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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The very first page of Respondents' brief encapsulates why reversal is required here. Respondents observe that "[w]here a prisoner seeks to bar his execution, he seeks habeas relief." Resp. Br. 1. True enough, but it is equally true that Nance's claim does not seek to bar his execution. Nance "does not challenge his conviction. Nor does he challenge his sentence." *Ramirez v. Collier*, 142 S. Ct. 1264, 2022 WL 867311, at *5 (2022). On the contrary, Nance's claim requires him to *prove* that the State has a feasible, readily implemented means of carrying out his sentence. This is not a claim of life or death, but one only of how death may be administered. And just like other claims that seek to ensure that the State carries out a conceded punishment in a constitutional manner, Nance's claim sounds in § 1983, not habeas.

Respondents labor mightily in a futile attempt to escape this simple truth (a truth they accepted up through their briefing in the court of appeals). They seek to redefine Nance's sentence as requiring lethal injection. It does not, which is why when Georgia changes its method of execution, it does not resentence anyone. Respondents contend that if Nance's claim succeeds, they will be "legally" barred from carrying out his sentence, but Georgia may carry out Nance's execution using any constitutional method it wishes. And Respondents claim that Nance's method of execution claim is actually a demand to be "released" from "custody," a contorted locution that confuses the line between habeas and § 1983 that this Court has drawn in the method-of-execution context.

At bottom, Respondents' distinction between claims that propose non-statutory alternatives and those that propose statutory alternatives is simply incoherent. Respondents spend pages contending that Nance's claim will "rewrite" state law and that he should have "worked within state law" by proposing an alternative method of lethal injection. Nance is unaware of any such method, which is why he proposed the firing squad as his alternative. But even if Nance proves that Georgia's current method of lethal injection is unconstitutional as applied to him, Respondents need not use his proposed alternative of firing squad. Indeed, it is conceivable that Respondents could establish that some other method of *lethal injection* passes constitutional muster. Nance could prevail by obtaining an injunction against Respondents using their current unconstitutional lethal injection protocol, while leaving them free to use a revised method of lethal injection. In other words, pleading a non-statutory alternative does not necessarily mean the State must use one—proving that the claim does not necessarily invalidate the sentence even on Respondents' own (erroneous) conception of that standard.

Respondents' rule is also a recipe for the very delay and confusion they supposedly seek to avoid. Respondents offer no answer to the administrability problems that Nance and the United States have identified, which will mire method-of-execution claims in disputes about whether a prisoner's proposed alternative can be implemented under current law. And to what end? If two prisoners bring identical challenges and propose identical alternatives, their cause of action and their very possibility of relief should not turn on the

contingency of whether a State has codified a particular aspect of how it carries out executions.

And the courthouse doors will indeed be closed under Respondents' rule. Contrary to Respondents' assertion, state habeas will not provide meaningful relief in States like Georgia, where method-of-execution claims cannot be brought in state habeas under Georgia law. That is why, at a bare minimum, this Court should hold that if Nance's claim sounds in habeas, it is not a second or successive petition under this Court's precedents—precedents that Respondents all but ignore. The judgment below should be reversed.

ARGUMENT

I. NANCE'S CLAIM SOUNDS IN § 1983, NOT HABEAS.

A. Nance's claim sounds in § 1983 because it neither necessarily implies the invalidity of his sentence nor seeks his release. Put simply, if Nance's claim succeeds, Respondents can still execute him. Respondents strained attempts to evade this straightforward point fail.

1. Respondents barely address the actual test this Court has adopted for distinguishing between habeas and § 1983 claims; *i.e.*, whether Nance's claim necessarily implies the invalidity of his sentence. To the extent they do, it is to halfheartedly maintain that Nance's claim—which proposes an alternative to lethal injection—necessarily implies the invalidity of his sentence because that sentence ostensibly imposes death by lethal injection, not just death. Resp. Br. 28–29. That argument does not describe Georgia law

accurately, let alone the distinction this Court has recognized between the punishment of death and a particular means of carrying it out.

As an initial matter, Georgia law makes clear that lethal injection is not the "sentence" for a capital offense, but a method of carrying out that sentence. Lethal injection is not an enumerated punishment for murder in Georgia; "death" is. Ga. Code Ann. § 16-5-1(e)(1) ("A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life."). Georgia law further distinguishes between that sentence of death and the method of execution by providing that "[a]ll persons who … have had imposed upon them a *sentence of death* shall suffer *such punishment by lethal injection*." *Id.* § 17-10-38(a) (emphases added). These provisions, which are typical among States that have the death penalty,[1] demonstrate that a claim to enjoin the

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[1]*See* Ind. Code Ann. §§ 35-50-2-3(b)(1)(A), 35-38-6-1(a) (differentiating between the "death penalty" and how "[t]he punishment of death shall be inflicted"); Colo. Rev. Stat. Ann. §§ 18-3-107(3), 18-1.3-1202 (same); Idaho Code Ann. §§ 19-2515(3), 19-2716 (same); Neb. Rev. Stat. Ann. §§ 83-964, 28-105.01(1) (similar); Mont. Code Ann. § 46-19-103(1)–(3) (similar); Ohio Rev. Code. Ann. §§ 2929.05(A), 2949.22(A) (similar); Or. Rev. Stat. Ann. §§ 163.105 (1)(a), 137.473(1) (similar); 18 Pa. Stat. and Cons. Stat. Ann. § 1102(a)(1) and 61 Pa. Stat. and Cons. Stat. Ann. § 4304(a)(1) (similar); Tenn. Code Ann. §§ 39-13-204(g)(1), 40-23-114(a) (similar). *See also* N.C. Gen. Stat. Ann. § 15-188 (referring to "the mode of executing a death sentence"); Kan. Stat. Ann. § 22-4001(b) ("The secretary of corrections shall supervise the carrying out of each sentence of death"); Nev. Rev. Stat. Ann. §§ 176.025, 176.355(2)(a) (differentiating between the "sentence of death" and how "[t]he

use of lethal injection does not necessarily (or even potentially) invalidate the sentence itself.

And, aside from the particular wording of the Georgia code, as this Court has held, a change to the method of execution does "not change the penalty—death—for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915).[2] To use Justice Scalia's phrasing, changing the manner of execution does not change the "quantum" of punishment, and thus does not invalidate the sentence. *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring).

Georgia practice bears this out. As Respondents concede, Nance's sentence did not specify a method of execution, Resp. Br. 29 n.3, though in other cases Georgia courts have specified a method. *Id.* Tellingly, however, when Georgia has changed its method of execution—*e.g.*, moving from electrocution to lethal injection—it routinely did not resentence defendants,

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Director of the Department of Corrections shall: Execute a sentence of death"); Tex. R. Crim. P. 43.14(a) (similar).

[2] Respondents assert that allowing claims like Nance's will force courts to address potentially difficult ex post facto questions in assessing whether a new method of execution is "less humane" than the prior one. Resp. Br. 25. But that question will never arise as to the prisoner bringing the as-applied challenge. An existing method of execution will be enjoined only if an alternative "significantly reduces" the risk of pain under the current method. *Glossip v. Gross*, 576 U.S. 863, 877 (2015). And the State could similarly avoid such questions arising with respect to other litigants by retaining the method that existed at the time of sentencing.

regardless of whether the method of execution was noted in the sentence.[3] If Georgia were right that changing the method of execution invalidated the sentence, then a new sentence would be required. Rather, changing the method of execution did not require resentencing because the new method merely provided an alternative means of carrying out that sentence.

These basic points demonstrate why Respondents are so mistaken when they claim that an order enjoining the use of a particular method of execution is the equivalent of an order holding that a statute like the Defense of Marriage Act is unconstitutional. Resp. Br. 19–20. In both cases, a state actor is enjoined from taking an unconstitutional action, but that is only the beginning of the inquiry for determining whether a prisoner's claim sounds in § 1983 or habeas. The question here is whether the claim necessarily bars carrying out the sentence, and it does not.

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[3] *See, e.g.*, Death Sentence, *Georgia v. Ledford*, Indictment No. 92-CR-4295 (Ga. Super. Ct. Nov. 14, 1992); Judgment and Sentence of Death, *Georgia v. Johnson*, Indictment No. 97-R-1723 (Ga. Super. Ct. Apr. 7, 1998); Sentence, *Georgia v. Wilson*, Case No. 39249B (Ga. Super. Ct. Nov. 7, 1997); *J.W. Ledford*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/1453/jw-ledford (last visited Apr. 14, 2022) (executed by lethal injection); *Marcus Ray Johnson*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/1421/marcus-johnson (last visited Apr. 14, 2022) (same); *Marion Wilson*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/1500/marion-wilson (last visited Apr. 14, 2022) (same). *See also* Amicus Br. of ACLU 15–18 (noting similar practices in other States).

2a. Respondents further contend that, because Nance proposes a non-statutory alternative, his claim would "legally bar" his execution and therefore must be raised in habeas. As Respondents tell it, Nance's sentence would be invalid if he prevailed because Respondents supposedly could not carry it out "*right now*," even though they concededly could in the future. Resp. Br. 21–22 (emphasis in original).

But *every* meritorious method-of-execution challenge restrains the use of an unconstitutional procedure. That is the nature of the claim: the State's current method of execution cannot be carried out because it is unconstitutional. As such, these challenges may stop an execution from happening "*right now*" because the State must make changes to carry out the execution constitutionally. But this Court has, without fail, found that such claims sound in § 1983, even if the State's compliance efforts "delay" or "frustrate" implementation of the sentence. *See Hill v. McDonough*, 547 U.S. 573, 583 (2006).

Respondents' position confuses the degree to which a proposed alternative is readily implemented (which is part of the § 1983 merits analysis) with whether the claim disputes that the sentence can *ever* be legally carried out (which determines whether the claim sounds in § 1983 in the first place). Delay associated with the first kind of issue "does not cast on [the prisoner's] sentence the kind of negative legal implication that would require him to proceed in a habeas action." *Id.*

b. Respondents nonetheless insist that Nance's claim is a special case because it supposedly yields "legal" delay rather than "administrative" delay. Resp.

Br. 18. According to them, Nance's claim renders his sentence invalid by proposing a non-statutory alternative that Respondents would be unable to implement on their own given that they cannot "change Georgia statutes." Resp. Br. 24. Respondents' newly-minted distinction between "legal" and "administrative" delay reveals a deep misunderstanding of the proper scope of § 1983.

In the first place, Respondents are posing the wrong question. As a matter of law and logic, a sentence is valid if the *State* retains the right to enforce it. It is the State, not any prison official, that authorized the sentence, and the sentence's validity does not depend on any particular state official's ability to carry it out. As this Court has explained, the question is whether a method-of-execution claim would allow the "State" to carry out the execution. *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) ("[B]y simply altering its method of execution, the *State* can go forward with the sentence." (emphasis added)); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) ("[T]he inmate's proposal must be sufficiently detailed to permit a finding that the *State* could carry it out." (emphasis added)). Because changing *state* law is undoubtedly within a State's powers, the State retains the authority to enforce a death sentence even where its current law does not provide a means of implementation.

In any event, Respondents' line between "legal" and "administrative" delay is illusory. Section 1983 method-of-execution suits frequently concern proposed alternative procedures that fall within a State's current statutory authorization but nonetheless fall outside the warden's or correction official's legal power to

implement, or indeed outside the power of *any* state entity.

This situation can arise, for example, where a claimant proposes that the State use a different drug to carry out the execution, and the State contends that obtaining the drug is infeasible because it requires legal approval from a federal agency. *E.g.*, *In re Ohio Execution Protocol (Fears v. Morgan)*, 860 F.3d 881, 890 (6th Cir. 2017). A similar bar might arise from a State's own regulatory requirements. For example, in a separate challenge to Ohio's protocol, Ohio contended that using the proposed alternative drug was infeasible because suppliers might not be "legally eligible to distribute [it]" under Ohio law. Brief of State Appellees at 40, *In re Ohio Execution Protocol Litigation (Adams v. DeWine)*, 946 F.3d 287 (6th Cir. 2019) (No. 19-3064), ECF No. 33.

Cases like these demonstrate that even where implementing a proposed alternative requires legal approval by state and federal actors, the claim still sounds in § 1983. To be sure, barriers of this kind may be relevant to whether the alternative is feasible, but that inquiry bears on the *merits* of a § 1983 claim, not whether the claim sounds in § 1983 or habeas. Respondents offer no reason why legislative approval is different.

Yet under Respondents' rule, claims like the Ohio ones belong in habeas—or, even worse from an administrability perspective, *see infra*, they belong in § 1983 unless factual development establishes a "legal" bar. For example, a claim to use a "similar" drug might only impose "administrative" delay, as pleaded, but later

be deemed to pose "legal" delay, and thus sound in habeas, to the extent the record shows the defendant warden could not obtain the drug without legal approval from other actors. That kind of uncertain bifurcated regime, particularly with its grave consequences for the availability of relief, "make[s] little sense." *Thompson v. Clark*, 142 S. Ct. 1332, 2022 WL 994329, at *6 (2022).

3. Respondents then ask this Court to hold that "[s]tate[] sovereignty" justifies relegating Nance's claim to habeas lest federal courts "rewrite" and "affirmatively define state criminal punishments." Resp. Br. 26–28.

First, no court will rewrite Georgia law or command Georgia to use a particular method of execution. To succeed in his claim, Nance must prove both that Georgia's current method "cruelly superadds pain to the death sentence" and that there is "a feasible and readily implemented alternative" method that "would significantly reduce a substantial risk of severe pain." *Bucklew*, 139 S. Ct. at 1125. Nance contends that Georgia's current lethal injection protocol satisfies the first element and identifies the firing squad to meet the second. If Nance succeeds on his claim, however, Georgia will not be required to adopt firing squad as a method of execution. The function of the proposed alternative is to show the constitutional infirmity of the State's chosen method, not dictate the acceptable replacement method. The court will simply issue an order "prohibiting [the] method[ ]" that it found "cruel and unusual." *Id.* at 1123.

That order would leave Georgia free to implement its chosen punishment—the death sentence—in any

manner consistent with the Eighth Amendment. *Id.* ("[T]he Eighth Amendment doesn't forbid capital punishment, it does speak to how States may carry out that punishment."). Georgia may pass legislation adopting the firing squad, or it might pass legislation establishing another alternative. Indeed, Georgia might succeed in showing that some new method of lethal injection addresses the issues that Nance has identified; in that case, no statutory change would be necessary.

Second, at times Respondents' brief reads as if to contend the burden of adopting a new method legislatively is simply too great, even if (as is true) the State can choose any constitutional method it wishes. Resp. Br. 24–25. But if a State has chosen to authorize a single method of execution that is proven unconstitutional, then the State will need to adopt some other method for carrying out executions. *Bucklew*, 139 S. Ct. at 1125. That follows directly from the Eighth Amendment and the Supremacy Clause. There is nothing "remarkable" (to use Respondents' word) in using § 1983 to enjoin the enforcement of an unconstitutional law.

Respondents also do not and cannot dispute that States routinely adopt new methods of execution legislatively. *See* Pet. Br. 29.[4] Nor is legislative

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[4] In 2006, for example, South Dakota promptly amended its statutory method after state officials realized that the three-drug protocol they planned to use conflicted with the statute's specification of a two-drug protocol. *See Moeller v. Weber*, 523 F. Supp. 2d 975, 976 (D.S.D. 2007). Other States, including South Carolina, have adopted firing squad due to difficulties with lethal

amendment necessarily more difficult than amending a protocol under a particular statute, which, as discussed above, may require the State to navigate its own licensing procedures or obtain permission from a federal regulatory agency, or otherwise pose practical difficulties. And to the extent that Respondents contend that legislative change makes adopting the firing squad infeasible, *but see Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (observing that Missouri conceded that the firing squad was likely a feasible alternative), that factor is properly considered as part of the § 1983 analysis, and not an excuse to jettison it. All nine Justices agreed in *Bucklew* that a non-statutory alternative is not *per se* infeasible, *id.*, yet Respondents' argument would treat non-statutory alternatives as just that.

Finally, AEDPA's aims are not relevant to the question at issue. Resp. Br. 29–30. AEDPA reformed *habeas* actions but it did not redraw the line between when actions ought to be brought in § 1983 versus habeas, which is the issue before the Court.[5]

4. Respondents' other tack is to contend that even if Nance's claim does not necessarily imply the validity of

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injection. *See* Laurel Wamsley, *With Lethal Injections Harder to Come By, Some States Are Turning to Firing Squad*, Nat'l Pub. Radio (May 19, 2021), https://www.npr.org/2021/05/19/997632625/with-lethal-injections-harder-to-come-by-some-states-are-turning-to-firing-squad/.

[5] Indeed, even if Nance's claim sounded in habeas, which it does not, the State would have the same obligation to adopt a constitutional method of execution—so Respondents' protestations do nothing to establish why Nance's claim does not sound in § 1983.

his sentence, it does seek a "release" from "custody," and therefore sounds in habeas. Resp. Br. 17. Changing terminology does not change the outcome under the law.

This Court has never employed Respondents' verbiage in this context, and for good reason. At its "core," custody refers to "present physical confinement." *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004). And no challenge to the legality of the execution method will secure a prisoner's release from confinement, or even effect a "quantum change in the level of custody, such as release from incarceration to parole." *Wilkinson*, 544 U.S. at 86 (Scalia, J., concurring) (internal quotation marks and citation omitted).

But even adopting Respondents' language, Nance's claim does not challenge his custody. In Respondents' terms, the state-authorized restraint on Nance's liberty—his custody—is that he must serve a term of incarceration that will end in execution. Nance concedes the validity of that custody. Thus, even if Nance's method-of-execution claim succeeds, his custodian will retain the lawful authority to confine Nance and execute him in a manner consistent with the Eighth Amendment. His claim does not seek to "prevent ... execution." Resp. Br. 15 (quoting *Nelson*, 541 U.S. at 647).

Properly framed, Nance's claim is distinct from those that do, in fact, seek a release from custody. A *Ford* claim, for instance, asserts that the State is categorically barred from carrying out the execution as a matter of federal law. Respondents point to the fact that *Ford* claims sound in habeas even though the prisoner may someday regain competency. But the relevant question is not the "permanency" of the relief, but whether the

State is authorized to carry out the sentence if relief is granted. In method-of-execution cases, the State is; in *Ford* cases, the State is not.

Equally unavailing is Respondents' reference to a claim that a prisoner has been sentenced to the wrong prison. Resp. Br. 23. In the case Respondents cite, a federal court sentenced a defendant to imprisonment in a state prison where federal law did not authorize that sentence. *In re Bonner*, 151 U.S. 242, 254–57 (1894). The defendant contended that the federal court lacked "jurisdiction" to impose that punishment, and that the judgment was therefore "void" and that he was entitled to be "set at liberty." *Id.* That is different from Nance's claim, which concedes that the State has authorized the death penalty and that it can carry out his sentence, but disputes only the manner in which it can do so. Constitutional challenges addressing where a validly sentenced prisoner is housed *within* a prison system sound in § 1983. *E.g.*, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (Section 1983 challenge to being housed in Supermax facility); *Johnson v. California*, 543 U.S. 499 (2005) (Section 1983 challenge to housing scheme based on race).

Respondents also invoke *Wilkinson v. Dotson*, 544 U.S. at 82, but to no avail. Because Nance's claim does not seek to prevent his custody, it could never result in his "release." To the extent, however, Respondents actually claim that any *delay* in execution results in a "release from custody," that argument fares no better. As explained *supra*, that position cannot be squared with this Court's method-of-execution cases, all of which address claims seeking to enjoin state actors from using

a particular method of execution, with the attendant delay—and all of which sound in § 1983.

Moreover, if every challenge to a "restraint on liberty"—even those that, like Nance's, do not seek a change in the quantum of punishment—is a request to be "released from custody," Resp. Br. 16–17 (internal quotation marks and alteration omitted), then almost every conditions-of-confinement challenge could be recast as a habeas claim. A prisoner who, for example, challenges a prohibition on using the prison library or gathering for a religious service is bringing a § 1983 claim. Yet Respondents' approach understands that prisoner to seek a release from custody. Respondents disclaim this outcome, contending that such claims challenge only the "conditions" of custody, while Nance's claim supposedly seeks "relief" from custody, but that is not correct under Respondents' sweeping definition. If Nance's claim seeks relief from custody in the sense that it bars the State from using a particular "restraint" (*e.g.*, lethal injection) in carrying out his sentence, then a prisoner who challenges other restraints (*e.g.*, limits on gathering) has also challenged his custody.

B. Respondents do not seriously dispute Nance's account of the significant confusion and delay their rule will generate in method-of-execution litigation. They claim that anyone can "dream up fanciful hypotheticals," Resp. Br. 34, but the consequences of their position are real and obvious.

1. As explained, States already codify various aspects of executions in ways that will generate threshold—and ongoing—litigation about whether a method-of-execution challenge sounds in habeas under

Respondents' rule. Pet. Br. 35–36 (recounting examples of States that codify a requirement that a particular drug or a "similar" one be used); *see also* Amicus Br. of U.S. 21–23.

Respondents' defense of their position only adds to the uncertainty. Respondents concede that a challenge to a "regulatory law" would sound in habeas, Resp. Br. 25 n.2, meaning that there will be disputes about whether the challenged procedure is the product of regulation, and thus sounds in habeas, or some less binding directive, in which case it does not.[6] Likewise, Respondents ask courts to distinguish between claims that pose "administrative" delays as opposed to "legal" delays, but as discussed earlier, that distinction is incoherent. If a litigant proposes the use of a new drug that requires the State to obtain legal approval to use in executions, would the resulting delay be "legal" or "administrative"?

While these disputes will reliably rear their head at the start of method-of-execution cases, they often will not be resolved until factual development occurs. A challenge proposing a "similar" drug in a State that codifies the use of a specific or "similar" drug might (1) start in federal court as a § 1983 claim, (2) be dismissed for lack of jurisdiction as a habeas claim, (3) be remanded back to the district court on appeal for factual development to determine "similarity," (4) yield an

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[6] Respondents contend that line is clear, but Georgia courts disagree, and note that it varies by State in any case. *See, e.g.*, *Hill v. Owens*, 738 S.E.2d 56, 64, 63 n.4 (Ga. 2013) ("recognizing that although informal policy may not be "legally binding" it cannot be "manifestly disregarded").

injunction in favor of the prisoner, which in turn could be (5) reversed by an appellate court for lack of jurisdiction on the ground that the record does not support the assertion that the drug is similar (not withstanding that it is feasible and readily available). That is no way to structure litigation in any area, let alone death penalty litigation where claims are routinely heard on an expedited time frame.[7]

2. This confusion is all the more unwarranted because it turns on arbitrary features of how a State structures its execution procedures. Identical prisoners bringing identical constitutional claims should not have their entitlement to relief turn on the contingency of how a State has worded its statutes.

Respondents assert that claims like Nance's "try to work around the law," Resp. Br. 34, but it is difficult to know what that means. As discussed above, Georgia need not use the method Nance proposes, but it is Georgia's decision to conduct all executions via lethal injection, not any workaround by Nance, that necessitates this claim.

3. Respondents also have no answer for the broader confusion their rule will cause. For example, this Court's decision in *Ramirez* would have come out the other way under their rule had Texas codified (or adopted via regulation) its limitations on pastoral touch.

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[7] These complications would be exacerbated to the extent a request for an emergency stay is at issue. Courts would need to assess whether emergency relief is warranted without the necessary factual development to even know what kind of claim is at issue and whether there is jurisdiction to hear it.

Respondents contend that discussing such a scenario betrays a "disdain" for States, but States, like other litigants, have an incentive to take steps that reduce their legal exposure. And if the identical policy is all but immune from review if it is codified rather than adopted more informally, then States will inevitably consider taking those steps.

In the end, Respondents' argument on this score amounts to a bald plea for the Court to ignore its precedents and channel these claims to habeas so they cannot be brought. As discussed below, Respondents' position does in fact close the courthouse doors to these constitutional claims, and does so in a way that will complicate and prolong other method-of-execution litigation. This Court should reject Respondents' approach, which is as unwise as it is unlawful.

II. IF NANCE'S CLAIM SOUNDS IN HABEAS, IT IS NOT SECOND OR SUCCESSIVE.

Because Nance's claim properly sounds in § 1983, this Court need not reach the second question presented. But if the Court nevertheless concludes that Nance's claim must be brought in habeas, it should hold that the claim is not "second or successive" under 28 U.S.C. § 2244(b). The district court held that Nance's facial challenge to lethal injection was premature at the time of Nance's first habeas petition in 2013. As such, his as-applied claim based on developments through 2019 is not second or successive within the habeas framework.

A. Respondents barely engage with this Court's precedents governing the meaning of "second or successive" under 28 U.S.C. § 2244(b) and Nance's arguments about the application of these precedents to

his claim. Instead, Respondents implicitly ask this Court to ignore, and thereby overrule, those decisions. Resp. Br. 37–47.

In *Panetti v. Quarterman*, this Court explained that "[t]he phrase 'second or successive' is not self-defining" and does *not* "refer[] to *all* § 2254 applications filed second or successively in time, even when the later filing addresses a state-court judgment already challenged in a prior § 2254 application." 551 U.S. 930, 943–44 (2007). Instead, to determine whether a subsequent habeas petition is second or successive, this Court assesses first whether the claim would have constituted an abuse of the writ under the common law pre-AEDPA, and second whether allowing the petition is consistent with AEDPA's purposes. Pet. Br. 41 (citing *Banister v. Davis*, 140 S. Ct. 1698 1705–06 (2020)).

Respondents contend that AEDPA codified a pre-AEDPA common-law rule that *any* later-in-time petition was "second or successive." Resp. Br. 37–47. This Court's cases reject that position—because no such rule existed. As the Court explained in *Magwood v. Patterson*, "pre-AEDPA cases *cannot* affirmatively define the phrase 'second or successive' as it appears in AEDPA"; in fact, "Congress did not even *apply* the phrase 'second or successive' to applications filed by state prisoners until it enacted AEDPA." 561 U.S. 320, 337 (2010) (emphases added). The phrase "originally arose in the federal context" and "applied only to applications raising previously *adjudicated* claims" (and thus would not have applied to claims like Nance's, even on federal habeas). *Id.* "In light of this complex history of the phrase 'second or successive,'" the Court "rel[ies]

upon the current text to determine when the phrase applies, rather than pre-AEDPA precedents or superseded statutory formulations." *Id.* at 338.

B. Under *Panetti* and *Banister*, method-of-execution claims like Nance's, which were not ripe at the time of the first habeas petition, are not second or successive. Pet. Br. 44–48.

1. Respondents wrongly seek to narrow the class of cases subject to the *Panetti*/*Banister* framework. They contend that under these cases, only claims that are generally unripe at the time of the first habeas petition are exempt from the second-or-successive bar. Resp. Br. 45–48. That does not help Respondents because as-applied method-of-execution claims typically *are* unripe at the time of first habeas.[8] Pet. Br. 33–34.

In any case, the Court's doctrine is not so narrowly drawn. *Banister* asks at the first step if the particular claim in question was previously abandoned or otherwise would constitute an abuse of the writ. 140 S. Ct. at 1706–07. If a particular prisoner's as-applied method-of-execution claim could not have been brought at the time of first habeas, then bringing it later is not an

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[8] Respondents purport to cite various authorities for the proposition that such claims are ripe at the time of a first habeas petition, but to the extent those cases discuss the timing, they show the opposite. *Pizzuto v. Tewalt*, 997 F.3d 893, 901–02 (9th Cir. 2021) (claims became ripe as prisoners were "nearing the end of their post-conviction appeals" and their "window of opportunity [to bring a claim was] small and shrinking by the day"); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009) (noting that South Carolina adopted its challenged protocol eleven years after the prisoner had filed his first habeas petition).

abuse of the writ, even if some other prisoner could have brought a different as-applied challenge at the time of his first habeas petition.[9] *See id.* at 1707 (explaining that the abuse-of-the-writ doctrine "enable[d] courts to hear" subsequent petitions "if the 'ends of justice' warranted doing so").

2. Nor are Respondents correct that Nance's claim was ripe earlier and thus is second or successive even under a proper reading of *Panetti* and *Banister*. The record shows precisely the opposite. Nance *did* bring a facial challenge to lethal injection in his first habeas petition, but the district court denied it on the grounds that such claims sound in § 1983, and it was "premature" given the possibility of changed circumstances by the time of Nance's execution. Order, *Nance v. Warden*, No. 1:13-cv-04279 (N.D. Ga. Apr. 26, 2016), ECF No. 38.

As the district court explained, the claim was unripe because it was "quite possible that Georgia's execution protocols will change" before "Petitioner's execution date is set, rendering moot any ruling" by the trial court. *Id.* at 8–9. That petition, filed in 2013, necessarily did not raise the as-applied allegations that Nance learned of in 2019, and yet the district court still held that it was premature.

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[9] Respondents suggest *Burton v. Stewart*, 549 U.S. 147 (2007) held all previously unripe claims are "second or successive" when brought in subsequent habeas petitions. Resp. Br. 44–45. But *Burton* analyzed only how a prisoner's decision to file a subsequent habeas petition containing an unexhausted claim that was not previously raised in habeas affects the "second or successive" status of the subsequent petition—an issue not in dispute here. 549 U.S. at 154–57.

Just as it is consistent with writ principles to permit a previously unripe later-in-time petition contending that a prisoner is not competent to be executed, it is consistent with those principles to allow a previously unripe later-in-time petition contending that the State's current method of execution is unnecessarily cruel given the prisoner's unique medical conditions. Pet. Br. 44–45, 47. Accordingly, if Nance's claim must sound in habeas, it must not be construed as second or successive under this Court's precedents.

III. RESPONDENTS' RULE WILL CLOSE THE COURTHOUSE DOORS TO THE VERY CLAIM THIS COURT UNANIMOUSLY PRESERVED IN *BUCKLEW*.

Finally, there should be no mistake that Respondents' rule will make it all but impossible for courts to review method-of-execution claims proposing non-statutory alternatives—even where the State's method is unnecessarily cruel and the proposed alternative is easily implemented.

In contending that the courthouse doors are "wide open" to such claims, Respondents gesture toward two entrances. They first assert that prisoners may raise such claims in their first federal habeas petition. But even if these claims sounded in habeas – and they do not – they will not typically be ripe at the time of the first petition, as the record clearly demonstrates here. *See supra.*

That leaves Respondents to argue that state habeas, supplemented by this Court's review, is an adequate avenue for claims like Nance's. Even leaving aside that Georgia law does not allow second petitions as a matter

of right, Ga. Code Ann. § 9-14-51, Georgia law does not permit method-of-execution challenges to be brought in habeas *at all*. *See Owens v. Hill*, 758 S.E.2d 794, 799 (Ga. 2014) ("A habeas petition may only allege constitutional defects in a conviction or sentence itself, not defects in the manner in which a sentence is carried out by various state officers."). Even if this Court holds that method-of-execution challenges sound in federal habeas in some circumstances, that would not control Georgia law's treatment of what claims are cognizable in state post-conviction review.

When *Bucklew* held that the burdens of alleging a non-statutory alternative should not be "overstated," it surely did not mean that such claims could be brought only in a non-existent vehicle. 139 S. Ct. at 1128. This Court should reaffirm *Bucklew* and the rest of its method-of-execution and habeas jurisprudence and reverse the judgment below.

CONCLUSION

The Court should reverse and remand the judgment below.

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