No. 25-5379

IN THE

Supreme Court of the United States

KAYLE BARRINGTON BATES,

Petitioner,

v.

GOVERNOR OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR TUESDAY, AUGUST 19, 2025, AT 6:00 P.M.

Christina Mathieson
Counsel of Record
Katherine A. Blair
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818
christina_mathieson@fd.org
katherine_blair@fd.org

Counsel for Petitioner

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Respondent's arguments distort the issues in this case and support rather than undercut the appropriateness of certiorari review.

I. No threshold issue exists in this case

Respondent's contention that Mr. Bates' challenge to the manner in which his execution is carried out necessarily challenges his underlying sentence is clearly contradicted by this Court's precedent, and both the district court and Eleventh Circuit disregarded Respondent's argument below.

In *Heck v. Humphrey*, this Court addressed an issue left open in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), which had "held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." 512 U.S. 477, 481 (1994). Specifically, *Heck* presented the question of whether a claim for monetary damages that "call[s] into question the lawfulness of [the plaintiff's not-invalidated] conviction or confinement" may properly be brought under 42 U.S. § 1983. *Id*. at 483. This Court answered in the negative, because despite the relief Heck sought, resolution of the claim in his favor would imply the invalidity of his outstanding conviction. *Id*. at 486-87, 489-90.

Subsequent cases reaffirmed that the distinction between habeas actions and § 1983 actions is "whether a claim challenges the validity of a conviction or sentence." *Nance v. Ward*, 597 U.S. 159, 167 (2022). First, *Hill v. McDonough* dealt with how a method of execution suit is classified "if it would frustrate the execution as a practical matter." 547 U.S. 573, 583 (2006). This Court found § 1983 proper because the

injunction Hill sought did not "seek[] to establish 'unlawfulness [that] would render a conviction or sentence invalid.'" *Id*. (quoting *Heck*, 411 U.S. at 486). In *Nance*, the Court went further, holding that even though the State's laws did not provide for an alternative execution method—and thus relief on Nance's lethal injection challenge would *functionally* prevent the State from executing him—the suit still would not "'*necessarily* prevent' it." *Id*. at 169 (quoting *Nelson v. Campbell*, 541 U.S. 637, 647 (2004)) (emphasis in original). The Court explained:

> Nance's requested relief still places his execution in Georgia's control. Assuming it wants to carry out the death sentence, the State can enact legislation approving…[an alternative] method of execution. To be sure, amending a statute may require some more time and effort than changing an agency protocol…But in *Hill*, we explained that the "incidental delay" involved in changing a procedure . . . is not relevant to the vehicle question.

Nance, 597 U.S. at 170 (quoting *Hill*, 547 U.S. at 583).

Mr. Bates' action is proper under § 1983. He has not challenged the overall constitutionality of Florida's capital punishment system, nor the validity of his death sentence. He simply made a prima facie case that the warrant-selection process—**the way in which the State carries out the sentence**—is racially discriminatory and arbitrary. His requested relief "still places his execution in [Florida's] control." *Nance*, 597 U.S. at 170. Thus, as in *Nance* and *Hill*, "the claim belongs in § 1983 because—just like [those cases]—it challenges not the validity of a death sentence, but only the State's mode of carrying it out." *Id*. at 172 (citing *Ramirez v. Collier*, 595 U.S. 411 (2022)).

II. This case implicates important questions left open in *McCleskey* and the Eleventh Circuit's resolution is in conflict with this Court's precedent

Respondent misleads by stating this case presents no conflict with *McCleskey v. Kemp*, 481 U.S. 279 (1987). First, as Mr. Bates' petition for certiorari explained, the Eleventh Circuit's decision conflicts not with *McCleskey*, but with this Court's longstanding precedent regarding the need to eliminate invidious sources of official discrimination on the basis of race. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate **all** official state sources of invidious racial discrimination in the States.") (emphasis added); *Ross v. Moffitt*, 417 U.S. 600 (1974) ("Equal protection…emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."); *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, 600 US. 181, 209 (2023) ("Racial and ethnic distinctions of any sort are inherently suspect,'…and antipathy toward them [is] deeply 'rooted in our Nation's constitutional and demographic history.'") (quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 291 (1978)); *id.* at 206 ("Eliminating racial discrimination means **eliminating all of it.**") (emphasis added).

Rather than waging "an attack" on the holding in *McCleskey*, BIO at 18, Mr. Bates' case presents issues that *McCleskey* left unresolved. For instance, *McCleskey* recognized that this Court "has accepted statistics as proof of intent to discriminate in certain limited contexts" where the statistical proof of disparities is "stark[.]" 481 U.S. at 293-94, 294 n.2 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick*

Wo v. Hopkins, 118 U.S. 356 (1886)). And, this Court acknowledged that it has accepted statistical disparities as proof of an Equal Protection violation in the contexts of jury venire-selection and statutory violations under Title VII of the Civil Rights Act of 1964 "even when the statistical pattern does not approach [such stark] extremes." *McCleskey*, 481 U.S. at 293-94 (quoting *Village of Arlington Heights Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Foster v. Chatman*, 578 U.S. 488, 499-500 (2016) (describing the burden-shifting process after a prima facie case of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986)). In finding the habeas petitioner in *McCleskey* had not satisfied his burden of proof, this Court emphasized that the difference between *McCleskey* and the venire-selection and Title VII cases was that the latter involved "statistics relate[d] to fewer entities, and fewer variables…relevant to the challenged decisions." *Id.* at 295.

Mr. Bates' case challenges the actions of a sole decisionmaker (the Governor of Florida) and involves far fewer variables than *McCleskey*. *See* Petition at 10-12 (listing controls). Mr. Bates also presented additional evidence of DeSantis' history of discriminatory action, *see* Petition at 20-23, which this Court and the Eleventh Circuit have both recognized as probative of discriminatory intent. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 18 (2023) ("the extent of any history of official discrimination in the state" is relevant for totality of circumstances review in voting rights context); *Village of Arlington Heights*, 429 U.S. at 266-67 ("Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence" including "[t]he historical background of the decision…particularly

if it reveals a series of official actions taken for invidious purposes" and "[t]he specific sequence of events leading up to the challenged decision"); *Adams v. Demopolis City Schools*, 80 F.4th 1259, 1273 (11th Cir. 2023) (recognizing that "[d]iscriminatory intent may be established by evidence of a 'history of discriminatory official actions[,]'") (citation omitted); *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 81 F.4th 1328, 1333 (11th Cir. 2023) ("recent history" of discrimination is a probative evidentiary source of discriminatory intent).[1] Thus, this case presents two issues of first impression:

(1) whether a narrowly tailored § 1983 suit—against the actions of a sole decisionmaker, and which controls for other variables regarding intent—is appropriately held to the "stark statistic" standard governing habeas review after robust evidentiary development in *McCleskey* or the lesser disparity standard governing the more analogous jury-venire and Title VII cases; and

(2) what standard of review should apply where statistics showing dramatic racial disparity are accompanied by additional circumstantial evidence of the sole decisionmaker's general racial motivations.

[1] Also relevant is DeSantis' assertion that although the biological children of Edward Zakrzewski (a white man) are listed as "White" on the preeminent database for execution information and the family self-identified the children as white, they are not white enough to count as "White" for statistical purposes because their mother was South Korean. *Compare* NDFL-ECF 11 at 10, 11-12, *with* Death Penalty Information Center, *Execution Database*, https://deathpenaltyinfo.org/facts-and-research/data/executions (last visited Aug. 7, 2025). As Mr. Bates laid out in the lower courts, *see, e.g.*, CA11-ECF 7 at 21-22, DeSantis' position itself is a racially discriminatory classification known as hypodescent or the "one-drop rule," in which an individual's descendance from a non-Caucasian forebear was considered, in and of itself, to render that person "non-white." *See, e.g.*, *Loving*, 388 U.S. at 5 n.4 (1967) (holding that a state statute which classified individuals in this manner violated the Equal Protection Clause).

Neither of these issues presents a challenge to *McCleskey*—at most, they present an opportunity to define its contours.

Second, to the extent that the Eleventh Circuit decided Mr. Bates' § 1983 claims were foreclosed because his statistics were not "stark" enough (including that 95% of execution warrants involved white victims), that ruling indeed presents a conflict with *McCleskey*. This Court did not demand in *McCleskey* that a statistical showing of disparate racial impact be "virtually 100 percent" to establish discriminatory intent—that was the Eleventh Circuit's interpretation. *See* CA11-ECF 16-1 at 5 (quoting *Jones v. White*, 992 F.2d 1548, 1573 (11th Cir. 1993)).

Lastly, Respondent's statement that there "certainly is no conflict with this Court's decision in *Bucklew*" is misplaced. BIO at 18. Other than its recognition that § 1983 is a proper vehicle for manner of execution claims, *Bucklew v. Precythe*, 587 U.S. 119 (2019), is wholly irrelevant to Mr. Bates' case.

III. Respondent's continued factual disputes simply demonstrate that Rule 12(b)(6) dismissal was inappropriate

Respondent's assertion that the pleadings and proffered evidence below "definitively showed no significant racial disparity in the race of the capital inmates or the race of the victims in the warrants" is not only incorrect, but also proves Mr. Bates' point that dismissal under Fed. R. Civ. P. 12(b)(6) was inappropriate. Respondent's purported definitive showings are merely factual disputes that cannot properly be resolved against Mr. Bates at the pleading stage.

For example, a factual dispute exists against the evidentiary reliability and significance of the sample size underpinning Mr. Bates' statistical data. *Compare*

Petition at 16-19 *with* BIO at 16-17. Respondent has not addressed Mr. Bates' explanation that because DeSantis is sued in his official capacity, the full history of Florida's 115 modern executions is relevant and supportive of his claim. Nor has Respondent countered Mr. Bates' argument that a larger sample size is inappropriate in the context of executions by term-limited governors, assuming the underlying state death penalty scheme is facially constitutional under *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 226 (1976). And, Respondent's staunch refusal to accept Mr. Bates' statistical data regarding the race of victims in the sample set—a dispute which is undermined by the preeminent national database regarding executions—is the very epitome of a factual dispute.

Similarly, Respondent's theatrical allegation that it is "farcical" to believe DeSantis signed Curtis Windom's warrant within hours of being served with Bates' § 1983 complaint because "[w]arrants require more than a couple of hours of preparation including coordination with the Department of Corrections[,]" BIO at 15 n.3, is a factual dispute that cannot be resolved on the face of the pleadings,[2] but could be resolved if not for DeSantis' secrecy regarding the warrant selection process.

This shroud of secrecy means Respondent's criticism of Mr. Bates' inability to provide certain calculations should be given no credence. Contrary to Respondent's representations, see BIO at 16 n. 4, Respondent well knows Mr. Bates has no way—absent an order compelling discovery—to ascertain the comparative statistics

[2] Indeed, Mr. Bates is prepared—via discovery and factual development envisioned by the Federal Rules of Civil Procedure—to present evidence that Department of Corrections' staff were unaware that a warrant would issue on that date.

Respondent faults him for omitting.[3] Much of the information Respondent chastises Bates for "failing to provide" is actively withheld from him *by DeSantis*, who maintains that all information regarding the clemency and execution warrant-selection processes must remain secret. *See* Petition at 4-5. Respondent's motion to dismiss alone provided conflicting theoretical possibilities for how warrants are selected and who is in the pool for selection. *Compare* NDFL-ECF 11 at 7 (suggesting possible factors including "the inmate's current physical and mental health or the murders being particularly gruesome or involving multiple victims") with NDFL-ECF 11 at 16 (discussing sheer "[r]andomness").[4] But not one of these suggestions explains

[3] For instance, Respondent's representation that counsel for Mr. Bates can do calculations for warrant-eligible individuals is false. Timely Justice Act certifications provide no information regarding who has had clemency proceedings initiated—which are a legal prerequisite to execution warrants in Florida. Amidst numerous requests and litigation initiated by counsel for death-sentenced individuals, Respondent withholds all information about the clemency process. *See, e.g.*, *Gudinas v. State*, 2025 WL 1692284, *9 (Fla. June 17, 2025) (under Florida law, all clemency records are exempt from disclosure absent consent of the governor); *Zakrzewski v. State*, 2025 WL 2047404, *7 (Fla. July 22, 2025) (same). Perhaps it is this knowledge of Mr. Bates' current inability to access pertinent information that renders Respondent so averse to a discovery process. *See* BIO at 10.

[4] Relatedly, when first asserting in the district court the now-repeated argument that "[i]t is pure speculation that there even is an Eighth Amendment arbitrariness component to warrant selection[,]" BIO at 18, Respondent suggested selection for execution may occur by lottery. *See* NDFL-ECF 11 at 16. Respondent's only support for this proposition was an article explicitly named for an iconic line from THE HUNGER GAMES—a dystopian novel which famously critiques an autocratic system of government in which a lottery determines which children must fight to their deaths as purported retribution and deterrence for past treason. *Id*.

This was an important concession. After all, justices of this Court have held that even at stages in which a death-sentenced prisoner's rights are minimal, randomness remains constitutionally suspect. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part) ("Judicial intervention might, for example, be warranted in the face of a scheme whereby a state

the selection of a 67-year-old man with documented physical and mental health conditions and an exemplary prison record, who was convicted of the murder of a single victim that—while tragic—is in no meaningful way distinct from other murders resulting in Florida death sentences. And, a selection revealing that 95% of DeSantis' issued execution warrants involved white victims cannot reasonably be classified as random.

Despite this, DeSantis has provided no information about what his *actual considerations* entail, including whether race is a consideration. Unlike numerous other states which utilize a transparent, established, and consistently followed process for the timing and sequence of executions, Florida's executions are set "depending on the whim of one man[.]" *Furman*, 408 U.S. at 253 (Douglas, J., concurring in the judgment).

At bottom, all of Respondent's quibbles with Mr. Bates' proffered evidence miss the point. BIO at 14. Respondent illogically relies on a percentage comparison of the total number of Black victims whose deaths resulted in an execution during the DeSantis administration; the total number of Black men executed by DeSantis; and the total Black population in Florida. BIO at 14. While such a mathematical formulation is utterly irrelevant to Mr. Bates' claim, the extent to which Respondent emphasizes it, including in relation to his subsequent anomalous action in signing Curtis Windom's death warrant, strongly supports a conclusion that DeSantis issued

official flipped a coin to determine whether to grant clemency"); *Furman*, 408 U.S. at 293 (Brennan, J., concurring) (finding it constitutionally impermissible where death sentences "smack[] of little more than a lottery system").

Windom's warrant for the purpose of refuting Mr. Bates' claims and thus engaged in warrant selection with the purpose of wielding a racial impact.

To say Mr. Bates' pleadings "do not dispute [Respondent's] figures regarding the race of the defendant or the race of the victims" is a gross misrepresentation. Mr. Bates disputes many if not all of Respondent's statistical applications. But Mr. Bates has also been clear that while the stark data is certainly probative of his allegations, the claims turn not on overall population demographics in Florida, or **any** one statistic alone, but rather on whether the evidence as a whole is so striking as to establish unconstitutional discrimination or arbitrariness. Particularly at the initial pleading stage where every presumption must favor Mr. Bates, such an inquiry was too complex to be resolved against him without factual development regarding the implications of his proffered, facially valid statistics. Dismissal was inappropriate.

CONCLUSION

This Court should grant a writ of certiorari.

/s/ Christina Mathieson
Christina Mathieson
Counsel of Record
Katherine A. Blair
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
christina_mathieson@fd.org
katherine_blair@fd.org

Counsel for Petitioner

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