No. 24-6885

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Idaho

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The State defends as "sound" *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (plurality op.), Opp. 18, even though the case is based on an obsolete model of constitutional analysis. If anything, the State's apologia for *Resweber* emphasizes the negative impact it is having on the lower courts, and thus the need for the opinion to be reconsidered. The State then attempts to minimize the life-and-death issue presented here as unimportant because it arises infrequently, an argument that would perversely prevent *Resweber* from ever being reopened.

Finally, the State criticizes the case as being a poor vehicle on the grounds that Petitioner Thomas Creech supposedly suffered only mild "discomfort" at his botched execution, Opp. 25, and that Idaho has now adopted the firing squad as its preferred method of execution. The latter contention is irrelevant, since Mr. Creech's claim goes to any method. Apart from that, the theory would at best justify a remand, rather than the denial of certiorari, since the State is relying on a development that occurred after the courts below ruled. And the former point is implausible on its face. No one could seriously deny the psychological agony inflicted on a man who is told to prepare for his involuntary death, placed on a gurney before a crowd of dignitaries gathered to watch the spectacle, and stabbed with poisonous needles for an hour while his wife looks on in horror. *Resweber* is the precedent that insulated those alarming facts from meaningful judicial scrutiny below, and it should be reconsidered.

I. *Resweber* warrants a second look.

The State treads a fine line on *Resweber*, recognizing its "disturbing" and "gruesome facts," Opp. 11, 12, yet insisting that the opinion's legal infrastructure

remains intact, *see id.* at 18. Although the State is right to describe the events in *Resweber* as the relic of a bygone era, it is wrong to see the law in the opinion any differently.

The State complains that Mr. Creech has not identified how Eighth Amendment law has changed since *Resweber*. *See id.* at 19. What the State forgets are the evolving standards of decency. As explained in the certiorari petition, the evolving standards of decency have been at the core of this Court's Eighth Amendment jurisprudence for nearly seventy years. *See* Pet. 14. The evolving standards of decency did not exist as a legal concept at the time *Resweber* was released. *See Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (coining the term). Consequently, *Resweber* did not engage with the doctrine. *See generally* 329 U.S. 459. That is one "sea change" the State overlooks. Opp. 19.

Another is incorporation. In 1947, when *Resweber* was decided, the Eighth Amendment had not yet been incorporated against the States. *See Robinson v. California*, 370 U.S. 660, 666–67 (1962) (doing so for the first time). That is why Justice Frankfurter, in his critical *Resweber* concurrence, did not deal with the Eighth Amendment. *See generally Resweber*, 329 U.S. at 466–72 (Frankfurter, J., concurring). The State appears to suggest that Justice Frankfurter nevertheless did effectively reject the Eighth Amendment challenge in *Resweber*. *See* Opp. 13. He didn't. Justice Frankfurter referred only once to the Eighth Amendment in his opinion, and it was for the explicit purpose of clarifying that the provision was "*not involved* in the controversy." *Resweber*, 329 U.S. at 470 (Frankfurter, J.,

concurring).[1] More substantively, Justice Frankfurter's analysis was plainly tied to due process principles, *see* Pet. 9–10, something the State does not deny.

The State's failure to grapple with the centrality of the Due Process Clause in Justice Frankfurter's opinion leads the Attorney General to misunderstand how incorporation would have altered the result in *Resweber*. Under the evolving standards of decency, this Court brings its own "independent judgment to bear on the" constitutionality of the contested practice. *Hall v. Florida*, 572 U.S. 701, 721 (2014). Justice Frankfurter voiced a "personal feeling of revulsion" at the result in *Resweber*. 329 U.S. at 471 (Frankfurter, J., concurring). Surely a Justice revolted by a state action is one whose "independent judgment" will condemn it as an Eighth Amendment matter. While the State asserts that Justice Frankfurter's vote in *Resweber* was cast without "any hesitation," reluctance is exactly the sentiment he articulated to his dissenting colleague. *See* Arthur S. Miller & Jeffrey H. Bowman, *"Slow Dance on the Killing Ground": The Willie Francis Case Revisited*, 32 DePaul L. Rev. 1, 26, 73 (1982), available at https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2258&context=law-review (quoting a letter that Justice Frankfurter sent to Justice Burton, in which he wrote: "*I am sorry I cannot go with you*, but I am weeping no tears that you are expressing a dissent."). The thing that kept Justice Frankfurter

[1] Unless otherwise indicated, all internal quotations marks are omitted, all emphasis is added, and all citations are cleaned up.

from voting his conscience was the state of the law on incorporation. With the law having changed, the outcome in *Resweber* calls for a fresh look.

Lastly, the State fears a slippery slope unfolding after *Resweber* is overruled, in which condemned inmates will litigate the prospect of two needle stabs "during the same execution." Opp. 23. There is no cause for the State's anxiety. If *Resweber* was abrogated, it would be an easy matter for the courts to continue accepting the commonsense proposition that "more than a single needle insertion may be necessary" at a lethal injection execution, *State v. Webb*, 750 A.2d 448, 456 (Conn. 2000), and that "an isolated mishap alone does not give rise to an Eighth Amendment violation." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality op.). Whenever a constitutional line must be drawn, it is "subject, of course, to the objections always raised against categorical rules." *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Still, sometimes "a line must be drawn." *Id.* Here, it is logical to differentiate between the common situation in which a single execution involves multiple IV attempts (as in *Webb*) and the much rarer situation in which a person is forced to go to the chamber a second time after a psychologically torturous failure the first go-round. In all events, the slippery slope is properly considered at the merits stage and—if the Court saw fit—could help justify the denial of relief then. It is not a fair justification for the Court to avoid reevaluating *Resweber*, which is all Mr. Creech seeks in his certiorari petition.

II. The question presented is certiorari-worthy.

On the certiorari-worthiness of the question presented, the State's opening salvo is to stress how seldom multiple-execution cases arise. *See* Opp. 10. The rarity

of the scenario does not make the question unimportant. Assume, arguendo, that Mr. Creech is correct and *Resweber* ought to be overruled. Why should Mr. Creech be executed under an invalid precedent? Why should Kenneth Smith in Alabama? *See* Pet. 13–14 (describing the allegations implicated by Mr. Smith's multiple-execution claim); *Grayson v. Comm'r, Ala. Dept. of Corr.*, 121 F.4th 894, 898–99 (11th Cir.) (mentioning that Mr. Smith was executed), *cert. denied*, 145 S. Ct. 586 (2024). The fact that a rule of law will by definition only affect a small class of litigants is no reason to retain the wrong rule in place indefinitely.

Next, the State posits that *Resweber*, even if wrongly decided, is harmless. In the State's view, the cases that Mr. Creech is focusing on as examples of *Resweber*'s negative effects are unobjectionable because they included "robust discussion of the issue presented and the applicable law." Opp. 21. But the "applicable law" is *Resweber*, and it is freezing any meaningful constitutional analysis in the lower courts. Granted, the cases at issue contain, to varying degrees, background sections about the botched executions that occurred, references to some other Eighth Amendment cases, and so forth. Nonetheless, *Resweber* is where the buck stops in all of them.

The dynamic is most starkly visible in *Smith v. State*, 396 So.3d 400 (Ala. Crim. App. 2023). There, the Alabama Court of Criminal Appeals started with the premise that "it is not cruel and unusual punishment to execute an inmate who has been subjected to a current of electricity in a previous failed execution attempt," as per *Resweber*. *Smith*, 396 So.3d at 405. In the same breath, the court concluded that

it was therefore "certainly not cruel and unusual punishment to execute an inmate after the failure to insert an IV line in a previous failed execution attempt." *Id.* at 405. As for *Broom v. Shoop*, 963 F.3d 500 (6th Cir. 2020), while the Sixth Circuit engaged in a lengthy explanation for its result, the core logic of the opinion is tethered entirely to *Resweber*. Mr. Broom's claim was rejected because *Resweber* was, in the Sixth Circuit's view, the only case from this Court on the question and it was a loss for the inmate, which precluded relief under the federal habeas statute. *See Broom*, 963 F.3d at 510 (explaining that "if *Resweber* is no longer good law that just means there is no clearly established law in this realm *at all*" (emphasis in original)). Here, the decision below was of a piece with *Broom* and *Smith*. The key reasoning of the Idaho Supreme Court was that Mr. Creech's claim failed because *Resweber* "remains good law" and it had rebuffed a multiple-execution theory. *Creech v. State*, 558 P.3d 723, 733 (Idaho 2024).

In all of these cases, *Resweber* dictated the outcome. In none of them is there any independent consideration of whether the inmate's individual circumstances rise to the level of an Eighth Amendment violation. *Resweber* is blocking that consideration, regardless of the page count in these opinions.

The State inadvertently makes a strong case for granting certiorari when it concedes the principle that some multiple-execution attempts can be unconstitutional. Opp. 21. As the State sees things, Mr. Creech's particular facts simply do not "cross[] that line." *Id.* The reason for this Court to grant certiorari, however, is not to so that it can address the highly fact-bound question of whether a

specific set of allegations about a second execution triggers the Eighth Amendment. *See Wearry v. Cain*, 577 U.S. 385, 401 (2016) (Alito, J., dissenting) ("[W]e generally deny certiorari on factbound questions that do not implicate any disputed legal issue."). Rather, the basis for granting certiorari is that the courts below are not themselves posing that question. Instead, they are merely citing *Resweber* and moving on. To allow lower courts to determine whether a given multiple-execution case is viable or nor—as the State agrees they should do—*Resweber* must be removed as an obstacle.

A related misconception of the State's is to believe that Mr. Creech has to point to a split in the lower courts when his certiorari petition is based on the very fact that there is an incorrect *consensus* in the judiciary about *Resweber*. It is true, as the State says, that certiorari is granted in many cases to resolve divisions in authority. *See* Opp. 15. But not always. It makes little sense to demand disagreement when the request in the certiorari petition is to reassess a Supreme Court case. The lower courts are all bound to follow such caselaw—they cannot be expected to take differing positions on it.

Thus, when the question is whether to abrogate a precedent, the Court looks not at whether there is conflict, but whether there is discontent. *See, e.g.*, *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 451 (2015) (noting that certiorari had been granted to decide whether to overrule a case in part because of criticism by "courts and commentators"). Unsurprisingly, then, the cases in which this Court overrules prior precedent typically do not remark on any splits. *See, e.g.*, *Loper Bright Enter. v.*

Raimondo, 603 U.S. 369 (2024); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). That contrasts sharply with the Court's opinions in cases where it intervened for the purpose of resolving fissures in the law. *See, e.g.*, *Starbucks Corp. v. McKinney*, 602 U.S. 339, 345 (2024) ("We granted certiorari to resolve [a] Circuit split . . . .").

Mr. Creech's petition falls neatly within the tradition of cases where judges and scholars have underscored the need for antiquated precedent to be reviewed anew. For many years, *Resweber* has been the target of trenchant disapproval by judges and scholars. *See, e.g.*, *Arthur v. Dunn*, 137 S. Ct. 725, 734 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (emphasizing that the Court "should not be proud of th[e] history" of *Resweber*, where a majority "did not retreat from [its] nonintervention strategy even after Louisiana strapped a 17-year-old boy to its electric chair and, having failed to kill him the first time, argued for a second try—which this Court permitted"); *Broom*, 963 F.3d at 512 (describing *Resweber* as "a precedent that may have since outlived its usefulness"); *State v. Broom*, 51 N.E.3d 620, 640 (Ohio 2016) (O'Neill, J., dissenting) ("The Willie Francis case . . . magnifies the problems of cruelty and racial injustice in one package."); 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/cgi/viewcontent.cgi?article=1975&context=faculty_scholarship (surveying some of the deficiencies in *Resweber*). The State sums up the

basis for granting certiorari as well as Mr. Creech could: "Every state and federal court to address the question of whether the Eighth Amendment bars a second execution after the first attempt was unsuccessful has relied upon this Court's plurality decision in *Resweber*." Opp. 10. Because that unanimity is rooted in an obsolete and profoundly troubling precedent, certiorari is appropriate.

III. The case is a good vehicle.

On three fronts, the State attacks Mr. Creech's petition as a vehicle based on: 1) the level of pain he suffered; 2) the procedural posture of the case; and 3) Idaho's recent adoption of the firing squad as its preferred method of execution. All three are unavailing.

First, the State's attempt to downplay the gravity of Mr. Creech's experience is unserious. Idaho's Attorney General regards it as only causing a person "discomfort," Opp. 25, when he is led to a gurney, strapped to a table, and subjected to an hour-long effort to kill him against his will as a crowd watches. The State is only able to offer that characterization with a straight face by dwelling entirely on Mr. Creech's physical circumstances and ignoring the psychological trauma inflicted upon him. Unlike the State, lower courts have uniformly recognized psychological pain as registering under the Eighth Amendment. *See, e.g.*, *Clark v. Coupe*, 55 F.4th 167, 184 (3d Cir. 2022) (observing the "general consensus among the Courts of Appeals . . . that a threat of serious psychological injury invokes Eighth Amendment protection"); *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (holding that the pain the Eighth Amendment prohibits states from inflicting on prisoners "may be physical or psychological"); *Calhoun v. Detella*, 319 F.3d 936, 939 (7th Cir. 2003)

(recognizing that "the wanton infliction of psychological pain is . . . prohibited" by the Eighth Amendment). There is no foundation for this Court to dispute the agreement in the federal judiciary on this point, especially at the certiorari stage.

In fact, the psychological aspect of the case makes it a better vehicle for certiorari review. While the physical experience of inmates who survive execution attempts varies greatly, there is more commonality with respect to the horror that anyone feels when officials try to put him to death, fail, and then try again. With methods of execution expanding in recent years to cover lethal injection, the firing squad, nitrogen gas, and so forth, an opinion that encompasses more methods of execution is an opinion that will be more useful in the lower courts. *See* Nina Motazedi, *2025 Roundup of Death Penalty Related Legislation*, Death Penalty Information Center, June 4, 2025, https://deathpenaltyinfo.org/news/2025-roundup-of-death-penalty-related-legislation (summarizing recent legislative changes to methods of execution).

Moreover, the record in Mr. Creech's case on his psychological trauma is a clean one. The trial court accepted "that enduring one execution attempt and facing another has traumatized Creech." App. 26. Similarly, the Idaho Supreme Court 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 no messy factual disputes to complicate a decision from this Court instructing the bench and bar on the legal framework for assessing psychological harms in multiple-execution cases.

When the Court establishes that framework, Mr. Creech doubts it will agree with the State's analogy—that a botched execution is comparable to an everyday blood draw. Opp. 23. The average phlebotomist at a health care facility is presumably not trying to push fatal toxins into the veins of patients before a crowd of onlookers. In any event, the degree of psychological pain required by the Eighth Amendment in this context is something for the Court to take up at the merits stage. It is not a basis for it to deny certiorari and leave the law in this area stunted by *Resweber*.

Second, the State gets it backwards when it advises the Court to wait until Mr. Creech's federal habeas claim is adjudicated before intervening. *See* Opp. 26. As the certiorari petition outlines in a passage unaddressed by the State, this Court has shown a rational preference for taking up constitutional issues when they are teed up directly in a de novo fashion by state post-conviction proceedings, rather than when they are muddied by the exceedingly deferential standard for federal habeas review. *See* Pet. 17. Those standards belie the State's invitation to the Court to wait for federal habeas resolution in Mr. Creech's case "before considering whether to rewrite a case that has withstood the test of time." Opp. 26. In federal habeas, this Court cannot ask whether *Resweber* should be rewritten. It will have to ask whether "the earlier state court's decision was contrary to federal law then clearly established in the holdings of this Court" or whether it unreasonably applied such holdings. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). That meta-analysis of what this Court has said previously about the Eighth Amendment is not equivalent

to a straightforward inquiry into what the Eighth Amendment actually means. Notably, it was in the habeas context where the Sixth Circuit deemed *Resweber* to be "a precedent that may have outlived its usefulness," *Broom*, 963 F.3d at 512, yet one the court was duty-bound to follow.

As that language signals, what the law needs is an inquiry under current standards into the Eighth Amendment and multiple-execution attempts. Given the nature of federal habeas law, this Court's only time to provide such an explanation in Mr. Creech's case is now. Kicking the can down the road would also increase the likelihood of a death warrant coinciding with the next certiorari petition. By contrast, the present one can be decided in the ordinary course of business without the pressure of a scheduled execution and the resulting need for a stay, something this Court has characterized as "the extreme exception, not the norm." *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019).

Third, the State contests Mr. Creech's case as a vehicle on the speculative ground that he may be subjected to a firing squad in the future rather than another lethal-injection execution. *See* Opp. 25–26. Contrary to the State's unexplained assumption, the force of Mr. Creech's certiorari petition is not weakened by a potential switch to another method. Indeed, the Idaho Supreme Court's rationale for finding the claim cognizable in post-conviction proceedings was that Mr. Creech challenged a subsequent execution attempt by *any method* as unconstitutional. *See Creech*, 558 P.3d at 728 ("It is our view that Creech's claims necessarily implicate the validity of the death sentence previously imposed, because Creech's Eighth

Amendment challenge to a second execution attempt by *any means*, if successful, would prevent the State from carrying out his death sentence."). The Idaho Supreme Court's framing of the issue is consistent with the animating force behind Mr. Creech's certiorari petition. Fixing the dysfunction in the court system created by *Resweber* is why certiorari is proper. That dysfunction is the lack of meaningful judicial review over all multiple-execution attempts, *see* Pet. 11–16, no matter the method.

The State's firing-squad gambit is also far too weak as a factual matter to justify the denial of certiorari. As the State acknowledges, Idaho's new firing-squad bill does not go into effect until July 1, 2026. *See* Opp. 25. Until then, lethal injection remains the preferred method of execution in the state. *See* Idaho Code § 19-2716(3). The State invokes a non-binding press release issued by the Idaho Department of Correction about the execution chamber being taken offline for an unknown time period, *see* Opp. 25, but that does not alter the legal reality of what methods of execution are authorized in Idaho for the next year. *If* things change on July 1, 2026, that will still give the Court ample time to release an opinion on Mr. Creech's Eighth Amendment claim next term, and there is no question the matter will remain ripe under the statute for that period.

Setting all that aside, the State's allusions to the statutory amendment are, at most, a reason for the Court to remand—not to deny the certiorari petition. The bill in question was signed into law on March 12, 2025, *see* https://legislature.idaho.gov/sessioninfo/2025/legislation/H0037/, more than four

months after the Idaho Supreme Court issued the opinion below, *see Creech*, 558 P.3d 723. As set forth here and in Mr. Creech's certiorari petition, the central plank of the Idaho Supreme Court's opinion was its inflexible reliance on *Resweber*'s supposed rule about multiple execution attempts, which had nothing to do with the particular method employed. If that plank is removed and this Court erases the per se multiple-execution rule (as Mr. Creech requests), and if the State is correct that the transition to the firing squad is germane to the outcome of the case, that would call for a remand. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (reiterating that this Court generally does "not decide in the first instance issues not decided below").

IV. There are no preservation problems.

Misunderstanding both Idaho's pleading requirements and this Court's forfeiture framework, the State flags two illusory preservation concerns. Specifically, the State stresses that Mr. Creech's post-conviction petition "said nothing about *Resweber*, or evolving standards of decency." Opp. 8. The State never explains why Mr. Creech was obligated to address *Resweber* or the evolving standards of decency *in his petition*. Both the evolving standards of decency and *Resweber* were taken up at length in Mr. Creech's response to the State's motion for summary disposition. *See* App. 66–73. In Idaho post-conviction proceedings, the petition must "set forth the grounds upon which the application is based," and "[a]rgument, citations, and discussion of authorities *are unnecessary*." Idaho Code § 19-4903; *see State v. Abdullah*, 348 P.3d 1, 32 (Idaho 2015) (applying § 19-4903 to

a capital case). Mr. Creech consequently had no responsibility to elaborate on *Resweber* and the evolving standards of decency in his petition. The purpose of his petition was to outline his claim, i.e., that another execution attempt would violate the Eighth Amendment, and he did so. Summary disposition litigation in Idaho is the stage at which substantive briefing occurs in a post-conviction matter at the district court. That is where Mr. Creech appropriately expressed his position on *Resweber* and the evolving standards.

Nor did the state courts have any quarrel with Mr. Creech's approach below. The Idaho Supreme Court tackled head-on both the evolving standards and *Resweber*, without saying a word about forfeiture. *See Creech*, 558 P.3d at 733. This Court reviews any issue that was "passed upon" below. *Citizens United v. FEC*, 558 U.S. 310, 330 (2010). What is more, the Court's "traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). Mr. Creech's claim is that the Eighth Amendment forbids another execution attempt; the evolving standards of decency and *Resweber* are simply associated with particular arguments bolstering that theory. He is entitled to advance them, and the State's preservation objection is insubstantial.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted this 11th day of July 2025.

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