No. 21-439

In the Supreme Court of the United States

MICHAEL NANCE, PETITIONER

v.

TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, AND WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON, RESPONDENTS

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

BRIEF FOR JONATHAN F. MITCHELL AND ADAM K. MORTARA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Two decades ago, a Georgia jury sentenced Petitioner Michael Nance to death by lethal injection. Georgia law holds that capital inmates shall be executed only by lethal injection. But Nance now asserts that Respondents cannot lawfully execute him by lethal injection under the Eighth Amendment. 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?

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INTEREST OF AMICUS CURIAE[1]

Amici curiae between them have over forty years of experience with this Court's habeas corpus jurisprudence. Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools

[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

and is the former Solicitor General of the State of Texas. Mr. Mitchell recently served as a court-appointed *amicus curiae* in the Fifth Circuit. *In re Hall*, No. 19-10345.

Adam K. Mortara is a Lecturer in Law at the University of Chicago Law School, where he has taught federal courts, federal habeas corpus, and criminal procedure since 2007. Mr. Mortara has also served as a court-appointed *amicus curiae* in criminal law and federal habeas cases, including before this Court in *Terry* v. *United States*, No. 20-5904, and *Beckles* v. *United States*, No. 15-8544, and before the Eleventh Circuit in *Wilson* v. *Warden*, No. 14-10681, and *Bryant* v. *Warden, FCC Coleman-Medium*, No. 12-11212.

SUMMARY OF ARGUMENT

No one could dispute that the second question presented is, in fact, the *second* question. The Court says as much on its website, using the time-honored numbering convention that the second question gets a "2." First is first, and second is second. This Court's decisions in *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007)—which hold that a second habeas application containing a *Ford* claim is not really second even when the prisoner has had an adjudication of a first application—should be overruled. *Stare decisis* is irrelevant to these decisions and others which expand the availability of the writ of habeas corpus for convicts because criminals do not in any meaningful way rely on them. The State's interest in finality compels overruling such erroneous precedents.

It would be hard to get more egregiously wrong than saying a second application is the first. *Amici* respectfully

hope that we no longer live in "an age in which two and two will make five when the Leader says so." George Orwell, *Review of "Power: A New Social Analysis" by Bertrand Russell* (1939).

ARGUMENT

I. *MARTINEZ-VILLAREAL* AND *PANETTI* SHOULD BE OVERRULED

We have nothing to add to the short dissent of Justice Thomas in *Martinez-Villareal*. A *second* application is indisputably "second or successive" when in response to a previous application a court "adjudicate[d] some of the claims presented . . . ." 523 U.S. at 651. The majority's anti-ordinal conclusion to the contrary can be justified only by considerations properly left to the political branches. As Justice Thomas (joined by Justice Scalia) put it better:

> Ultimately, the Court's holding is driven by what it sees as the "far reaching and seemingly perverse" implications for federal habeas practice of a literal reading of the statute. Such concerns are not, in my view, sufficient to override the statute's plain meaning.

Id. at 651–52 (internal citation omitted).

It is not this Court's role to supplement or edit the language of an Act of Congress based on its speculation about "implications" or "practical effects." *See Bostock* v. *Clayton County*, 140 S.Ct. 1731, 1738 (2020) ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President."). The error of *Martinez-Villareal* can survive only by virtue of an unreflective and

equally erroneous application of *stare decisis*. Because *Martinez-Villareal* (and thus *Panetti*) are not entitled to any *stare decisis* protection, this Court can address them as if it "feels like the *first* time."[2]

II. *STARE DECISIS* DOES NOT PROTECT DECISIONS WHICH EXPAND THE AVAILABILITY OF THE WRIT FOR STATE CONVICTS

Stare decisis should not stand in the way of overruling any decision that expands the availability of the federal writ to state convicts. *Cf. Lockhart* v. *Fretwell*, 506 U.S. 364, 372–73 (1993) (holding new rules in favor of government apply retroactively to cases on collateral review). A state's interest in finality should always trump sticking to a wrong turn with the confidence of a dad on a road trip gone awry.[3]

It is always worth repeating that nothing in the Constitution mandates that federal courts sit in habeas review of state court convictions. "In a discussion about habeas corpus, nothing is more disqualifying than the belief that the Suspension Clause has anything to do with prisoners who have already been convicted by a Court of competent jurisdiction." Brief for Jonathan F. Mitchell and Adam K. Mortara at 4, *Edwards* v. *Vannoy*, No. 19-5807 (citing *Dep't of Homeland Sec.* v. *Thuraissigiam*, 140 S.Ct. 1959, 1983, 1985 n.2 (2020) (Thomas, J., concurring)). When

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[2] Michael L. Jones (of Foreigner), *Feels Like The First Time* (1977).

[3] *See National Lampoon's Vacation* (1983) (clip available at https://www.youtube.com/watch?v=tfmKwgrQzdE, last visited Mar. 29, 2022) (this clip well represents *Reed* v. *Ross*, 468 U.S. 1 (1984), too).

Congress fashioned such jurisdiction in 1867, the Court narrowly tailored the writ's availability to respect the finality of convictions by state courts of competent jurisdiction. *See Edwards* v. *Vannoy*, 141 S.Ct. 1547, 1567–68 (2021) (Gorsuch, J., concurring); Brief for Jonathan F. Mitchell and Adam K. Mortara at 1–2, 10, *Brown* v. *Davenport*, No. 20-826; *cf. also Martinez-Villareal*, 523 U.S. at 652 (Thomas, J., dissenting) ("A statute that has the effect of precluding adjudication of a claim that for most of our Nation's history would have been considered noncognizable on habeas can hardly be described as 'perverse.'"). Later, the Court expanded the writ and "departed from [the finality] principle," whereupon Congress and later Justices sought to temper it. *Edwards*, 141 S.Ct. at 1568–71 (Gorsuch, J., concurring) (quoting *Brown* v. *Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result)) (alteration in original); *see also* Mitchell & Mortara *Davenport* Brief, *supra* at 1–2. That is because "finality, the idea that at *some* point a criminal conviction reaches an end, a conclusion, a termination, is *essential* to the operation of our criminal justice system." *Edwards*, 141 S.Ct. at 1571 (Gorsuch, J., concurring) (quoting *Prost* v. *Anderson*, 636 F.3d 578, 582 (10th Cir. 2011)).

Nance seeks a ruling that invalidates his sentence—and undermines the finality of that determination.[4] "[I]f

[4] *Amici* can find no fault with the analysis of the Eleventh Circuit in concluding that Nance is presenting what should be construed as a habeas petition. His counsel's fretting today that, should this Court affirm, state-law issues will dominate these sorts of cases provides some opportunity to clear things up. Pet. Br. at 6–7 (all while blithely explaining that it is no big deal to invalidate a sentence because the

the rule of law means anything, it means the final result of proceedings in courts of competent jurisdiction *establishes* what is correct 'in the eyes of the law.'" *Id.* (quoting *Herrera* v. *Collins*, 506 U.S. 390, 399–400 (1993)). States should not be "forced to suffer the indignity of having their final judgments reopened" (or being forced to pass new legislation to restore an invalidated criminal sentence) merely because this Court erroneously expanded the narrow writ and permitted a barred second or successive application by declaring that 2+2=5. *Ibid.*

Even if *stare decisis* did not give way to finality, it "is not an inexorable command." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). It gives way where the prior precedent is "egregiously wrong," has engendered little reliance interest, and has eroded over time. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J.,

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State can just pass new legislation — Our Federalism at work!). To allay these concerns, the Court should require that prisoners file all method-of-execution claims in state court and, with a nod to *Pullman* abstention, craft an exhaustion requirement that in practice resembles § 2254(b)(1)(A). "[W]hen the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question, federal courts should ordinarily abstain from passing on the federal issue." *Overton* v. *Bazzetta*, 539 U.S. 126, 140–41 (2003) (Thomas, J., concurring in the judgment). It may be that the state judiciary can offer prisoners the relief they seek — after all state supreme courts routinely exercise what some might call a power to revise state law. And if all method-of-execution claims went through state court first, they would be subject to ordinary *res judicata* (for § 1983 claims) and § 2254(d) or procedural default (for habeas applications).

concurring in part). Traditional *stare decisis* factors counsel in favor of overruling *Martinez-Villareal* (and its progeny).[5]

An ordinary reader of the English language probably did not need Justice Thomas to explain that "first" means "first" and "second" means "second," and as noted earlier, this Court does not need *amici* to explain it again. *Martinez-Villareal* is thus "egregiously wrong." A federal statute is "the supreme Law of the Land" under Article VI of the Constitution, and *stare decisis* considerations and court-created doctrines should never be allowed to trump this Court's constitutional duty to enforce "supreme" congressional enactments. *See* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1 (2011).[6]

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[5] *Martinez-Villareal* and *Panetti* might be the parents of this Court's recent decision in *Banister* v. *Davis*, 140 S.Ct. 1698 (2020), which holds that a Rule 59(e) motion is not a second or successive habeas application. *Banister* has substantial *dicta* about *Martinez-Villareal* and *Panetti*. But its retro-chic solicitude for a textually irrelevant "assess[ment] of whether Congress would have viewed [an application] as successive," *id.* at 1706, should be treated as just that — *dicta*. Perhaps *Banister*'s holding can stand when *Martinez-Villareal* and *Panetti* fall, but that is not a question this Court need answer in this case.

[6] *Stare decisis* may of course be used to inform the construction of an ambiguous federal statute, and this Court does not violate the Supremacy Clause by invoking *stare decisis* to adhere to a permissible interpretation of statutory language that may nonetheless depart from the preferred interpretation of the present-day Court. But under no circumstance may *stare decisis* be used to trump the text of an unambiguous federal statute such as § 2244(b). *See generally* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001).

Nor are any reliance interests at stake. No criminal defendant can be said to have a reliance interest that is premised on the possibility that, while competent to have been sentenced to death, he will, in the future after his first federal habeas application, become incompetent. "I am relying on *Martinez-Villareal* because, while today my *Ford* claim is unripe or meritless, I know that in the future I would like to present a *Ford* claim to avoid execution. This would be after I have presented habeas claims in my real first application all of which I know are losers thus necessitating my reliance on the *Martinez-Villareal* and *Panetti* exception that grants prisoners like me a second chance even though § 2244(b)'s text says otherwise." No one can rely on *Martinez-Villareal* and *Panetti* unless they have prescience beyond the power of Man.

The writ is always discretionary anyway. *Edwards*, 141 S.Ct. at 1571 (Gorsuch, J., concurring). Prisoners can thus hardly be said to rely on its availability when a court always has discretion to deny it, and prisoners do not "have any claim of reliance on past judicial precedent." *Lockhart*, 506 U.S. at 373; *McCarthan* v. *Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1097 (11th Cir. 2017) (en banc) (William Pryor, J.) ("As a fundamental matter, rules about collateral review do not create significant reliance interests.").

All the traditional *stare decisis* factors weigh in favor of setting *Martinez-Villareal* and *Panetti* aside and enforcing the clear and unambiguous text of AEDPA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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