the death house, which he watches constantly. *Id.*

On March 18, 2024—only nineteen days after the failed execution—Mr. Creech filed the post-conviction petition below, challenging any subsequent attempt to execute him under the Eighth Amendment. App. 40–60. In ruling on the petition,

the trial court accepted "that enduring one execution attempt and facing another has traumatized Creech." App. 26. Nevertheless, relying on *Resweber* and cases interpreting it, the court summarily denied relief on the Eighth Amendment claim. App. 27–28. Mr. Creech appealed, and the Idaho Supreme Court rebuffed the Eighth Amendment claim on the merits. *See Creech*, 558 P.3d at 730–33. Like the trial judge, the Idaho Supreme Court felt obligated by *Resweber* to reject the claim without an evidentiary hearing. *See id.* Mr. Creech now seeks certiorari review.

REASONS FOR GRANTING THE WRIT

Resweber is a blemish on this Court's reputation. The Court there invited the state of Louisiana to electrocute to death a Black teenager after it tried and failed once before, and without allowing him to present any evidence about the pain and suffering he would endure as a result. As with other dark chapters in the Court's history, *Resweber* should be stricken from the books so as to improve the public's faith in the judiciary and the Justices' willingness to confess their own errors.

Apart from the fact that *Resweber*'s result is objectionable standing on its own, the opinion is also standing in the way of the law. Courts around the country have used *Resweber* to reflexively turn aside Eighth Amendment challenges to multiple execution attempts without any evidentiary development. As a result, no judicial inquiries are taking place to demarcate the line between torture and a legitimate second execution attempt. *Resweber* is effectively being treated, and was so in this case below, as though it stands for the proposition that repeat execution efforts can *never* violate the Eighth Amendment. That cannot possibly be the law,

and in order to figure out where the boundary lies, the obstruction—*Resweber*—must be lifted.

The present case is an exemplary opportunity for the Court to do just that. Below, the Idaho Supreme Court denied relief squarely on the merits while directly invoking *Resweber*. Because this case comes here from state court, the onerous federal habeas standard is irrelevant. And none of the additional cognizability issues or procedural doctrines that have complicated other similar certiorari petitions are present now. The case at bar gives the Court a chance to reexamine a highly problematic precedent without any distractions.

I. *Resweber* tarnishes the Court's legacy.

For three-quarters of a century, *Resweber* has been on the books even though, with the benefit of hindsight, it is a thoroughly outdated relic from a rightfully bygone era. That is long enough.

Willie Francis was a Black boy accused of murdering Andrew Thomas, a White pharmacist, when he was fifteen years old in 1944 Louisiana. *See* Arthur S. Miller & Jeffrey H. Bowman, *Death by Installments* 20 (Greenwood Press 1988) (hereinafter "*Death by Installments*"). "If Willie Francis had been tried for his alleged crime today, he would not have been sent to the electric chair the first time." *State v. Broom*, 51 N.E.3d 620, 640 (Ohio 2016) (O'Neill, J., dissenting). For starters, the Court has since outlawed the execution of juveniles. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005). What is more, Francis was "convicted by an all-white, all-male jury," *Broom*, 51 N.E.3d at 640 (O'Neill, J., dissenting), which likewise reflects the case's connections to a legal past that we properly left behind

many years ago, *see Flowers v. Mississippi*, 588 U.S. 284, 301 (2019) ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process."); *see also Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) ("[W]omen cannot be systematically excluded from jury panels from which petit juries are drawn."). To get him to that jury, the state of Louisiana interrogated Francis while he was jailed for a month without charges and without access to counsel. *See* Deborah W. Denno, *When Willie Francis Died: The "Disturbing" Story Behind One of the Eighth Amendment's Most Enduring Standards of Risk*, *Death Penalty Stories* 17, 35 (2009), available at https://ir.lawnet.fordham.edu/faculty_scholarship/975/ (hereinafter "Denno"). Such an ordeal would have been unconstitutional only twenty years later. *See Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

Francis did not meet with his lawyers until less than a week before his trial for first-degree murder. *See* Denno, *supra*, at 35. At trial, those lawyers "put up no defense despite a glaring lack of evidence." *Broom*, 51 N.E.3d at 640 (O'Neill, J., dissenting). Defense counsel waived their opening statement and called no witnesses, notwithstanding the availability of an individual who could have spoken to inconsistencies in Francis's confession and in the prosecution's narrative. *See Death by Installments*, *supra*, at 24–26. One of many avenues unexplored by defense counsel was the strong likelihood that the victim had abused Francis. In his confession, Francis wrote that "it was a secret about me" the victim. Arthur S. Miller and Jeffrey H. Bowman, *"Slow Dance on the Killing Ground": The Willie Francis Case Revisited*, 32 DePaul L. Rev. 1, 46 (1982), available at

https://via.library.depaul.edu/law-review/vol32/iss1/2 (hereinafter "*Slow Dance*"). Yet, Francis's attorneys did no investigation into what Francis meant by this. It was only decades later that an employee of victim's, Stella Vincent, admitted that she had seen "an incident involving Andrew Thomas and Willie Francis, an incident followed by the druggist yelling and lashing out at the boy." Gilbert King, *The Execution of Willie Francis: Race, Murder, and the Search for Justice in the American South* 265–67 (Basic Civitas 2008) (hereinafter "King"). This episode was so upsetting that Stella quit the pharmacy the same night. *Id.*

Given these flagrant oversights, Francis was inevitably convicted and then "received a mandatory death sentence," *Broom,* 51 N.E.3d at 640 (O'Neill, J., dissenting)—another feature of his case that would be called out today as blatantly unconstitutional under long-established precedent, *see Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality op.). After being sentenced, Francis "was not informed of his rights to appeal or to appointed counsel for that purpose," and as a consequence his highly questionable punishment was untested by any further litigation. *Broom*, 51 N.E.3d at 640 (O'Neill, J., dissenting). Justice O'Neill concluded his recitation of the facts in *Resweber* with the incredulous remark that "this is the case" his colleagues in the majority had "relie[d] upon to suggest that due process is alive and well in Ohio." *Id.* (O'Neill, J., dissenting).

The enforcement of Francis's death sentence was as reprehensible as the context from which it emerged. Indeed, the state of Idaho itself has acknowledged the "gruesome facts" associated with Francis's execution. App. 95–97. In his

dissenting opinion, Justice Burton described the disturbing nature of Francis's botched execution. *See Resweber*, 329 U.S. at 480 n.2 (Burton, J., dissenting). When the electricity was switched on, "Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor." *Id.* (Burton, J., dissenting). Francis "was jumping and kicking so much that he'd ultimately lifted the 300-pound chair six inches off the ground—it had made a full quarter turn before coming to rest." King, *supra*, at 240. The chaplain who was present noted that Francis's "body squirmed and tensed and he jumped so that the chair rocked on the floor." *Resweber*, 329 U.S. at 480 n.2 (Burton, J., dissenting).

Other facts surrounding the execution speak further to what a sordid spectacle it was. For one thing, "the two men who had set up the electric chair were drunk." Arthur Selwyn Miller, *A "Capacity for Outrage": The Judicial Odyssey of J. Skelly Wright* 24 (Greenwood Press 1984) (hereinafter "Miller"). George Etie, the owner of a local tavern, had been out drinking with the two executioners the morning before the execution and noted that the two men "were so drunk that it was impossible for them to have known what they were doing." King, *supra*, at 239–40. After seeing that Francis was still alive, the executioner upped the voltage and yelled "I'm giving you all I got now." *Death by Installments*, *supra*, at 9. When the executioner finally gave up, he "snarled that he would try again and if the chair still did not work, he would kill Willie with a rock." Miller, *supra*, at 25.

An observer summed up the events succinctly and captured both the macabre nature of the physical event and the racist atmosphere of the case as a whole: "This

boy really got a shock when they turned that machine on." *Resweber*, 329 U.S. at 480 n.2 (Burton, J., dissenting). As Justice O'Neill aptly put it: "The Willie Francis case . . . magnifies the problems of cruelty and racial injustice in one package." *Broom*, 51 N.E.3d at 640 (O'Neill, J., dissenting).

Just as we have a new vantage point to assess the disturbing events approved of in *Resweber*, so too for the law. The result in *Resweber* was unquestionably the product of a now long-outmoded conception of constitutional law. In *Resweber*, four dissenting Justices had no difficulty identifying the grisly details sketched out above as "cruel and unusual." 329 U.S. at 476 (Burton, J., dissenting). The only reason Justice Frankfurter did not join them was because he was asking a different constitutional question. In his view, the Eighth Amendment had not been incorporated against the States. *See id.* at 470–71 (Frankfurter, J., concurring). Had Justice Frankfurter approached the case through the lens of the Eighth Amendment, there is little doubt he would have embraced the dissenters' characterization of a subsequent execution attempt as cruel and unusual. For he went out of his way to flag how "strong" his "personal feeling of revulsion" was at the "State's insistence on its pound of flesh." *Id.* at 471 (Frankfurter, J., concurring). Privately, Justice Frankfurter wrote to Justice Burton, "I am sorry I cannot go with you, but I am weeping no tears that you are expressing a dissent." *Slow Dance*, *supra*, at 73. In another letter to his colleague, Justice Frankfurter confessed: "I have to hold onto myself not to reach your result." *Id.* at 23, 71. Nevertheless, Justice Frankfurter considered himself limited to the test for substantive due

process violations. *Compare Resweber*, 329 U.S. at 470–71 (concluding that Francis had not shown the transgression of "a principle of justice so rooted in the traditions and conscience of our people"), *with Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (formulating the standard for substantive due process violations in the same terms). If Justice Frankfurter had been participating in the *Resweber* appeal only fourteen years later, he would instead have utilized the Eighth Amendment, and the majority would have flipped. *See Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding that the Eighth Amendment was incorporated against the States by the Due Process Clause). In fact, "the Willie Francis case weighed so heavily on [Justice Frankfurter's] conscience that he convinced a former Harvard law school classmate, a leading member of the Louisiana bar, to seek clemency on Francis's behalf." *Broom*, 51 N.E.3d at 641 (O'Neill, J., dissenting). Justice Frankfurter made those arrangements because he thought the "Governor of Louisiana ought not to let Francis go through the ordeal again." Miller, *supra*, at 33. It makes little sense to hew to the formal outcome in *Resweber* when, under current law, the result would have been the opposite. *See Broom,* 51 N.E.3d at 641 (O'Neill, J., dissenting) (commenting that, in *Resweber*, "five of the justices were able to recognize the second attempt for what it was: torture").

Overruling *Resweber* would be in keeping with the Court's finest tradition. When there has been "a sea change in this Court's interpretation of the Constitution," it is appropriate to reevaluate the precedents that grew out of the abandoned cases. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 358

(Roberts, C.J., concurring); *accord id.* at 389 (Breyer, J., dissenting) (agreeing that stare decisis sometimes yields when there has been "a change in legal doctrine that undermined or made obsolete the earlier decision"). Like *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Resweber* is an "infamous[]" artifact from the Jim Crow era. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 246 (2023) (Thomas, J., concurring). And like in *Plessy*, "[h]istory has vindicated" the dissenters. *Id. Resweber* should be thrown in the same dustbin.

The final word on this point belongs to Willie Francis himself. Reflecting with extraordinary generosity of spirit on the opinion by this Court that condemned him to be put to death a second time, Francis made clear that he was "not complaining or anything like that, because I know down in my heart everybody has tried to do the right thing for me and for everybody else." *Demands of the Dead: Executions, Storytelling, and Activism in the United States* 44 (Katy Ryan ed., Univ. of Iowa Press 2012). Francis reconciled himself to the reality "that there has never been another case like mine before and I see how hard it is to say what is the right thing in my case." *Id.* It is hard, but the right thing remains overruling *Resweber* and turning the page on a dark chapter in the Court's history.

II. *Resweber* is impeding the development of the law.

It is not only this Court's reputation that would benefit from the abrogation of *Resweber*, but the law. This is not a situation like with *Korematsu v. United States*, 323 U.S. 214 (1944). There the Court avoided overruling an indefensible precedent "primarily because it ha[d] not needed to," since similar facts never again arose. Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104

W. Va. L. Rev. 571, 586 (2002). Quite to the contrary, *Resweber* is actively preventing serious constitutional claims from receiving meaningful judicial scrutiny.

Four appellate opinions prove the point. In each of them, courts leaned heavily on *Resweber* while summarily casting aside Eighth Amendment challenges to multiple execution attempts without permitting any evidentiary development. *See Creech*, 558 P.3d at 732–33; *Smith v. State*, 396 So.3d 400, 405–07 (Ala. Crim. App. 2023); *Broom v. Shoop*, 963 F.3d 500, 511–13 (6th Cir. 2020); *Broom*, 51 N.E.3d at 628–33. These courts gleaned from *Resweber* the categorical rule that a second execution attempt is always and everywhere constitutional. *See, e.g.*, *Smith*, 396 So.3d at 405 ("If it is not cruel and unusual punishment to execute an inmate who has been subjected to a current of electricity in a previous failed attempt, then it is certainly not cruel and unusual punishment to execute an inmate after the failure to insert an IV line in a previous failed execution attempt.").

The consensus in the lower courts that *Resweber* represents a blanket prohibition on multiple-execution Eighth Amendment claims is doubly wrong. Once because, as noted above, there was no majority holding on the Eighth Amendment in *Resweber* at all. *See Vasquez v. Hillery*, 474 U.S. 254, 261 n.4 (1986) (referring to the baseline principle that an "opinion joined by five Justices" is what "carr[ies] the force of law"). As one respected commentator has observed, many courts have mistakenly regarded *Resweber* as precedent and, "[r]egrettably, some of this reliance has been erroneous or misleading." Denno, *supra*, at 88. And the consensus

is also wrong because it cannot be the law that *every* second execution attempt is constitutional. There is no question that "[p]unishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). Surely there are scenarios in which repeat execution attempts cross the line into torture. *See Resweber*, 329 U.S. at 477 (Burton, J., dissenting) ("If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake.").

Yet *Resweber* is serving as the justification for lower courts' wholesale refusal to police that constitutional boundary. The dynamic is unsurprising. In *Resweber* itself, the plurality rendered its decision without the benefit of a hearing below. *See id.* at 472 (Burton, J., dissenting) (protesting the plurality's opinion because it was issued without "the determination of certain material facts not previously determined," as in a capital case "there must be no avoidable error of law or uncertainty of fact"). That same fact-free method is having a baleful effect on the lower courts. Consider the predicament of Kenneth Smith. As mentioned earlier, the Alabama Court of Criminal Appeals perfunctorily discounted Smith's multiple-execution claim in light of *Resweber*. But Smith had asserted numerous detailed facts about his botched execution to show how much pain and suffering it entailed. According to Smith's complaint, his executioners slid needles back and forth under his skin, tilted him back in his "gurney in an inverse crucifixion position," and then

approached him with "the biggest needle he had ever seen," whereupon he "could feel the needle sliding under his collarbone," leaving him "in such physical pain that he had difficulty breathing" and "was writhing and shaking uncontrollably." *Smith v. Hamm*, No. 2:22-cv-497, 2023 WL 4353143, at *4 (M.D. Ala. July 5, 2023). Perhaps a court might find, after hearing all the facts at a full and fair trial, that Smith's experience wasn't torturous in the constitutional sense. Still, it strains credulity to maintain, as the Alabama state court did, that Smith's ordeal could not have been unconstitutional because of what happened to Francis on the electric chair in 1947. If *Resweber* is removed from the equation, the lower courts can do their jobs in these cases properly and adjudicate Eighth Amendment claims on their own facts rather than on facts from an unrelated case eight decades old.

Resweber is stymying the law in another respect as well: by keeping the evolving standards of decency out of judicial analyses when it should be at the forefront. Since 1958, the Eighth Amendment has been tethered to "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. In the years that followed, this Court has struck down the death penalty in numerous settings for the sole reason that it was, as used against a particular prisoner, inconsistent with the evolving standards of decency. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 419–47 (2008); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002); *Ford v. Wainwright*, 477 U.S. 399, 406–18 (1986); *Coker v. Georgia*, 433 U.S. 584, 593–99 (1977) (plurality op.). Only four years ago, the Court reaffirmed that the evolving-standards line of cases remains in force. *See United States v. Briggs*,

592 U.S. 69, 76 (2020). The evolving standards do not appear in *Resweber*, as the phrase was first coined eleven years later. Nor are the evolving standards considered in any of the multiple-execution cases from the lower courts discussed above.

The most notable cameo for the evolving standards of decency in a multiple-execution case was below. There, the opinion nodded to Mr. Creech's contention "that when the Supreme Court decided *Resweber*, Eighth Amendment jurisprudence had yet to incorporate evolving standards of decency into its analysis." *Creech*, 558 P.3d at 733. "Nevertheless," the court continued, "*Resweber*, for all of Creech's misgivings, remains good law." *Id.* The Idaho Supreme Court's commentary neatly encapsulates the trouble with *Resweber*. It has given lower courts license to disregard the constitutional doctrine that is binding on them. Moreover, it is doing so in a particularly perverse fashion. The central purpose of the evolving standards is to ensure that the Eighth Amendment does not become "fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Hall v. Florida*, 572 U.S. 701, 708 (2014). Despite that commitment, lower courts are using *Resweber* to reject multiple-execution claims by ignoring everything that has happened in the world since 1947 and relying on a case in which a Black teenager was electrocuted twice by a deep southern state. *See* Denno, *supra*, at 93 (remarking that the "society" at issue in *Resweber* "did not represent progress either legally or socially").

"Society changes." *Graham v. Florida*, 560 U.S. 48, 85 (2010). The law of multiple execution attempts does not—until *Resweber* is reexamined by the Court.

III. This case is an ideal vehicle for revisiting *Resweber*.

Mr. Creech's case nicely tees up the continued vitality of *Resweber*, both because there are no procedural obstacles to its consideration and because the Idaho Supreme Court's opinion below embodies all of the problems with *Resweber*.

As to the former, this is as clean an appeal as the Court will ever get on *Resweber*. The Idaho Supreme Court expressly found that Mr. Creech employed the proper vehicle for his Eighth Amendment claim. *See Creech*, 558 P.3d at 728–30. There were no procedural impediments to the court's review of the claim, such as a statute of limitations or restrictions on successive petitions. *Compare with Smith*, 396 So.3d at 403–05 (faulting a petitioner who asserted a similar claim for insufficiently pleading it under state law). Rather, the Idaho Supreme Court unambiguously reached the merits of the Eighth Amendment issue. *See Creech*, 558 P.3d at 732–33.

The fact that this case arises from state court also recommends it for certiorari review. In the Broom case, for instance, the *Resweber* issue was presented in a certiorari petition framed by the federal habeas standard of review. *See Broom v. Shoop*, No. 20-6419, Petition for Certiorari, Nov. 19, 2020, at i (articulating the question presented as whether *Resweber* was "the clearly established United States Supreme Court precedent, for purposes of 28 U.S.C. § 2254(d)" on repeat execution attempts). That standard is highly deferential, which inhibits the Court from

reaching the underlying questions in a straightforward way that advances the law. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."); *see also Peede v. Jones*, 585 U.S. 1025, 1026 (2018) (Sotomayor, J., respecting the denial of certiorari) ("Considering the posture of this case, under which our review is constrained by the [federal habeas standards], I cannot conclude the particular circumstances here warrant this Court's intervention," even though the decision below was "deeply concerning."). To avoid the complications of federal habeas jurisprudence, this Court has increasingly accepted review of state post-conviction matters. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 163 (2021). It should do so here.

In addition to its procedural suitability, the way in which the case was resolved below makes it a strong candidate for certiorari review. The Idaho Supreme Court's opinion reflects all the negative impacts that *Resweber* has had on the law. To begin, the Idaho Supreme Court linked its result tightly to *Resweber*, declaring that the decision "remains good law." *Creech*, 558 P.3d at 733. *Resweber* is accordingly front and center in the proceedings. The Idaho Supreme Court also correctly identified Mr. Creech's invocation of the "evolving standards of decency" only to decline to apply them, in the face of decades of controlling precedent to the

contrary. *Id.* at 733. As a consequence, the case directly implicates the dynamic by which *Resweber* has frozen the law in this area in a time capsule from 1947.

Factually, too, this case is the right fit for the question presented. Mr. Creech alleged in his post-conviction petition that "[i]t would constitute the unnecessary and wanton infliction of pain" for Idaho "to attempt to execute him by any method after subjecting him to the psychological torment of the botched execution." App. 52. He recited at length the facts showing the distress that an anticipated execution, after the botch, was causing him, including paranoia, nightmares, delusions, and obsessiveness. App. 50–51. Idaho's judges had no quarrel with Mr. Creech's presentation. The trial court understood "that enduring one execution attempt and facing another has traumatized Creech." App. 26. So did the Idaho Supreme Court: it took "as true Creech's allegations that he experienced the pain and ongoing psychological distress that he described." *Creech*, 558 P.3d at 731. There are thus no messy factual disputes to interfere with this Court's consideration of the legal issue.

Finally, the Idaho Supreme Court's handling of the evidentiary-hearing question perfectly crystallizes how *Resweber* is blocking the development of the law. The Idaho Supreme Court discerned in *Resweber* a requirement that challenges of this type must aver that "the State is pursuing the second" execution attempt "to intentionally or maliciously inflict unnecessary pain." *Id.* As it happens, Mr. Creech made precisely that allegation. He took the position in the trial court that a "second attempt would be conducted with full knowledge and deliberation," as Idaho would now be aware of "the certain pain, terror and trauma" it would be inflicting on Mr.

Creech. App. 69. To the Idaho Supreme Court, this was not enough, as "the record . . . did not support . . . a finding" of such malice. *Creech*, 558 P.3d at 733. But it was the Idaho Supreme Court itself that deprived Mr. Creech of the ability to make that record, as it withheld from him the evidentiary hearing he sought. *See id.* at 730–32. Mr. Creech had no ability to elicit evidence from correctional officials about their state of mind in the absence of a hearing. *See Raudebaugh v. State*, 21 P.3d 924, 927 (Idaho 2001) (underscoring how a post-conviction petitioner in Idaho is not entitled to discovery as a matter of course but only when it "is necessary to protect" his "substantial rights"). The Idaho Supreme Court put Mr. Creech in Catch 22, insisting that he present evidence while rendering it unavailable.

Resweber is the source of that Catch 22. In *Resweber*, the plurality declared in the absence of an evidentiary hearing that there was "no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." 329 U.S. at 464. The *Resweber* Court thereby invited judges from around the country to reject serious Eighth Amendment claims based on factual presumptions that are entirely untested by the adversarial process. *Cf. Broom*, 51 N.E.3d at 80 (French, J., dissenting) (criticizing the majority for denying relief under *Resweber* without a hearing by "mak[ing] its own assessment without a record or input from the parties"). In short, *Resweber* is short-circuiting the judicial process in these cases, it did so below, and Mr. Creech's petition therefore offers an excellent occasion for the Court to set things right.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 26th day of March 2025.

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