

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL NANCE, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 21-439  
TIMOTHY C. WARD, COMMISSIONER, )  
 )  
 GEORGIA DEPARTMENT OF CORRECTIONS, )  
 )  
 ET AL., )  
 )  
 Respondents. )  
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TIMOTHY C. WARD, COMMISSIONER, )

GEORGIA DEPARTMENT OF CORRECTIONS, )

ET AL., )

Respondents. )

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Washington, D.C.

Monday, April 25, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:50 a.m.

1 APPEARANCES:  
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7 Petitioner.  
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9 Georgia; on behalf of the Respondents.  
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P R O C E E D I N G S

(11:50 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case Number 21-439, Nance against Ward.

Mr. Hellman.

ORAL ARGUMENT OF MATTHEW S. HELLMAN

ON BEHALF OF THE PETITIONER

MR. HELLMAN: Thank you, Mr. Chief Justice, and may it please the Court:

Mr. Nance's claim sounds in Section 1983 because it is a claim about how the state may execute him, not a claim that the state cannot execute him. That simple proposition decides this case, and, indeed, when the case began, Respondents did not dispute it.

Respondents' new contention that some method-of-execution cases sound in habeas is wrong, wrong about the scope of the writ, wrong about the scope of Section 1983, and wrong under this Court's method-of-execution case law.

Proposing a non-statutory method of execution is proposing a method of execution. By its very nature, the claim does not attack the validity of the death sentence, which places

1 it squarely on the 1983 side of the line that  
2 this Court has demarcated.

3 And that is particularly so because  
4 Mr. Nance is required to prove that the state  
5 has a feasible and readily available alternative  
6 means of carrying out the execution. It would  
7 stretch habeas beyond recognition to hold that  
8 it applies to a claim that not only concedes the  
9 validity of the sentence but proves that the  
10 state has a feasible means of carrying it out.

11 Respondents, of course, are free to  
12 dispute the feasibility of the firing squad as  
13 an alternative method, but that feasibility  
14 analysis is part of the Section 1983 merits  
15 inquiry, just as it is with the feasibility  
16 inquiry for any other proposed method.

17 Any other result would mire  
18 method-of-execution litigation in threshold  
19 questions about whether a proposed alternative  
20 is truly non-statutory. The result would be  
21 confusion, delay, and arbitrariness.

22 More than that, Respondents' rule  
23 would close the courthouse doors to the very  
24 claim that all nine members of the Bucklew Court  
25 held should not be unduly difficult to bring.

1                   With that, I welcome the Court's  
2                   questions.

3                   JUSTICE THOMAS:   Could a state write  
4                   into legislation that -- for certain crimes,  
5                   that the execution would be, for example, only  
6                   lethal injection?

7                   MR. HELLMAN:   It is possible to  
8                   imagine a state law that -- that does that.  
9                   That is not what Georgia law does, but I do  
10                  think if the state -- and this would be the  
11                  first state that we are aware of to do that --

12                  JUSTICE THOMAS:   Well, let's just say  
13                  a state, in response to this confusion, writes  
14                  it into their statute, capital crime, that there  
15                  is to be a specific form of execution.

16                  MR. HELLMAN:   I do think that would  
17                  present a different case, Your Honor, but if I  
18                  may, what Georgia does is different and typical  
19                  of state practice.   When Georgia changes its  
20                  method of execution, for example, when it went  
21                  from electrocution to lethal injection, no one  
22                  on death row was resentenced.

23                  And that is because Georgia law, like  
24                  every other state law that we're aware of,  
25                  treats the method as different from the method

1 of execution -- from the death sentence itself.  
2 And the state has good reasons for doing that.  
3 That is not an accident.

4 If changing the method of execution  
5 invalidated the sentence and required a new  
6 sentence, that could have collateral effects,  
7 such as reopening post-conviction review or a  
8 retroactivity analysis.

9 So that's fine if the state does it  
10 that way, but they can't have it both ways.

11 JUSTICE THOMAS: Well, and -- and from  
12 your standpoint, if you -- the argument you're  
13 making now is, of course, the firing squad. If  
14 Georgia agrees with you and accedes to -- to  
15 your request, would you be foreclosed from  
16 arguing another method-of-execution challenge or  
17 having another method-of-execution challenge  
18 with respect to the firing squad?

19 MR. HELLMAN: Yes, Your Honor. If we  
20 --

21 JUSTICE THOMAS: You would be  
22 foreclosed?

23 MR. HELLMAN: Well, if I -- if I may  
24 explain, we are proposing the firing squad as  
25 our alternative method. We will prove that it



1 is feasible and readily available. That's our  
2 burden. And in the process of doing that, if  
3 the case were to go forward on that basis, we  
4 would establish a method. If the state uses  
5 that method, yes, we -- we may not challenge it  
6 on -- on -- on -- as you are saying.

7 JUSTICE SOTOMAYOR: Counsel, to  
8 unpackage what you said, as far back as 1915, in  
9 the Malloy case, we said that a method of  
10 execution is not part of a sentence, correct?

11 MR. HELLMAN: Correct, Your Honor.

12 JUSTICE SOTOMAYOR: And so a change  
13 from one form of execution to another doesn't  
14 affect the sentence?

15 MR. HELLMAN: That is correct.

16 JUSTICE SOTOMAYOR: That's why we said  
17 you don't have to resentence someone.

18 MR. HELLMAN: Correct, for ex post  
19 facto conclusions, yes, Your Honor.

20 JUSTICE SOTOMAYOR: So there is some  
21 language in some of our cases that the other  
22 side relies upon that says when there is a  
23 duration -- a challenge to the duration of the  
24 sentence, that that has to go into habeas.

25 No judgment of execution that I'm

1 aware of issued by a court says you have to be  
2 sentenced to death on such and such a date,  
3 correct?

4 MR. HELLMAN: That is correct. And  
5 even -- I'm aware of situations in which a date  
6 is included, but that is not -- that date can  
7 change without requiring resentencing.

8 JUSTICE SOTOMAYOR: Exactly.

9 MR. HELLMAN: Yes.

10 JUSTICE SOTOMAYOR: And so there -- as  
11 far as I'm concerned, are you aware of any legal  
12 impediment, constitutional or otherwise, that  
13 would prevent the Georgia -- Georgia from  
14 amending its law to permit execution by firing  
15 squad?

16 MR. HELLMAN: I'm -- no, Your Honor.  
17 There -- there's no impediment I'm aware of in  
18 the way that you phrase it.

19 JUSTICE SOTOMAYOR: All right. And so  
20 just like a regulation can be changed --

21 MR. HELLMAN: Correct.

22 JUSTICE SOTOMAYOR: -- by prison  
23 officials not to cut down someone's vein, and we  
24 had a case that says that's permissible --

25 MR. HELLMAN: Correct.

1 JUSTICE SOTOMAYOR: -- under habeas --  
2 under habeas, Georgia could do what it chooses  
3 to do in terms of finding a viable method of  
4 execution?

5 MR. HELLMAN: That's what makes it a  
6 1983 claim, Your Honor, because the claim isn't  
7 that he can't be executed. The claim is a how  
8 question. What manner? That is correct.

9 JUSTICE SOTOMAYOR: Thank you.

10 JUSTICE ALITO: Your argument is that  
11 this does not preclude execution because Georgia  
12 could enact a new statute, right?

13 MR. HELLMAN: That is one argument,  
14 yes, Your Honor.

15 JUSTICE ALITO: What if the state  
16 constitution said that the only permissible  
17 method of execution is lethal injection? Would  
18 you make the same argument, well, the state  
19 constitution could be amended?

20 MR. HELLMAN: It would still be a 1983  
21 claim, Your Honor, because habeas is about  
22 claims that say the sentence is invalid. In  
23 that case, there would be a question as to how  
24 feasible this alternative would be. But that  
25 would be part of the 1983 analysis, just as it

1 is with our claim or some other -- some other  
2 proposed method.

3 JUSTICE ALITO: I mean, you're taking  
4 things very far when you say that. Amending a  
5 constitution is not an easy thing. I mean, some  
6 constitutions, like the federal Constitution,  
7 are extraordinarily difficult to amend, but you  
8 would say, well, it doesn't matter because, in  
9 theory, it could be done?

10 MR. HELLMAN: Well, two parts. One,  
11 the question is what is the habeas writ, and  
12 this isn't about invalidating a sentence. But  
13 then, to the feasibility point that you are --  
14 you are talking about, the only way a claimant  
15 gets relief under the Eighth Amendment standard  
16 is to show that his proposed alternative is  
17 feasible and readily available.

18 So, if he can't --

19 JUSTICE ALITO: No, I understand that.

20 MR. HELLMAN: Yes.

21 JUSTICE ALITO: But I'm -- it's the  
22 issue of -- of how that -- how that claim is to  
23 be raised, whether it's in habeas or whether  
24 it's in federal habeas or under 1983. Of  
25 course, it can be done under state law.

1                   Suppose state law provided that if the  
2 state -- if there is a change in the prescribed  
3 method of execution, the defendant has to be  
4 resentenced.

5                   Would your answer be the same there?

6                   MR. HELLMAN: I think that gets to  
7 Justice Thomas's hypothetical where he --  
8 because it's functionally the same kind of  
9 question, where a state for the first time to  
10 our knowledge does make the method in some way,  
11 some -- in the important way part of the  
12 sentence.

13                   I suppose that could be a different  
14 case, but, again, states don't do that as a  
15 matter of practice because they don't want to  
16 have a resentencing when the method is changed.  
17 And so --

18                   JUSTICE ALITO: What if the -- what if  
19 the state law was that if there's a change in  
20 the method of execution, there must be a new  
21 guilt-phase trial? I mean, I'm trying to  
22 understand how far your argument would go,  
23 and -- and I think what you're -- what you're --  
24 what would you say about the guilt-phase  
25 argument?

1           MR. HELLMAN:  If the guilt -- if the  
2 conviction -- it's -- if I understand your  
3 question, is overturned or vacated, then that is  
4 -- under the Court's 1983 versus habeas line,  
5 that -- that -- that would be a habeas case, but  
6 that is not what -- obviously what we have here.

7           And, again, I appreciate the question  
8 of how far the principle goes, but the answer, I  
9 think, under this Court's cases is that if you  
10 are contending that you cannot be executed,  
11 there is no method, the death penalty is  
12 unconstitutional, the death penalty is  
13 unconstitutional as applied to me, the claimant,  
14 that is habeas.

15           If it's a question of how the death  
16 penalty is to be administered, there's a  
17 question of the feasibility of the alternative,  
18 but that's just grist for the 1983 inquiry.

19           JUSTICE ALITO:  Well, let me just ask  
20 one more.  I mean, you gave to start out a  
21 number of question -- a number of answers to  
22 questions by Justice Sotomayor about what could  
23 be done, you can split it, et cetera, et cetera.  
24 Aren't those all questions of Georgia law?

25           I mean, Georgia law could say you

1 can't split it, you can split it, you can't  
2 change the method, you -- you may change the  
3 method. Isn't that completely up to the state?  
4 And what do we know about -- what answers are  
5 there to any of those questions?

6 I mean, you said in one of the  
7 footnotes in your reply brief that under Georgia  
8 law, a change in the method of execution doesn't  
9 require anything other than the use of the new  
10 method. But there's no case that holds that  
11 that I -- you didn't cite one anyway.

12 MR. HELLMAN: Let me see if I can  
13 attempt to respond to your question.  
14 Ultimately, what we have here is a question of  
15 federal law because the scope of habeas --  
16 federal habeas and the scope of Section 1983 are  
17 federal questions.

18 And we know from the Malloy case, as  
19 Justice Sotomayor referred to, that simply going  
20 from one punishment to another, at least without  
21 more, doesn't present an ex post facto concern.

22 The scope of what state law does, I  
23 suppose, could vary in some other state, but as  
24 to what Georgia law does, there's no question.

25 And I point the Court to the Dawson

1 case, which we do talk about in our briefs,  
2 which -- in which the argument was made, because  
3 the state was moving from electrocution to  
4 lethal injection, there was a contention  
5 actually made by the state, I believe, in that  
6 case that resentencing -- that -- that it was a  
7 challenge to the death penalty itself.

8 And the Court said no, that is not the  
9 case as a matter of Georgia law. The method is  
10 separate from the death sentence. And that is  
11 in keeping as -- the ACLU brief actually has an  
12 extensive discussion of quite a few states, all  
13 of whom changed their method of execution  
14 without engaging in a resentencing.

15 So I think -- I think the -- the --  
16 the federal law aspect of this is clear as well  
17 as the -- how -- how state law plays into that.

18 CHIEF JUSTICE ROBERTS: How -- how  
19 does Georgia's method of execution -- how is  
20 that set?

21 MR. HELLMAN: Georgia's method of  
22 execution is first a -- a statutory matter that  
23 is then -- the Department of Corrections has  
24 policies and procedures that implement that  
25 method.



1 CHIEF JUSTICE ROBERTS: And so they --  
2 they would have to change the statute itself?

3 MR. HELLMAN: Well, to adopt -- I  
4 believe, to adopt the firing squad, that might  
5 well require a statutory amendment. But let me  
6 -- I think this is a -- a good time to raise a  
7 second part about the argument because I think  
8 it gets lost in some of the back and forth  
9 between the parties.

10 The firing squad is our proposed  
11 alternative. We are not aware of any method of  
12 lethal injection that would be constitutional as  
13 to Mr. Nance. But, although we are required to  
14 prove that there is a feasible alternative  
15 readily available to the state, that is not the  
16 alternative the state is obligated to obtain or  
17 obligated to use in the case.

18 The state can carry out Mr. Nance's  
19 execution by any legal method. And if the state  
20 were able to come up with a new method --

21 CHIEF JUSTICE ROBERTS: Without regard  
22 to the current statute?

23 MR. HELLMAN: As a matter of Eighth  
24 Amendment law, Georgia may carry out -- may use  
25 any lethal method.

1 CHIEF JUSTICE ROBERTS: But not -- but  
2 not as a matter of Georgia law?

3 MR. HELLMAN: I think, as for Georgia  
4 law, they have a statutorily authorized method,  
5 which is lethal injection. What I was talking  
6 -- so -- so I believe to -- to -- to not use  
7 lethal injection would require amendment.

8 However, what -- my point was that  
9 just because we propose an alternative that  
10 would require that, it doesn't mean that Georgia  
11 is required to adopt that alternative, and, in  
12 fact, if they were able to come up with a method  
13 of lethal injection that was constitutional,  
14 they could use it, which I think shows the  
15 distinctions my friends are trying to draw on  
16 the other side are illusory.

17 They want to say, because you proposed  
18 a non-statutory method, this is -- now we're  
19 on -- on to the habeas track. But the case  
20 won't necessarily end up with a non-statutory  
21 method being adopted.

22 If Georgia has a constitutional method  
23 of lethal injection, which we are not aware of,  
24 but, as a legal matter, they are not foreclosed  
25 from using it by any relief that we would be

1 able to obtain. And so to have these questions  
2 turn on speculation as to what method might  
3 ultimately be adopted and to take our proposal  
4 and assume that is the one the state might use  
5 is -- is -- is incorrect.

6 JUSTICE KAVANAUGH: You -- you make  
7 forceful arguments about why 1983 is the  
8 appropriate mechanism here. But, if this --  
9 suppose it's in a gray area, and we basically  
10 have a -- a choice of which way to proceed here.  
11 And suppose relevant to that choice are the  
12 practical considerations of how this will play  
13 out under 1983 versus habeas in the future.

14 The other side, I think, says the 1983  
15 route is too susceptible to delay, gamesmanship,  
16 those kinds of things. I wanted to give you an  
17 opportunity to respond to that.

18 MR. HELLMAN: I -- I appreciate that,  
19 Justice Kavanaugh. With respect, I think it's  
20 just the other way around. And I'll -- and I'll  
21 take the defense part first and then talk about  
22 the problems with their --

23 JUSTICE KAVANAUGH: Yeah, both.

24 MR. HELLMAN: -- their method. Yes.

25 JUSTICE KAVANAUGH: Yeah.

1           MR. HELLMAN: Courts with Section 1983  
2 have all the tools they need to deal with  
3 dilatory claims, estopped claims, claims that  
4 require a stay but aren't entitled to one  
5 because the prisoner comes too late or without a  
6 showing of likelihood of success.

7           JUSTICE KAVANAUGH: In fact, the  
8 district court here ruled against you on that  
9 ground, right?

10          MR. HELLMAN: In fact, the district  
11 court ruled against us on that ground.

12          JUSTICE KAVANAUGH: Keep going. Okay.

13          MR. HELLMAN: The one appellate judge  
14 that looked at it thought that we had stated a  
15 claim, but, yes --

16          JUSTICE KAVANAUGH: Yeah.

17          MR. HELLMAN: -- the district court  
18 did rule against us on that ground.

19                 So 1983 has -- offers courts all the  
20 tools they need to deal with this. But, if you  
21 adopt their rule, then, at the start of every  
22 case, there will be a question about whether the  
23 proposed alternative is truly non-statutory, and  
24 that gets complicated quickly for a variety of  
25 reasons, some that we raise in our brief and

1 some of which become clear from my friend's  
2 position.

3 As we talk about, for example, many  
4 lethal injection statutes prescribe specific  
5 drugs as well as similar drugs -- similar drugs.  
6 What is a similar drug?

7 If a proposal is equally as effective,  
8 readily available, feasible but not similar,  
9 then it's apparently a habeas claim. And you  
10 might not know that from the initial papers in  
11 the case. It might require fact finding. It  
12 might require querying as to what a similar drug  
13 is. That's one example of something that might  
14 get decided and go back up and go back down with  
15 ramifications for whether the claim needs to be  
16 exhausted for habeas purposes.

17 And then I'll only point out that  
18 my -- my friend's test for non-statutory seems  
19 to be whether the warden could implement the  
20 alternative himself or herself.

21 And there are, as we talked about in  
22 the briefing, many questions often where a  
23 proposed alternative drug is given as the  
24 alternative, but it might require licensing by a  
25 federal government or -- or some other state

1 actor, not the Department of Corrections, to  
2 approve the use of the drug.

3 All of those questions would define  
4 the cause of action with jurisdictional  
5 consequences, exhaustion consequences. And to  
6 -- to load all of that into an inquiry that has  
7 been clear for quite some time, with Justice  
8 Scalia's opinions about 1983 versus habeas, they  
9 tell you what the right answer is to that.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Thomas?

13 JUSTICE THOMAS: Nothing for me,  
14 Chief.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Breyer?

17 Justice Alito, anything further?

18 JUSTICE ALITO: I do want to ask you a  
19 question or two about the second issue, about  
20 the second and successive issue.

21 Could you just state in general terms  
22 what rule you would like us to adopt with  
23 respect to -- to determine whether a -- a  
24 petition is second or successive?

25 I know you think this is like Panetti,

1 but can you express it in -- in more general  
2 terms?

3 MR. HELLMAN: Yes. We would have the  
4 Court follow the two-step inquiry that Banister  
5 articulates based on the cases.

6 Question one would be whether the  
7 claim is an abuse of the writ, which would look  
8 at whether it was abandoned, whether it was ripe  
9 at the time of the first habeas.

10 And then Question -- then step two  
11 really does focus on the unique aspect or the --  
12 I shouldn't say unique -- nearly unique aspect  
13 of this kind of claim.

14 Like a Ford claim, which says that it  
15 is unconstitutional to execute those who are  
16 incompetent to understand the punishment that is  
17 being handed down by the state, this claim too  
18 assumes that the state, to meet the Eighth  
19 Amendment standard here, is employing a method  
20 of punishment that super adds pain for no  
21 penological reason where there is a feasible and  
22 readily alternative -- readily available method  
23 at hand.

24 JUSTICE ALITO: All right. Well, the  
25 second part picks up on the statement in

1 Panetti -- I won't be able to give you a direct  
2 quote -- but Panetti said this is basically a --  
3 a -- a one-off. This is a unique situation.

4 And now you say, well, this is another  
5 unique situation. Okay. That's a possibility.  
6 But, as to the first part, if we say second or  
7 successive means pre-AEDPA abuse of the writ,  
8 that's a big change, isn't it? You think that's  
9 -- you think that's what Congress meant when it  
10 enacted AEDPA?

11 MR. HELLMAN: I think --

12 JUSTICE ALITO: We have all that old  
13 law. I thought AEDPA was intended to get rid of  
14 a lot of that.

15 MR. HELLMAN: I think step one is a  
16 door that a claimant to be successful has to  
17 pass through, and if that were the only door,  
18 that would be a sea change in how we understand  
19 the relationship of AEDPA to -- to -- to these  
20 kinds of claims.

21 But there's a second step, and that  
22 step really is one that only a few claims will  
23 be able to take.

24 JUSTICE ALITO: Okay. And what is it  
25 about those claims? So, if it's not just abuse



1 of the writ, purposeful neglect, what -- what is  
2 it about the -- what happens at the second door?

3 MR. HELLMAN: Just as the Court in  
4 Panetti took the view that Congress did not mean  
5 to deprive claimants of relief where their  
6 claims weren't ripe earlier and the claim itself  
7 involved the unconstitutional execution -- we'll  
8 assume concededly unconstitutional execution --  
9 this claim too presents that in a way that  
10 because of the Eighth -- demanding Eighth  
11 Amendment standard, really does, I -- I submit,  
12 put it in stark relief and is equivalent to the  
13 kind of claim that Ford thought or Panetti  
14 thought was different from not just the  
15 run-of-the-mill case but the -- the cases  
16 generally in this area.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Counsel, you're  
20 not emphasizing what I see as the key reason  
21 that this is similar to the other cases. It's  
22 the ripeness issue. Banister spoke about the  
23 test being whether it would have been considered  
24 an abuse of -- of the writ for a new set of  
25 facts to lead to a -- a -- a constitutional

1 violation.

2 As in Ford, the issue is are you  
3 competent at the moment you're going to be  
4 executed. And many cases are -- are dismissed  
5 by courts below because the mental condition has  
6 been around for years and there was delay. That  
7 could happen here too, as it appears to have  
8 happened in the district court's view.

9 But putting that aside, it's the  
10 ripeness question, isn't it, but ripeness in  
11 terms of this is something that develops after,  
12 generally develops after?

13 MR. HELLMAN: That -- that is a  
14 necessary component of it and an important  
15 component of it, but I just want to be clear it  
16 is not the only component of the test that --  
17 that we're talking about today. But, yes,  
18 that's quite correct.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Mr. Hellman, I -- I  
21 understand that you think that there needs to be  
22 a way to bring this claim somehow. But, as  
23 between these two ways of bringing the claim,  
24 the 1983 way and the habeas way, which would be  
25 essentially saying don't worry about the second

1 and successive bar, is there any difference from  
2 your point of view?

3 MR. HELLMAN: Yes, both for Mr. Nance  
4 and -- and in terms of coming up with an  
5 administrable system, there are important  
6 differences. The -- and -- and they dovetail in  
7 many ways.

8 If it's done via habeas, the  
9 administrability problems become quite difficult  
10 because then you will have questions about  
11 whether or not this claim, once it's been  
12 determined to be a truly non-statutory  
13 alternative to pose the kind of -- that meets  
14 the test that Respondents are -- are laying out,  
15 then you might have to go back to state court  
16 and there would be exhaustion questions.

17 There would be, to the extent that  
18 there's a determination, the AEDPA standards  
19 apply to -- to -- to that review. So, yes, we  
20 -- we -- 19 -- 1983 is the right cause of action  
21 under this Court's cases because it doesn't --  
22 just because we're talking about what voids the  
23 judgment. And a claim that voids the judgment  
24 goes to habeas and this kind of claim does not.

25 But it is true that habeas claims

1 often carry procedural questions and different  
2 standards of review that make those claims --  
3 that -- that -- that up the administrability  
4 difficulties that we've been talking about.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Gorsuch?

7 JUSTICE GORSUCH: I'd like to pursue  
8 that just a little bit further with you. And,  
9 certainly, if -- if -- if AEDPA were to control,  
10 you'd have to go to state court in the first  
11 instance and review in federal court would be  
12 more limited.

13 But I wonder whether -- how that cuts  
14 -- and this kind of gets to Justice Kavanaugh's  
15 point too, which is we've said that if you're  
16 going to seek a shortening of your sentence,  
17 you've got to go to habeas.

18 MR. HELLMAN: Correct.

19 JUSTICE GORSUCH: And, here, you're  
20 putting the state to a choice of either changing  
21 its law or being frustrated in its ability to  
22 carry out a lawful judgment.

23 And why isn't that exactly the sort of  
24 thing, that federalism concern that animated  
25 AEDPA, indicate to us -- why isn't that a signal

1 that the right place to think about this case is  
2 that state courts should have the opportunity to  
3 address these questions in the first instance  
4 under AEDPA?

5 MR. HELLMAN: I think the reason that  
6 isn't the right way to think about it is, as  
7 Justice Scalia artfully put it in the Wilkinson  
8 concurrence to -- to Justice Breyer's decision  
9 for the Court in that case, the question for  
10 habeas is it's a narrow writ.

11 The question of what happens once  
12 you're in habeas, there are lots of hurdles  
13 there. No doubt about it. But you've got to  
14 get to habeas before all of that applies.

15 So the question is, what is the scope  
16 of the writ? And I know the Court doesn't  
17 necessarily agree a hundred percent about what  
18 the scope of the writ is looking at a case from  
19 earlier this week, but I think everyone agrees,  
20 and Justice Scalia certainly explained for the  
21 Court, it has to -- a -- a claim about habeas,  
22 the proper ways in habeas, has to attack the  
23 validity of the death judgment.

24 This claim does not do that.  
25 Method-of-execution claims do not do that. And

1 so, by -- and they don't even --

2 JUSTICE GORSUCH: You -- you'd agree  
3 it puts the state to the choice of either  
4 changing its law or changing its sentence?

5 MR. HELLMAN: No, I don't agree with  
6 that.

7 JUSTICE GORSUCH: You don't agree with  
8 that?

9 MR. HELLMAN: I don't agree with that.

10 JUSTICE GORSUCH: How -- how else  
11 could Georgia proceed in this case?

12 MR. HELLMAN: Well, our proposal, the  
13 one that we think is feasible and readily  
14 available, is -- is the firing squad.

15 JUSTICE GORSUCH: To change -- to  
16 change its law, right?

17 MR. HELLMAN: But that does not -- I  
18 -- I just want to be clear about what that  
19 assertion does in the case. It carries our  
20 burden when we prove it that there is an  
21 alternative.

22 JUSTICE GORSUCH: I understand that  
23 for Eighth Amendment purposes. But it does mean  
24 that, as a practical matter, the state cannot  
25 carry out the sentence or it must change its law

1 to do so, right?

2 MR. HELLMAN: The reason I say no, if  
3 I may, is that if Georgia developed, employed, a  
4 method of lethal injection that was  
5 constitutionally adequate, they could use it.

6 JUSTICE GORSUCH: It would have to  
7 change its method of execution.

8 MR. HELLMAN: That is true, but that  
9 would make every method-of-execution claim sound  
10 in habeas.

11 JUSTICE GORSUCH: I see. Okay. Let  
12 -- let's put that aside, all right? Let --  
13 let's -- a starker example, one where you would  
14 concede hypothetically that Georgia would either  
15 have to change its law or change its sentence.  
16 Then what?

17 MR. HELLMAN: If Georgia has to change  
18 its law to carry out the sentence and the method  
19 of execution is not part of the sentence, as it  
20 is not in Georgia --

21 JUSTICE GORSUCH: So it doesn't make  
22 any difference?

23 MR. HELLMAN: It -- it goes to the  
24 feasibility perhaps.

25 JUSTICE GORSUCH: Still goes to 1983,

1 doesn't go to habeas then?

2 MR. HELLMAN: And -- and -- and I'm  
3 saying that not because it's my preference. I'm  
4 saying that because Section 1983 is the cause of  
5 action going back for 150 years for how --  
6 that -- that you use when the -- when you  
7 concede the validity of a sentence but ask to --  
8 for an injunction against carrying it out in an  
9 unconstitutional way.

10 JUSTICE GORSUCH: I just wanted to  
11 test the boundaries of your argument. I  
12 appreciate that. Thank you.

13 MR. HELLMAN: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 JUSTICE BARRETT: So, as Justice  
17 Sotomayor was pointing out, one of the  
18 difficulties with this kind of claim is the  
19 ripeness concern if we were to say that it must  
20 proceed in habeas.

21 And on page 50 of the state's brief,  
22 the state says that there would be an avenue for  
23 pursuing that kind of claim in state court and  
24 state post-conviction proceedings, and I just  
25 wondered if you had a reaction to that.



1           MR. HELLMAN: I -- I -- I do. With  
2     respect to my friends, method-of-execution cases  
3     cannot be brought in Georgia post-conviction  
4     proceedings. What -- what the red brief talks  
5     about on page 50 is the notion that the second  
6     and successive bars under Georgia  
7     post-conviction rules are less stringent than  
8     they are under what's enacted in AEDPA, but  
9     there's -- it has to be the right kind of claim  
10    to be brought into habeas in the first place.

11           And as I believe we point out in -- in  
12    our brief, I -- I can get you the page citation  
13    -- Georgia, as a matter of Georgia  
14    post-conviction law, a claim challenging how  
15    Georgia carries out its execution is not  
16    cognizable in state post-conviction. So your --  
17    the courthouse doors are closed. I know we've  
18    used that metaphor a lot, but they are.

19           JUSTICE BARRETT: Thank you.

20           CHIEF JUSTICE ROBERTS: Thank you,  
21    counsel.

22           MR. HELLMAN: Thank you, Your Honor.

23           CHIEF JUSTICE ROBERTS: Ms. Hansford.

24

25

1 ORAL ARGUMENT OF MASHA G. HANSFORD  
2 FOR THE UNITED STATES, AS AMICUS CURIAE,  
3 SUPPORTING THE PETITIONER

4 MS. HANSFORD: Mr. Chief Justice, and  
5 may it please the Court:

6 There's no sound reason to carve off  
7 claims like Petitioner's from the general rule  
8 that method-of-execution challenges must proceed  
9 under Section 1983. And to Justice Kavanaugh  
10 and Justice Kagan's questions, a dual track  
11 system would add procedural complexity, creating  
12 delay and inviting gamesmanship.

13 For instance, a claim that alleges  
14 multiple alternatives could proceed in separate  
15 actions in different venues, or a case may have  
16 to restart in a different court if a prisoner  
17 amends his complaint or if an appellate panel  
18 revives an alternative rejected by the Court.

19 And there's no compelling doctrinal  
20 reason for that approach. In fact, it would  
21 expand the scope of habeas to hold that a purely  
22 state law problem that does not invalidate a  
23 criminal judgment can somehow transform an  
24 action into a core habeas claim.

25 I welcome the Court's questions.

1 JUSTICE ALITO: Suppose we were to  
2 agree with the state in this case. In what way  
3 would the interests of the federal government be  
4 adversely affected?

5 MS. HANSFORD: Absolutely, Justice  
6 Alito. We do think that the determination in  
7 this case as to whether this is a core habeas  
8 claim would also apply to the federal  
9 government. The federal government -- of  
10 course, federal prisoners do not use Section  
11 1983, but they use the APA. And in the  
12 method-of-execution litigation that the federal  
13 government handled in 2020 and 2021, the  
14 prisoners did use the APA. Many claims were  
15 joined together.

16 At some point in that suit, the  
17 prisoners added a firing squad alternative, and  
18 we do think that if there were a dual track  
19 system, there would have been all kinds of  
20 procedural complications to what was already a  
21 very complicated and difficult litigation that  
22 would have made it substantially more difficult.

23 JUSTICE SOTOMAYOR: Can I follow up on  
24 that as I know there are 10 states that -- like  
25 Georgia who allow -- who specify one method in

1 their law, and there are seven states who allow  
2 multiple methods.

3 So your point is, if we rule in  
4 Respondents' favor, we're going to have this  
5 patchwork of similar identical issues on a  
6 particular method of -- of execution, perhaps  
7 around different states, some going into 1983  
8 and some going into habeas.

9 MS. HANSFORD: That's right, Justice  
10 Sotomayor. The states vary widely, and there  
11 are some states like Florida and Alabama that  
12 actually just include a safety valve. They say  
13 our preferred method is lethal injection, also  
14 electrocution, but if both of those are  
15 unconstitutional, any constitutional manner is  
16 fine.

17 The same claim would always be a  
18 Section 1983 in those suits. And so there would  
19 be very different treatment. And I -- I -- I  
20 guess one -- one thing I would note on that is,  
21 to the extent that the states may benefit in the  
22 short run from additional AEDPA protections,  
23 I -- I -- if the trend is for more states to do  
24 what Alabama recently did and to add such a  
25 catch-all, that would be a -- a pretty

1 short-term benefit, but I think the -- the  
2 practical downsides in terms of creating this  
3 procedural complexity and the back-and-forth  
4 rerouting which prisoners can use to delay  
5 executions, I think, would last for a long time  
6 and is very concerning to the government.

7 JUSTICE SOTOMAYOR: Thank you,  
8 counsel.

9 JUSTICE ALITO: Would you agree with  
10 Mr. Hellman that it wouldn't matter if the  
11 Georgia constitution said that the only  
12 permissible method of execution is lethal  
13 injection?

14 MS. HANSFORD: Justice Alito, I  
15 wouldn't say it doesn't matter. It doesn't  
16 matter to the procedural question, the  
17 procedural question it should still be 1983.

18 It may well be relevant to the merits  
19 inquiry. We take the Court's decision in  
20 Bucklew to say that invalidity under state law  
21 is not per se rendering something invalid, but I  
22 think, if it would be particularly difficult to  
23 amend state law, it's not clear to us that a  
24 court should close its eyes to that while taking  
25 into account other reasons that an alternative

1 would be difficult to implement, like licensing  
2 and other concerns.

3 So we think there may be a state --  
4 there may be a role for that in the merits  
5 analysis.

6 JUSTICE ALITO: Well, I don't really  
7 understand that. I really don't understand that  
8 answer. If the question is whether the -- the  
9 granting of a claim makes it impossible to  
10 execute the judgment, I mean, I think both sides  
11 have to figure out where to draw the line.

12 But your argument is it goes all the  
13 way. If it's -- even if it would require an  
14 amendment to the state constitution, it doesn't  
15 matter?

16 MS. HANSFORD: That's right, Justice  
17 Alito. We think that because the judgment would  
18 plainly remain valid under Georgia law, it is  
19 not a habeas claim, and then how difficult the  
20 alternative would be to implement by a state  
21 taking measures within its control really just  
22 goes to the merits of the inquiry.

23 And I -- I -- I think one of the  
24 things that's difficult in this case is the  
25 intuition that it's hard to see a lethal

1 injection challenge succeeding on the merits.

2 So maybe just to abstract away from  
3 that and to give you an example that is not at  
4 all realistic for what states actually do, but  
5 if a state were to adopt either as a statutory  
6 matter or put in its constitution that the  
7 method of execution is, say, burning at the  
8 stake, and a prisoner who says I agree that the  
9 death sentence is valid, my judgment is valid,  
10 but I should be -- but burning at the stake  
11 super adds pain relative to lethal injection.

12 The fact that the state would then  
13 have to take a step and if it wanted to carry  
14 out the execution in a constitutional manner  
15 amend its law, then that does not change the  
16 nature of the claim and does not make it a  
17 habeas --

18 JUSTICE ALITO: You think it would be  
19 hard for a prisoner to challenge that in habeas?

20 MS. HANSFORD: I -- I -- I -- I -- so  
21 I'm not making a courthouse-gates-being-closed  
22 type of argument. I'm just saying that as a  
23 conceptual matter, because habeas is about the  
24 validity of the judgment, I think it's clear  
25 that that is not an attack on the validity of

1 the judgment but just the manner of carrying out  
2 that judgment.

3 JUSTICE ALITO: But doesn't that  
4 depend on state law, whether it's an attack on  
5 the validity of the judgment or not?

6 MS. HANSFORD: Yes, it does, Justice  
7 Alito.

8 JUSTICE ALITO: Okay.

9 MS. HANSFORD: So we do think that a  
10 state has the power to define its judgment and a  
11 state could choose to define such a -- to -- to  
12 define the judgment to include the manner of  
13 execution. We agree with Petitioner that no  
14 state has done this. I think the ACLU brief is  
15 helpful in laying this out.

16 That would have all kinds of important  
17 implications for retroactivity, for resetting  
18 collateral time, and I think that the state  
19 constitution example probably as a practical  
20 matter is a little bit unrealistic for the same  
21 reasons. States have repeatedly made executions  
22 more humane, and they don't want to make it  
23 difficult to change methods of execution.

24 JUSTICE ALITO: Well, if it's a  
25 question of state law, then what do we say about



1 Georgia law? Well, we predict that Georgia will  
2 do what all these other states have done? Is  
3 that what we -- we're supposed to do?

4 MS. HANSFORD: Justice Alito, no  
5 prediction is needed. The Georgia Supreme Court  
6 has said in Dawson that judge -- the judgment is  
7 not void when the manner of execution changes.

8 In fact, the manner of execution  
9 changed from electrocution to lethal injection  
10 with that decision. And not only does  
11 Petitioner's judgment in this case not specify a  
12 method of execution, even in Georgia cases where  
13 judgments did specify the method of execution,  
14 Georgia courts have held that the sentence could  
15 proceed without resentencing.

16 And I think that's really critical to  
17 illustrating that what is at issue is not the  
18 validity of the state's judgment. And I do  
19 think that's the one place where state law is  
20 relevant, because habeas is about what the  
21 judgment is, and the state does have the power  
22 to define that.

23 JUSTICE GORSUCH: I'm sure it's just  
24 me, but I guess I'm a little confused. Could a  
25 state make the method of execution part of its

1 judgment in such a way that any attack on it  
2 would be required to go to habeas?

3 MS. HANSFORD: Yes, Justice Gorsuch.

4 JUSTICE GORSUCH: How -- how would  
5 that happen on your view?

6 MS. HANSFORD: So a state could say we  
7 define the punishment for the offense to be  
8 execution by lethal injection.

9 JUSTICE GORSUCH: So, if there were a  
10 state law saying that, that would be sufficient?

11 MS. HANSFORD: That's right, Justice  
12 Gorsuch. Or if the state court held that maybe  
13 just looking at the particular statutes, that it  
14 viewed the method as inseparable and so  
15 resentencing is required every time a method of  
16 execution is changed. So, as a matter of  
17 federal law under the Malloy decision, that is  
18 not required, but a state could say we see  
19 Malloy, but we disagree.

20 Now the states have actually gone in  
21 the opposite direction --

22 JUSTICE GORSUCH: No, I understand  
23 that.

24 MS. HANSFORD: -- in several cases.

25 JUSTICE GORSUCH: I understood that

1 point. So I guess it really does boil down to  
2 what Georgia law says here then?

3 MS. HANSFORD: I -- I think that if --  
4 if there -- if Georgia law here defined the  
5 method of execution as part of the judgment and  
6 it's crystal-clear -- I -- I would submit that  
7 it doesn't -- then I do think the outcome would  
8 be different.

9 JUSTICE GORSUCH: Okay. And what do  
10 we do about the fact that in the verdict form  
11 the jury indicated it would be death by lethal  
12 injection?

13 MS. HANSFORD: So, Justice Gorsuch,  
14 it's unclear what that meant on the verdict  
15 form. It was part of the language on the  
16 verdict form, but it's not clear what that meant  
17 because lethal injection was the only  
18 statutorily authorized method. And so -- and  
19 the judgment didn't repeat those words.

20 But I think the reason that that feels  
21 significant is that it seems like it may suggest  
22 that Georgia is a state that actually defines a  
23 sentence to be death by lethal injection. And,  
24 in fact, we know from the Supreme Court  
25 decision, from the practice when method of

1 executions have changed in the past, and from  
2 the language of Petitioner's actual judgment,  
3 that that is not the case.

4 JUSTICE GORSUCH: What do we do about  
5 the common law history as well that, you know,  
6 the death sentence, manner of execution was  
7 often typically part of the death sentence?

8 MS. HANSFORD: Justice Gorsuch, if the  
9 Malloy decision had come out the other way based  
10 on that common law --

11 JUSTICE GORSUCH: On ex post facto.  
12 Yeah.

13 MS. HANSFORD: -- under ex post fact,  
14 I think -- I think that would have been an  
15 argument for that, but I think it's -- it's  
16 clear that, as a matter of federal law, it is  
17 not part of the sentence.

18 JUSTICE GORSUCH: Yeah, I wasn't  
19 asking as a matter of federal law. I was asking  
20 about common law. But maybe you don't have any  
21 thoughts on that, and that's fine.

22 MS. HANSFORD: Yeah, I -- I -- I -- I  
23 -- I -- I don't. I think that the -- the Malloy  
24 decision has crossed that bridge.

25 JUSTICE GORSUCH: All right. Thank

1 you.

2 JUSTICE KAVANAUGH: I just want to  
3 caution one answer -- about one answer you gave  
4 to Justice Alito because I don't think it's that  
5 big of a box. This doesn't defeat your  
6 argument, but you said, I think, that the  
7 difficulty of changing state law could come in  
8 on the merits of the 1983 claim.

9 Well, if you took that to its logical  
10 conclusion, if the state constitution said  
11 burning at the stake is the only method, that  
12 would mean you couldn't maintain a Bucklew claim  
13 against that. And I don't think that's right.  
14 As I said in the Bucklew oral argument and  
15 opinion, I don't think that can be right.

16 MS. HANSFORD: So, Justice Kavanaugh,  
17 we don't have a position on the particulars of  
18 how the merits inquiry should play out. We  
19 think this Court hasn't -- hasn't developed that  
20 further.

21 We -- we recognize there are difficult  
22 questions on both sides, and we take Bucklew to  
23 say that kind of the standard basic difficulty  
24 of changing the law isn't enough, but we do  
25 think that the option is open to potentially

1 take into account if there are some extreme  
2 difficulties.

3 Now I will say it's extremely unlikely  
4 that this would come up because the Bucklew  
5 standard is so rigorous on the merits. So, in  
6 addition to the protections from 1983, including  
7 the PLRA, which, Justice Gorsuch, does require  
8 exhaustion for 1983 prisoners, there is that  
9 very demanding standard.

10 And the -- the alternative has to be  
11 feasible and readily implemented. It has to  
12 significantly reduce a substantial risk of  
13 severe pain, which is where a lot of these cases  
14 can drop out more easily. And the state has to  
15 not have a legitimate penological reason.

16 So, if something is so important to  
17 the state that it's in the constitution, perhaps  
18 there would be a legitimate penological reason.  
19 It's hard to imagine the state codifying just  
20 one method of execution for no particular  
21 reason. But, you know, if the state does  
22 something extreme like in the  
23 burning-at-the-stake example, then it does seem  
24 like -- that the answer should probably be that  
25 that case --

1 JUSTICE KAVANAUGH: Yeah. Back to --

2 MS. HANSFORD: -- that should go  
3 forward on the merits.

4 JUSTICE KAVANAUGH: -- current  
5 statutes and the way current state statutes are  
6 phrased, I think what you were just saying is  
7 most of these claims go out on the -- the first  
8 prong and you don't -- am I right about that, or  
9 am I wrong about that?

10 MS. HANSFORD: I think --

11 JUSTICE KAVANAUGH: The first prong  
12 being you haven't shown severe pain as  
13 shorthand.

14 MS. HANSFORD: I think -- I think that  
15 is where a lot of the -- of the activity is.  
16 And that's one of the reasons the dual track  
17 system would be so unwieldy, because that is the  
18 same question, regardless of the alternatives,  
19 and then splitting the claim up to litigate  
20 whether the firing squad is readily implemented  
21 versus a different protocol really does not make  
22 a lot of sense and creates the possibility for  
23 competing stays being entered, which -- which is  
24 also not helpful to the litigation.

25 And just to say one more thing on the

1       protections that are available even under  
2       Section 1983, I just want to emphasize the very  
3       important protection of the limits this -- this  
4       Court set out in Hill on the stays. And, in  
5       fact, I think the Hill -- the aftermath of the  
6       Hill case is itself a good example.

7                 In that case, of course, the Court  
8       ruled unanimously that a Section 1983 action,  
9       instead of a habeas action, could proceed. And  
10      Florida executed that prisoner less than four  
11      months later because the district court said  
12      that it was filed too close to the execution  
13      date, and so, for that reason alone, the 1983  
14      suit could be tossed. And the Eleventh Circuit  
15      agreed that it was -- that -- that a stay was  
16      not warranted.

17                So there are a lot of protections for  
18      the states. We don't want to in any way suggest  
19      that the state's sovereignty considerations are  
20      not significant here. But we -- we just submit  
21      that that's not the test for whether AEDPA  
22      applies or not. The application of AEDPA turns  
23      on whether the validity of the judgment is being  
24      attacked, and in this case, it is not.

25                If there are no further questions.



1                   JUSTICE SOTOMAYOR: Counsel, on the  
2 common law issue, your adversary cites only one  
3 support for that, and that's Blackstone. And  
4 the Blackstone treatise states that a sheriff  
5 who substituted a different method of execution  
6 than one handed down by a judge could be guilty  
7 of a felony.

8                   That's a different situation than this  
9 one. There it suggests that the judgment  
10 included a method of execution that a sheriff  
11 decided to change, correct?

12                   MS. HANSFORD: That's right. And I  
13 think the common law is further complicated by  
14 the fact that this would often go to the  
15 jurisdiction of the court to impose a sentence  
16 in the first place. But -- but, again, I -- I  
17 think that if Malloy had come out the other way  
18 and had held that the method is an inherent part  
19 of the judgment for purposes of federal law,  
20 then I think we would have a different situation  
21 here.

22                   JUSTICE SOTOMAYOR: Thank you,  
23 counsel.

24                   CHIEF JUSTICE ROBERTS: Justice  
25 Breyer, anything further?

1 Justice Alito?

2 Justice Kagan? No?

3 Okay. Thank you, counsel.

4 MS. HANSFORD: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Petraney.

6 ORAL ARGUMENT OF STEPHEN J. PETRANY

7 ON BEHALF OF THE RESPONDENTS

8 MR. PETRANY: Mr. Chief Justice, and  
9 may it please the Court:

10 This case is not about whether  
11 Petitioner Nance can challenge lethal injection  
12 under the Eighth Amendment. He can do that in  
13 state court. He can -- excuse me. He can do it  
14 in a properly exhausted federal habeas petition.

15 It's also not about the substance of  
16 an Eighth Amendment claim, which remains the  
17 same in any forum. Instead, it's only about how  
18 and where he should file this claim. And, here,  
19 he seeks to prevent his custodian from executing  
20 him. That is habeas relief, and so it's not  
21 cognizable in Section 1983.

22 Execution is a distinct form of  
23 custody. That's why prisoners can challenge  
24 capital punishment in habeas to begin with.  
25 And, here, Nance seeks to bar his custodian from

1 exercising that custody over him. That's habeas  
2 relief. It doesn't matter whether someone  
3 someday might be able to execute Nance if  
4 Georgia were to authorize a different criminal  
5 punishment.

6 The relevant point is that he seeks to  
7 bar death by lethal injection, the only  
8 state-authorized punishment he's actually  
9 subject to.

10 Indeed, Congress passed AEDPA for  
11 situations just like this one to prevent  
12 unnecessary intrusions on state sovereignty.  
13 Nance virtually ignores AEDPA and would have  
14 states amend their statutes and even  
15 constitutions merely to effectuate their  
16 criminal judgments, all without AEDPA's  
17 protections, including prior state court review,  
18 which can resolve many of these cases. That is  
19 not what Congress wanted.

20 Simply put, Nance could have filed in  
21 state court. He could have filed a 1983  
22 complaint that did not seek to bar lethal  
23 injection entirely. Or he could have chosen not  
24 to abandon his similar claims on  
25 post-conviction. But what he can't do is get

1 around AEDPA by challenging his execution via  
2 Section 1983.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Counsel, is the  
5 method of execution a part of the sentence,  
6 capital sentence, in this case?

7 MR. PETRANY: So I think one of the  
8 virtues of our approach, Justice Thomas, is the  
9 Court would not need to answer that question.  
10 And I strongly disagree with my friend from the  
11 other side, who says it's clearly not. I think  
12 it's unclear under Georgia law whether it is or  
13 not.

14 What Georgia courts have said is that  
15 when the legislature changes from, say,  
16 electrocution to lethal injection, that doesn't  
17 require resentencing. That doesn't mean the  
18 sentence didn't change in some sense. I mean,  
19 the sentence is what the state says it is.

20 And if they change what they say it  
21 is, that might be subject to federal constraints  
22 in terms of ex post facto and so forth, but  
23 there is nothing that says that a state must  
24 resentence a prisoner in order to change their  
25 sentence.

1                   Just to give one example, when  
2 Virginia repealed the death penalty recently, by  
3 statute, they changed all of those sentences.  
4 They didn't require resentencing or anything  
5 like that.

6                   And so I think, if you go down the  
7 road of allowing these challenges to custody in  
8 1983, the Court is effectively saying we are  
9 telling states this is not part of their  
10 sentence.

11                   JUSTICE KAGAN: Well, Mr. Petraney,  
12 doesn't Georgia law itself separate the sentence  
13 of death from the method of execution?

14                   So I'm just going to read you your  
15 statutes and you can tell me whether I've gotten  
16 them wrong. But it says, a person convicted of  
17 the offense of murder shall be punished by  
18 death, by imprisonment for life without parole,  
19 or by imprisonment for life. That's one.

20                   And then there's another provision,  
21 just by death. Another provision that says all  
22 persons who have had imposed upon them a  
23 sentence of death shall suffer such punishment  
24 by lethal injection.

25                   So your own statutes are clearly

1 saying there's the -- it shall be punished by  
2 death, there's the sentence. And if you're  
3 given that sentence of death, here's the way we  
4 propose carrying it out.

5 MR. PETRANY: So a few points on that,  
6 Justice Kagan.

7 First is I don't think that federal  
8 courts should generally be in the business of  
9 telling states, well, if you don't write your  
10 statutes a certain way, we're not going to  
11 consider them to be part of the sentence or  
12 something like that.

13 I mean, I think that's for states to  
14 say.

15 JUSTICE KAGAN: Well, here, you have a  
16 statute. It says what it says. Then you also  
17 have a Supreme Court decision that makes clear  
18 that the ordinary way of reading these words is,  
19 in fact, the way Georgia reads these words.

20 And -- and that's why nobody needed a  
21 resentencing when you changed your method of  
22 execution. So I guess I just don't see what  
23 argument you have here.

24 MR. PETRANY: Well, so a couple  
25 points, Your Honor.

1           First, I would say, if you go down  
2 later in the -- in the lethal injection statute,  
3 it defines participation in a death sentence as  
4 only lethal injection-oriented things. So I  
5 think it's very clear that the state understands  
6 a death sentence as lethal injection.

7           But even if it didn't -- and I think  
8 this is the virtue of our approach -- habeas  
9 isn't about challenging sentences per se.  
10 Habeas is about challenging custody. If you  
11 were to challenge, for instance, a criminal  
12 fine, you couldn't do that in habeas because  
13 it's not custody.

14           And Preiser, which is where the Court  
15 began with this doctrine, the sentence was still  
16 extant at the end. The sentence still existed.  
17 The reason that this went into habeas was  
18 because the custody was going to be cut short in  
19 that case.

20           And so, while my friends from the  
21 other side focus again and again and again on  
22 sentences, they're really talking about a  
23 different question. The question is whether  
24 custody is being stopped here, not whether the  
25 sentence is being vacated.

1                   And, in fact --

2                   JUSTICE KAGAN: But, see, I guess I  
3 thought that our test is always does this imply,  
4 necessarily imply, the invalidity of the  
5 sentence. And if the sentence is just death,  
6 this does not necessarily imply the invalidity  
7 of the sentence. Quite to the contrary.

8                   Mr. Nance is saying he concedes the  
9 validity of the sentence of death.

10                  MR. PETRANY: Well, so a couple of  
11 points, Your Honor.

12                  First, I respectfully just have to  
13 disagree. Preiser makes clear, Balisok makes  
14 clear, it really isn't a question of is the  
15 sentence extant at the end. You might be let  
16 out of jail a few days earlier. It's not that  
17 you're -- there was some problem with your  
18 sentence. You're just -- you got let out of  
19 jail, and so that's -- that's habeas relief.

20                  And so similarly here, even if the,  
21 you know, the sentence per se still exists in  
22 some form, if you no longer can be executed,  
23 then that's a bar against custody, but also Heck  
24 made clear, and I think the follow-on cases as  
25 well, it used the term "validity." It didn't



1 use the term "vacate."

2           And I think that there was an  
3 important point to that. In all of these cases,  
4 the question is, can I enforce this sentence  
5 against you? It's not a matter of, well, is it  
6 literally being vacated.

7           And -- and none of these cases,  
8 actually, neither Preiser or Heck, Balisok, et  
9 cetera, was someone asking for vacatur of the  
10 sentence. They were just asking for something  
11 that would mean the sentence could no longer be  
12 validly enforced against them. And that's what  
13 he's asking for here.

14           I would also hasten to add, although  
15 my friend from the other side now suggests that  
16 maybe some sort of lethal injection could be  
17 viable, that is not what they said -- what Nance  
18 said in his complaint. It's not what he said in  
19 his opening brief.

20           103 of the Petitioner's appendix, the  
21 relief that he requested was to enjoin the use  
22 of any lethal injection at all. So, if this --  
23 if -- if Nance were to succeed, his custodian  
24 could not exercise this custody over him.

25           That is mainline habeas relief. And I

1 think that this focus on the sentence is really  
2 an attempt to get away from that particular  
3 point, and I also think that it creates a lot of  
4 practical problems in terms of looking at state  
5 law.

6 In nearly every case, the Court has to  
7 look at state law to figure out, well, what's  
8 going to be the effect here? Will he be  
9 released if we rule this way? Will he not be  
10 released? Will he maybe be released?

11 In the capital context, the question  
12 should be, well, can he be executed if we rule  
13 this way or can the warden no longer execute  
14 him? That's the question.

15 The question is not, will there need  
16 to be a resentencing? And if that's the  
17 question, then you get into very complicated  
18 questions of separation of powers and what a  
19 federal court can say about what a state court  
20 sentences are and so on and so forth.

21 JUSTICE KAVANAUGH: You -- sorry, keep  
22 going.

23 MR. PETRANY: Well, I was just going  
24 to say, on the other hand, I think that any  
25 practical concerns with our approach are -- are

1 vastly overblown. And I can get into those.  
2 But, of course, Justice Kavanaugh, if you have a  
3 question.

4 JUSTICE KAVANAUGH: You didn't raise  
5 this argument in the lower courts and I think  
6 indicated that you'd grown accustomed to 1983.  
7 Is that correct?

8 MR. PETRANY: Well, most of --

9 JUSTICE KAVANAUGH: That doesn't  
10 preclude your argument here. I'm just -- is  
11 that accurate?

12 MR. PETRANY: Yeah, yeah. So, Your  
13 Honor, most of these cases up until now had been  
14 genuine method-of-execution claims, things like  
15 don't use this drug, use this drug. And so,  
16 yes, we were, I think, accustomed to that.

17 And there are lots of reasons to  
18 dismiss Mr. Nance's claim. And so we relied  
19 principally --

20 JUSTICE KAVANAUGH: And it was  
21 dismissed here under 1983 because it was too  
22 late, right?

23 MR. PETRANY: I'm sorry? I didn't --

24 JUSTICE KAVANAUGH: Because it was too  
25 late? There had been delay?

1                   MR. PETRANY: Oh, yeah. Yeah. I  
2 mean, the -- the primary argument we had was  
3 that this -- this has been ripe and known for  
4 years, and Nance waited until essentially all of  
5 his other litigation options ran out.

6                   JUSTICE KAVANAUGH: And the district  
7 court was able to deal with that under 1983?

8                   MR. PETRANY: It -- it did, although,  
9 as my friend on the other side points out, at  
10 least one appellate court judge disagreed with  
11 --

12                   JUSTICE KAVANAUGH: Right.

13                   MR. PETRANY: -- that conclusion.

14                   JUSTICE KAVANAUGH: So I guess that  
15 leads to my bigger-picture question, which I've  
16 indicated to the other side as well, we've  
17 largely shaped the interaction of 1983 and  
18 habeas without interpreting a statute here,  
19 figuring out where our precedents lead and what  
20 makes the most sense in terms of the interaction  
21 of the two things, the two routes here.

22                   And so we have some discretion, I  
23 think, a gray area, and it seems like we've been  
24 on a 15-year effort to organize how these  
25 method-of-execution claims should proceed,

1 culminating in Bucklew, which gave pretty clear  
2 directions about that and also repeated the Hill  
3 versus McDonough thing about undue delay and too  
4 late.

5 So I guess my question is why would we  
6 upset all of that and create new complications,  
7 for example, on the second or successive  
8 question, as illustrated by Justice Alito's  
9 questions earlier, we're going to get into a  
10 whole set of complications under that. Why?

11 MR. PETRANY: Well, so a couple of  
12 points, Your Honor.

13 First, I don't think this is entirely  
14 just kind of a judgment for the Court to make.  
15 I think it is looking at statutes. There's  
16 1983. There's AEDPA. And in Preiser, the Court  
17 held, look, the -- the specific controls over  
18 the general. So, if Congress has indicated a  
19 certain thing should happen when there are  
20 challenges to custody, that should go under  
21 AEDPA.

22 And I think that to the extent that  
23 this is a challenge to custody -- and that's our  
24 argument --

25 JUSTICE KAVANAUGH: Let me -- let me

1 supplement and say I think both sides have good  
2 arguments, at least plausible arguments about  
3 how to characterize the sentence.

4 MR. PETRANY: Well, so, Your Honor, I  
5 think that one -- one place to look is AEDPA  
6 itself was designed to prevent this sort of  
7 piecemeal attack on executions. I mean, the --  
8 the Antiterrorism and Effective Death Penalty  
9 Act was designed to get everything into a single  
10 federal habeas petition that a petitioner wanted  
11 to bring and it recognized that, you know, stuff  
12 might come up later, but we think states can  
13 handle that and that's the regime that we want.

14 And so I think that that's one  
15 indication of where the Court should go. I  
16 also, to just get into some of the supposed  
17 practical problems here, I -- I haven't really  
18 heard any particularly difficult practical  
19 problems.

20 My friend from the United States  
21 suggests, well, maybe someone would amend their  
22 complaint. That happens a lot. And, yeah, if  
23 you amend your complaint and now you have a  
24 different claim or a different theory or  
25 something, that can change where things go. I

1 mean, to just use Balisok as an example --

2 JUSTICE KAVANAUGH: What about new  
3 facts? You know, you -- you've gotten older and  
4 you have a new medical condition that will make  
5 the lethal injection feel like torture?

6 MR. PETRANY: Well, then you -- then  
7 you raise that claim, of -- of course. I mean,  
8 -- and -- and we -- and we think they absolutely  
9 can.

10 And to just -- to clarify another  
11 point about Georgia law here, because this came  
12 up on my friend on the other side's time, the  
13 Owen versus Hill case is very clear that what it  
14 is talking about is genuine method-of-execution  
15 claims that go to drug choice, you know, the  
16 sort of things that any warden can handle, not  
17 barring lethal injection entirely.

18 But even if that weren't the case,  
19 even if Georgia were to someday decide, well,  
20 you know, in our own system, we want to put  
21 these into a different box, Owen versus Hill  
22 makes clear that you can raise those challenges  
23 in a declaratory judgment action in Georgia  
24 state court. So there is no question that you  
25 can raise that claim.

1           The only -- I mean, in a lot of  
2     circumstances, of course, it's going to fail  
3     because of timeliness or the merits or something  
4     like that, but it's definitely cognizable in  
5     Georgia state court.

6           And so what this ultimately boils down  
7     to is, you know, to paraphrase Justice Scalia,  
8     Nance just wants another federal district court  
9     to rule on one of his claims.

10          JUSTICE KAGAN: But doesn't what this  
11     ultimately boil down to whether Bucklew is  
12     completely gutted? I mean, you're suggesting an  
13     approach where it's like it's not 1983; it's  
14     habeas. Oh, sorry, in habeas, you run into the  
15     second and successive bar. You're just never  
16     going to be able to bring these claims. Or  
17     maybe I should say almost never.

18          And it seems as though that's exactly  
19     what Bucklew said should not happen. Bucklew,  
20     all nine justices agreed on one point, which is  
21     that somebody in Mr. Nance's position was  
22     entitled to raise a alternative method of  
23     execution that had not been authorized by state  
24     law.

25          And the Court said we see little



1 likelihood that an inmate facing a serious risk  
2 of pain will be unable to identify an available  
3 alternative for that reason, because he was  
4 entitled to identify an alternative that was not  
5 authorized. There was a concurrence that really  
6 underscored that point.

7           And -- and now you're saying, oh,  
8 well, you know, really, Bucklew didn't mean what  
9 it said, notwithstanding that it said an -- an  
10 -- a petitioner is always going to be able to do  
11 this. What we meant was a petitioner is  
12 technically always going to be able to do this,  
13 but in 90 percent, 99 percent of the time, he's  
14 not going to have an appropriate vehicle.

15           Now is that really a -- a reading of  
16 Bucklew that would not be, I don't know,  
17 embarrassing?

18           MR. PETRANY: No, Your Honor, I don't  
19 think that's at all what we're saying. Nance  
20 can absolutely file this sort of a claim in  
21 state court any times he wants. And, of course,  
22 he can file it on his initial post-conviction  
23 time, which he did. He filed very similar  
24 lethal injection claims. He also included a  
25 claim in his federal habeas petition that his

1 counsel was ineffective for failing to raise  
2 these sorts of claims. So Nance himself is kind  
3 of the advertisement for the fact that these are  
4 available all the way along the line.

5 But what I take Bucklew to say is the  
6 claim itself shouldn't be hard in terms of  
7 finding an alternative, but it specifically left  
8 open that where you do that, whether you do it  
9 in state court or federal court, might be, you  
10 know, a question because, if you are going to  
11 stop the warden from executing you, period,  
12 that's habeas relief.

13 It doesn't mean you can't make that  
14 claim. Of course, you can. Georgia courts are  
15 wide open to that sort of claim. And I think  
16 what AEDPA tells us is, and this Court has said  
17 it numerous times, and Congress has certainly  
18 affirmed it, that not every single claim gets a  
19 federal forum in district court.

20 No matter what, of course, this Court  
21 would have certiorari review if there were some  
22 extreme breakdown in state court. And in most  
23 cases, I think that petitioners are going to be  
24 able to raise these across-the-board  
25 no-lethal-injection-whatsoever kind of claims in

1 their first federal habeas petition. But I  
2 don't see this as cutting back on Bucklew at  
3 all, any more than Heck or any of these other  
4 cases cut back on substantive rights.

5 JUSTICE BARRETT: But -- but, you  
6 know, on -- so, on page 50 of your brief, which  
7 I asked your friend on the other side about, you  
8 say that there would be a forum in Georgia  
9 courts. But would there not be these kinds of  
10 ripeness problems or second or successive bars?  
11 Or I assume that Georgia post-conviction  
12 practice has bars that would be analogous to the  
13 ones that apply under AEDPA.

14 Is it really the case that the state  
15 courts would be wide open for -- you're --  
16 you're saying wide open has a forum. Is that  
17 really true in these kinds of claims?

18 MR. PETRANY: I think it is, Your  
19 Honor. Of course, if someone has had a ripe  
20 claim for eight years or something along those  
21 lines and then tries to file it and gets booted  
22 out of court, that's not unique to this area of  
23 the law. It's not unique to Georgia courts.  
24 Federal courts would do the same thing. So  
25 there might be timeliness concerns or merits

1 concerns.

2           But Georgia law is very clear there is  
3 no time limit for a capital sentence habeas  
4 petition. You can file a second or successive  
5 one if you have a reason for doing so. And the  
6 fact that you couldn't file this claim before  
7 would be a good reason. Again, we don't think  
8 that's actually the case here, but it is  
9 available.

10           And so I don't really see -- there are  
11 the ordinary barriers that any capital  
12 petitioner is -- for that matter, any habeas  
13 petitioner is going to have to deal with in  
14 terms of time limits and ripeness and so forth.  
15 But nothing about that is -- is distinct in this  
16 case as opposed to any other kind of capital or,  
17 you know, likewise just imprisonment claim.

18           JUSTICE BARRETT: You say in the  
19 footnote on this page that if, in a hypothetical  
20 situation, you say that would be unlikely to  
21 occur, there were no state forum in which this  
22 kind of Bucklew claim could be pressed, that the  
23 Petitioner could raise a due process challenge  
24 saying, you know, I just had no forum for my  
25 claim.

1                   What would be the procedural vehicle  
2 for asserting that? 1983?

3                   MR. PETRANY: Yeah. So I think it's  
4 so unlikely to occur there isn't really much  
5 case law that I could provide for the Court in  
6 terms of here's how it would happen, but I think  
7 you could file essentially either a federal  
8 habeas petition or a 1983 claim and just say I  
9 have no opportunity whatsoever, I never had a  
10 chance to do this, and I believe that that  
11 violates due process for this, this, and this  
12 reason, and, therefore, I'm entitled to do this  
13 in this forum.

14                   I don't think that, you know, the  
15 distinction at that point between 1983 and  
16 habeas is going to be as important because we're  
17 in, again, a -- an unrealistic hypothetical  
18 world where you've had no opportunity over the  
19 course of, you know, your entire time in prison  
20 to bring this sort of a claim.

21                   But I think, again, this is getting  
22 very far away from what is, in this case, a  
23 mainline case. This is a petitioner who says  
24 you cannot execute me by the only way you're  
25 authorized to execute me. At the end of the

1 case, the warden would not be able to exercise  
2 this custody over the Petitioner if he  
3 succeeded.

4 That makes it habeas. That makes it  
5 AEDPA.

6 JUSTICE SOTOMAYOR: Counsel, how is  
7 this different from any of the cases where  
8 states have said a particular form of medical  
9 treatment is too expensive, we don't have the  
10 budget for it?

11 In my estimation, budgets are  
12 generally passed by law. The laws have to be  
13 changed, and the Court says it's  
14 unconstitutional not to do. The state does what  
15 it needs to do. Similarly, just in Americans  
16 for Prosperity Foundation last year, in a 1983  
17 action, we said a California regulation was not  
18 a permissible remedy, enjoining a California  
19 regulation.

20 All of these things require changes  
21 either in state statutory law or regulatory law,  
22 and we've never suggested that curing a  
23 violation on its face because a law prohibits  
24 something stops a 1983.

25 But I just experienced in the news

1 Florida changing its law with respect to one of  
2 its state citizens in a matter of weeks, if not  
3 days. Is there something that stops Georgia  
4 from acting expeditiously if the Court were to  
5 rule in its favor? You have lots of reasons why  
6 the Court shouldn't in the 1983 action, but  
7 let's do the worse.

8 MR. PETRANY: Well, so I think, as to  
9 your first point, Justice Sotomayor, I want to  
10 be clear. We're not saying that 1983 actions  
11 don't reach state law. They do. They just  
12 don't reach state -- or they just don't reach,  
13 excuse me, challenges to custody.

14 So you could have to rewrite your  
15 entire constitution --

16 JUSTICE SOTOMAYOR: Well, that --

17 MR. PETRANY: -- in California or --

18 JUSTICE SOTOMAYOR: -- we get back --

19 MR. PETRANY: -- wherever.

20 JUSTICE SOTOMAYOR: -- to our main --

21 MR. PETRANY: I mean, that's --

22 JUSTICE SOTOMAYOR: -- argument, which  
23 is --

24 MR. PETRANY: That's --

25 JUSTICE SOTOMAYOR: -- what's the

1 judgment? Is it custody or is it death? And is  
2 the method of execution separate from that? But  
3 that's assuming that argument, you win on that  
4 argument, which I still have a hard time  
5 understanding how you do because, in Dawson, the  
6 Georgia Supreme Court saw the two as different  
7 in the statute.

8 MR. PETRANY: Well, but, to be clear,  
9 Your Honor, under our theory, we don't think the  
10 Court needs to determine that. We do think that  
11 the sentence is invalid because --

12 JUSTICE SOTOMAYOR: Well, could you  
13 just answer my bottom-line question?

14 MR. PETRANY: Yeah. I -- if you could  
15 remind me --

16 JUSTICE SOTOMAYOR: And can you --

17 MR. PETRANY: -- Justice Sotomayor,  
18 what the -- what the question is.

19 JUSTICE SOTOMAYOR: -- change a  
20 budget, change a law, change a regulation -- is  
21 there anything that precludes the state from  
22 doing that if it were to become necessary?

23 MR. PETRANY: Well, they can do --  
24 they can do that. The -- the Court --

25 JUSTICE SOTOMAYOR: And they could do



1 it in a reasonable amount of time if they chose?

2 MR. PETRANY: Well, I suppose it  
3 depends, I mean, depending on the -- the -- the  
4 hypothetical situation, but, yeah, I mean, at --  
5 at some point, a state can -- can change its  
6 laws, of course, or if it's constitutional, it's  
7 going to be very difficult.

8 JUSTICE SOTOMAYOR: You're not  
9 suggesting that, unlike the -- our U.S.  
10 Constitution, that you need two-thirds of the  
11 state to change the law, two-thirds of the --

12 MR. PETRANY: Well, I --

13 JUSTICE SOTOMAYOR: -- districts to  
14 change?

15 MR. PETRANY: -- Your Honor, I can't  
16 speak to every state constitution. I'm sure  
17 some of them are -- are very difficult to amend.  
18 But my -- my underlying point is --

19 JUSTICE SOTOMAYOR: Well, this is not  
20 a constitutional issue, but I'm asking you.

21 MR. PETRANY: No, here it's not, no.

22 JUSTICE SOTOMAYOR: All right. It's a  
23 statutory change.

24 MR. PETRANY: Yeah, I mean, Georgia  
25 theoretically could do it, but the warden can't.

1 And the order is going to the warden. I mean,  
2 this is an injunction against a particular  
3 person who wants to exercise a particular form  
4 of custody over Nance. And that's habeas  
5 relief. That's classic habeas relief. And  
6 that's the bottom of our argument.

7 JUSTICE SOTOMAYOR: Thank you,  
8 counsel.

9 MR. PETRANY: I just want to very  
10 briefly touch on the second or successive issue.  
11 The text of 2244 is exceedingly clear. My  
12 friend on the other side has barely even  
13 mentioned the text and I think for good reason.

14 It does not do him any favors. If we  
15 -- if the Court were to adopt a rule that said,  
16 well, if you couldn't have done this before or  
17 if this wasn't ripe at the time of your first  
18 habeas petition, we're not going to apply the  
19 second or successive bar, we would, in fact, as  
20 Justice Alito indicated, just be back in abuse  
21 of the writ days.

22 This Court has explicitly acknowledged  
23 that's not what Congress wanted. It very  
24 specifically picked the first half of a two-part  
25 test and said, if it's second or successive,

1 it's barred with these very narrow exceptions,  
2 which themselves would be all but meaningless if  
3 one adopted Nance's rule in this case.

4 And, again, none of this goes to  
5 whether or not Mr. Nance can file this claim  
6 somewhere. He is going to be able to file the  
7 claim. It's just a question of is it in state  
8 court or is it in a federal district court.

9 If the Court has no further questions.

10 JUSTICE BREYER: Well, I do have one  
11 question. I mean, what -- what's the  
12 prisoner -- these take years, these cases --  
13 what's the prisoner supposed to do if the method  
14 seems all right when he is sentenced, and then  
15 they change it over 10 years and now it doesn't  
16 seem all right? And he's filed 14 habeas  
17 petitions on other matters.

18 Well, can he file this one or not?

19 MR. PETRANY: Well, in -- in federal  
20 court, if he's already filed a prior application  
21 --

22 JUSTICE BREYER: No, I'm just saying  
23 to you, in your opinion, if we decide for you  
24 and you win, can the individual file the claim  
25 that this method they're going to execute me is

1 unconstitutional? Can he do it or not?

2 MR. PETRANY: In state court,  
3 absolutely. We think he'll lose.

4 JUSTICE BREYER: In -- oh, in habeas.

5 MR. PETRANY: Oh, in habeas? No, Your  
6 Honor, because he already --

7 JUSTICE BREYER: No, okay. So you're  
8 --

9 MR. PETRANY: -- had a federal habeas  
10 petition, yes.

11 JUSTICE BREYER: -- saying he should  
12 file in habeas and, by the way, he can't?

13 MR. PETRANY: Well, Your Honor, he  
14 did, in fact, file claims that were very similar  
15 to this one.

16 JUSTICE BREYER: No, no, no, no. Take  
17 my case. Ten years passes. There was an old  
18 way that he didn't object to. Now they changed  
19 the law. The new way he does object to.

20 MR. PETRANY: Yes, Your Honor. There  
21 are some claims that are not going to be able to  
22 be brought in a habeas petition. And this Court  
23 has recognized this on numerous occasions. Just  
24 --

25 JUSTICE BREYER: Well, that's what I'm

1 saying.

2 MR. PETRANY: Yes. Just --

3 JUSTICE BREYER: It's a new claim. I  
4 mean, it's not a new -- sorry, it's a new method  
5 of execution. He thinks it's torture and it  
6 wasn't there before while he filed 15 other  
7 habeas petitions.

8 Now he comes to you and says: I have  
9 my new habeas petition. Now the method they're  
10 actually going to use is torture.

11 And can he do it or not?

12 MR. PETRANY: Not in a federal habeas  
13 petition. He could do it under state law, where  
14 he would have to establish, you know, the -- the  
15 merits of his claims. But that is -- again,  
16 that's not unlike plenty of other claims that  
17 drop out because of the way Congress wrote  
18 AEDPA.

19 So, to just take one example, in  
20 Burton versus Stewart, the Court held that  
21 various claims that the Petitioner had were just  
22 gone for good because he had already filed and  
23 litigated a first habeas petition, and at the  
24 time, those other claims were not available.

25 He couldn't file them at that time

1 because they were not exhausted yet. So  
2 Congress was aware, and this Court has said on  
3 numerous occasions that, yeah, every once in a  
4 while there's going to be a type of a claim or  
5 something that comes up that doesn't get federal  
6 district court initial review. And we --

7 CHIEF JUSTICE ROBERTS: Well, you --

8 MR. PETRANY: -- trust the process to  
9 do that.

10 CHIEF JUSTICE ROBERTS: -- mentioned  
11 earlier that -- you're -- you're saying he  
12 should go into state court, and you mentioned  
13 earlier that he was likely -- would be likely to  
14 lose there.

15 MR. PETRANY: On the merits, Your  
16 Honor, or because he -- his -- you know,  
17 everything was untimely, which would be the same  
18 in Section 1983. It would be either way. And  
19 wherever he goes, we think his claims would be  
20 untimely. But he's at least got a cognizable  
21 cause of action in state court. It's just we  
22 think he would lose for other reasons.

23 CHIEF JUSTICE ROBERTS: Okay. Well,  
24 he -- you say go there and he's going to lose.  
25 And yet you -- you're saying that he can't file

1 in federal court because he filed a prior habeas  
2 petition, but the claim was not there when that  
3 prior -- prior habeas petition was filed,  
4 Justice Breyer's hypothetical about, you know, a  
5 change in his medical condition, that it is now  
6 a different situation to have lethal injection.  
7 And now that does seem like a pretty daunting  
8 catch-22.

9 MR. PETRANY: So, Your Honor, two  
10 points.

11 First, just to be clear, that isn't  
12 actually the case here. It was ripe at the time  
13 --

14 CHIEF JUSTICE ROBERTS: Well, yeah.

15 MR. PETRANY: -- of his first federal  
16 habeas petition, but, yes, there are theoretical  
17 possibilities of this happening, but Congress  
18 was well aware of that, and, in fact, the very  
19 terms in Section 2244 make that clear.

20 The fact that Congress exempted such  
21 narrow categories from the second or successive  
22 bar shows --

23 CHIEF JUSTICE ROBERTS: But, by that,  
24 you're -- you're assuming that AEDPA, when  
25 Congress passed it, they understood that it

1 would have this kind of coverage.

2 MR. PETRANY: I -- well, I think that  
3 Congress absolutely knew it would have this kind  
4 of coverage. In fact, this was the point of  
5 AEDPA. The reason that Congress enacted 2244 in  
6 its current form was to narrow and/or, to use  
7 this Court's terms, make more stringent the bar  
8 on successive petitions.

9 Previously, at --

10 CHIEF JUSTICE ROBERTS: Well, I know.  
11 But this is, I mean, from, you know, the Ford  
12 case, for example, the question of how you want  
13 to interpret successive petitions. I mean, I'm  
14 sure that you've consulted your interests  
15 carefully, but you're going to be confronting  
16 difficult challenges if you prevail here.

17 MR. PETRANY: Well, I think that the  
18 point of AEDPA was that state courts getting  
19 these difficult challenges is what was supposed  
20 to happen. I mean, AEDPA was, again, which this  
21 Court has confirmed, was Congress's decision  
22 that state courts is where almost all of this  
23 should happen, and only in extreme circumstances  
24 should a federal court be getting involved.

25 And so it's not at all surprising that



1 state courts would be the ones to deal with  
2 these constitutional issues. In fact, that is  
3 the entire point of AEDPA, was to force them  
4 into state courts so that states could, in fact,  
5 effectuate their own judgments and in many cases  
6 just avoid an unnecessary clash of sovereigns.

7 And that happens all the time. States  
8 stay their own executions all the time. They  
9 rule for prisoners all the time. So states are  
10 more than capable of carrying out their federal  
11 constitutional duties. And that was what  
12 Congress thought when it passed AEDPA.

13 So it's --

14 CHIEF JUSTICE ROBERTS: Well, tell me  
15 again why you're -- you're pretty confident he's  
16 going to lose in state court.

17 MR. PETRANY: Well, I think that his  
18 claims are untimely. He -- he claims  
19 essentially that his veins are problematic and  
20 that he's -- and that Gabapentin might interfere  
21 with the -- the lethal injection.

22 The veins he has known about for  
23 decades. His filings repeatedly, again and  
24 again and again, said, I have bad veins due to  
25 long intravenous drug use and so forth.

1           The Gabapentin he pleaded that he had  
2 started in 2016, which was roughly four years  
3 before he filed his 1983 --

4           CHIEF JUSTICE ROBERTS: And you think  
5 --

6           MR. PETRANY: -- claims.

7           CHIEF JUSTICE ROBERTS: -- were --  
8 were the facts otherwise, this was, in fact, a  
9 new condition that developed, I mean, that you  
10 -- you -- he would prevail in state court?

11          MR. PETRANY: Well, he would at least  
12 get past the timeliness bars. Then he has to  
13 make the claim, you know, the Bucklew claim. Is  
14 this, in fact, a feasible alternative? Does the  
15 state not have a legitimate penological interest  
16 in what it's doing? Will lethal injection  
17 actually cause the kind of pain that he claims  
18 and so forth?

19          You know, he has to win on the merits,  
20 but, yes, it would be there for him to make that  
21 claim as long as he gets it in, you know, on  
22 time.

23          JUSTICE KAVANAUGH: Were our recent  
24 string of religious advisor cases properly  
25 bought -- brought in 1983 to the extent that it

1 required a change in state law?

2 MR. PETRANY: So, Your Honor, as I  
3 understand those cases, they didn't require a  
4 change in state law. It was just a practice.  
5 And so they were, in fact, properly filed in  
6 1983.

7 JUSTICE KAVANAUGH: Suppose they were  
8 in state regulations that had to be changed,  
9 though.

10 MR. PETRANY: Yeah, so, of course,  
11 that -- that case isn't actually presented here.  
12 And there are slightly --

13 JUSTICE KAVANAUGH: Would -- would --

14 MR. PETRANY: -- different concerns.

15 JUSTICE KAVANAUGH: So, if a state  
16 puts no religious advisors into the execution  
17 room into the state law starting tomorrow --

18 MR. PETRANY: Mm-hmm.

19 JUSTICE KAVANAUGH: -- will those  
20 claims now have to be brought in habeas rather  
21 than 1983 and then barred?

22 MR. PETRANY: Yes. So I think that  
23 they would have to be filed in state court and  
24 they would have very good chance of succeeding.  
25 And so I think states are very unlikely to

1 handicap --

2 JUSTICE KAVANAUGH: But no -- no  
3 federal forum available for that claim?

4 MR. PETRANY: Well, of course, to the  
5 extent that, you know, state court goes  
6 completely rogue, there's still, you know,  
7 review by this Court available at the end, which  
8 is what Congress --

9 JUSTICE KAVANAUGH: By federal  
10 district court, I should say.

11 MR. PETRANY: Yes. Yes. No.  
12 Exactly, no federal district court review in  
13 that very unlikely and, as far as I'm aware,  
14 like, essentially, you know, never happens kind  
15 of circumstance, but I think to --

16 JUSTICE KAVANAUGH: Well, it does  
17 point out the oddity, I think, that -- I don't  
18 -- I don't know that anyone paused to say, boy,  
19 this religious advisor claim should be in  
20 habeas.

21 MR. PETRANY: Well, Your Honor, at  
22 least as I understand it, it didn't need to be  
23 in habeas because it was not, in fact, a legal  
24 requirement. It was just something the warden  
25 could or could not do.

1                   JUSTICE KAGAN: But one could easily  
2 imagine -- I mean, you said very rare. One can  
3 easily imagine those -- these sorts of  
4 requirements appearing in prison regulations,  
5 which have the status of law.

6                   MR. PETRANY: Well, so it depends --  
7 if it's just a policy that the warden can change  
8 anytime he wants, then you're not really  
9 affecting his authority and his custody.

10                   Now, if it is a legal regulation that  
11 would, in fact, be something that the warden  
12 can't get around, that would change things  
13 potentially.

14                   But there are two points here. The  
15 first is states have no real incentive to make  
16 their own judgments harder to effectuate by  
17 making parts of them details they don't really  
18 care about. If they really care about the  
19 details, then maybe they put them into statutes,  
20 but, if they don't, you're in a situation where  
21 they can't carry out a sentence or something  
22 like that because, you know, someone said, I  
23 want a -- I want a religious minister in the  
24 room, and under state law, they can't have them  
25 in there. That means now they can't execute

1 this person.

2 And also, to the extent that there  
3 are --

4 JUSTICE KAGAN: It is a little bit of  
5 irony you're making Mr. Hellman's point for him,  
6 that that's why states, you and others, don't  
7 make lethal injection part of the sentence.

8 MR. PETRANY: Well, no. It's -- they  
9 do make it part of their law, Your Honor. And I  
10 think that to the extent there's any concern  
11 about, well, what could states do or so forth,  
12 as I understand it, my friend on the other side  
13 does not contest that if a state said, well,  
14 you'd have to be resentenced, you know, a court  
15 would just have to check a box that says, all  
16 right, now we're sentencing you to death by this  
17 new method or something like that, that that  
18 would, in fact, require these to go to habeas.  
19 This -- this focus on the sentence, I think, is  
20 improper.

21 But states could do everything that he  
22 claims they can do under our rule under his rule  
23 as well. So I don't see this as any significant  
24 departure from what a state could do right now.

25 And, again, they have no incentive to

1 do that. There's a reason that they don't put  
2 details they don't care about into their  
3 statutes and regulations. There's a reason that  
4 Mr. Nance has not been able to come up with any  
5 particularly problematic state statute or  
6 anything like that, because if then there is a  
7 problem with that drug.

8           If you -- if you say in your statute,  
9 well, it can only be pentobarbital, well, if  
10 they can't get any pentobarbital or if there's  
11 something wrong with pentobarbital, then all the  
12 executions stop, all the criminal judgments  
13 can't be effectuated.

14           JUSTICE BARRETT: Can I ask a  
15 clarifying question about the religious advisor  
16 one? I -- I -- I'm probably just not tracking  
17 the position. But I guess, if a religious  
18 advisor claim was brought and we said that it  
19 was unconstitutional for the state to have a law  
20 or regulation prohibiting a religious advisor  
21 from being in the room, why wouldn't the  
22 execution go forward then with a religious  
23 advisor because the state law would essentially  
24 be unenforceable in that situation? Why would  
25 it stop the execution?

1           MR. PETRANY: Well, they're not -- to  
2 be clear, Your Honor, they wouldn't be  
3 conflicting. If the federal court ordered the  
4 warden to perform the execution, then, yeah, the  
5 -- the state law would kind of have to give way.

6           But what the federal court would be  
7 doing was just entering an injunction saying  
8 don't execute this person without a religious  
9 advisor in the room. And because state law  
10 doesn't let him do that, he's just in a  
11 situation where he can't execute that person.

12           And to some extent, that explains the  
13 big difference between death penalty-like claims  
14 and just your ordinary 1983 challenge to, you  
15 know, a condition of prison confinement or  
16 something, where just because you enjoin some  
17 prison regulation or even statute doesn't mean  
18 you're releasing the prisoners.

19           JUSTICE BARRETT: Mm-hmm.

20           MR. PETRANY: It's not -- it's  
21 understood they're still going to be in prison,  
22 whereas, here, if you stop them from doing it  
23 the only way the state has authorized, well,  
24 then the execution just stops, and that's habeas  
25 relief.



1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas, anything further?

4 Justice Breyer?

5 Justice Alito?

6 Justice Sotomayor?

7 Justice Kagan?

8 Justice Gorsuch?

9 JUSTICE KAVANAUGH: I have -- sorry --  
10 two quick ones just to follow up on Justice  
11 Barrett's. If the Court ruled that you had to  
12 have the religious advisor present in the room  
13 and state law did not allow that, wouldn't the  
14 -- I guess I'm -- maybe I'm missing this, but  
15 state law would have to change, or I guess the  
16 state law just would be deemed unenforceable?  
17 That might be her question.

18 MR. PETRANY: Yeah, the state law  
19 would have to change in order to carry out the  
20 execution. Right? The state doesn't have to  
21 change its law. Maybe it could --

22 JUSTICE KAVANAUGH: And your -- and  
23 your point --

24 MR. PETRANY: -- it could just not  
25 carry out the execution -- the warden could just

1 not carry out the execution.

2 JUSTICE KAVANAUGH: And that would be  
3 a habeas situation.

4 MR. PETRANY: Yes. No. Yes, we do  
5 think that would be a habeas situation, very  
6 unlikely to arise, but, yes, and you would have  
7 to go to state court first, then a federal  
8 habeas petition after.

9 JUSTICE KAVANAUGH: And second  
10 question, don't take it the wrong way, but if  
11 you were to lose in this case, is it better for  
12 the State of Georgia to lose on the 1983 point  
13 or to lose on the second or successive point?

14 MR. PETRANY: Well, it's not  
15 necessarily the last question you want to get  
16 while in front of the Court, Your Honor.

17 It's hard for me --

18 JUSTICE KAVANAUGH: I'm not saying  
19 you're going to. I just want to know --

20 MR. PETRANY: It's -- it's --

21 JUSTICE KAVANAUGH: -- what we're  
22 talking about.

23 MR. PETRANY: -- hard for me to say  
24 that I have, you know, a preference given that I  
25 -- I think we're correct on both issues. I

1 think that it would very much depend on what the  
2 Court said about the first question and what the  
3 Court said about the second question.

4           If -- if the Court was able to come up  
5 with some way on the first question that was --  
6 you know, did not damage habeas law, the  
7 understanding of habeas as a challenge to  
8 custody and all those things, I -- again, I  
9 don't think the Court can do that, but then  
10 maybe that wouldn't be such a -- you know, such  
11 a problem.

12           Similarly, with second or successive,  
13 if -- if it was another Panetti-like one-off  
14 carveout, that's very different from a rule that  
15 says, well, actually, just any claim that wasn't  
16 available previously.

17           So it's -- it's very hard for me to  
18 say --

19           JUSTICE KAVANAUGH: Yeah.

20           MR. PETRANY: -- but that -- that's  
21 the sort of analysis I would be thinking of.

22           JUSTICE KAVANAUGH: Very helpful.

23 Thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1                   Rebuttal, Mr. Hellman?

2                   REBUTTAL ARGUMENT OF MATTHEW S. HELLMAN  
3                   ON BEHALF OF THE PETITIONER

4                   MR. HELLMAN: Thank you, Mr. Chief  
5 Justice. Just a few quick points.

6                   First of all, as to what Georgia law  
7 contains, I do refer the Court to Dawson v.  
8 State, which is crystal-clear from the Georgia  
9 Supreme Court that the method of execution is  
10 not part of the sentence of death.

11                   And I think my friend on the other  
12 side more or less concedes that because he says  
13 -- he says it does not matter to his argument  
14 because his argument is about custody.

15                   Well, let's talk about custody for a  
16 moment. Point number one, characterizing this  
17 claim as seeking release from custody is odd to  
18 say the least to begin with because, of course,  
19 the death sentence remains in place and the  
20 state may use any legal method of execution to  
21 carry it out. That leaves my friend to say but  
22 the warden might not be able to adopt particular  
23 procedures.

24                   Method-of-execution claims of all  
25 stripes involve alternatives where there will be

1 a question about what the warden can or cannot  
2 do on his own or her own, for example, whether  
3 or not the warden could obtain a particular  
4 drug, whether or not the warden would need  
5 approval from some other regulatory entity,  
6 perhaps a federal entity or a state entity, in  
7 order to carry out the execution.

8           Making the habeas/1983 question turn  
9 on the answer to that inquiry, which will often  
10 require factual findings and complicated  
11 assessments, is a recipe, as I said at the  
12 beginning, for delay, confusion, and  
13 arbitrariness in these cases. So we recommend  
14 the Court not go down that road, which takes us  
15 to Section 1983, which has been here for 150  
16 years and provides the tools to courts to deal  
17 with dilatory claims, estopped claims, and any  
18 -- any other claim that does not warrant relief.

19           All we are asking for is the Court to  
20 apply its 1983 precedents and allow this claim  
21 to be heard on the merits so that those  
22 questions may be determined.

23           We ask the Court to reverse. Thank  
24 you.

25           CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 1:17 p.m., the case was  
3 submitted.)

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## Official - Subject to Final Review

<b>1</b>	<b>across-the-board</b> <sup>[1]</sup> 65:24 <b>Act</b> <sup>[1]</sup> 61:9 <b>acting</b> <sup>[1]</sup> 70:4 <b>action</b> <sup>[10]</sup> 21:4 26:20 31:5 33:24 47:8,9 62:23 69:17 70:6 77:21 <b>actions</b> <sup>[2]</sup> 33:15 70:10 <b>activity</b> <sup>[1]</sup> 15:15 <b>actor</b> <sup>[1]</sup> 21:1 <b>actual</b> <sup>[1]</sup> 43:2 <b>actually</b> <sup>[14]</sup> 15:5,11 35:12 38:4 41:20 42:22 50:8 56:8 67:8 76:10 78:12 81:17 82:11 90:15 <b>add</b> <sup>[3]</sup> 33:11 35:24 56:14 <b>added</b> <sup>[1]</sup> 34:17 <b>addition</b> <sup>[1]</sup> 45:6 <b>additional</b> <sup>[1]</sup> 35:22 <b>address</b> <sup>[1]</sup> 28:3 <b>adds</b> <sup>[2]</sup> 22:20 38:11 <b>adequate</b> <sup>[1]</sup> 30:5 <b>administered</b> <sup>[1]</sup> 13:16 <b>administrability</b> <sup>[2]</sup> 26:9 27:3 <b>administrable</b> <sup>[1]</sup> 26:5 <b>adopt</b> <sup>[8]</sup> 16:3,4 17:11 19:21 21:22 38:5 73:15 91:22 <b>adopted</b> <sup>[3]</sup> 17:21 18:3 74:3 <b>adversary</b> <sup>[1]</sup> 48:2 <b>adversely</b> <sup>[1]</sup> 34:4 <b>advertisement</b> <sup>[1]</sup> 65:3 <b>advisor</b> <sup>[8]</sup> 81:24 83:19 86:15,18, 20,23 87:9 88:12 <b>advisors</b> <sup>[1]</sup> 82:16 <b>AEDPA</b> <sup>[27]</sup> 23:10,13,19 26:18 27: 9,25 28:4 32:8 35:22 47:21,22 50: 10,13 51:1 60:16,21 61:5 65:16 66:13 69:5 76:18 78:24 79:5,18, 20 80:3,12 <b>AEDPA's</b> <sup>[1]</sup> 50:16 <b>affect</b> <sup>[1]</sup> 8:14 <b>affected</b> <sup>[1]</sup> 34:4 <b>affecting</b> <sup>[1]</sup> 84:9 <b>affirmed</b> <sup>[1]</sup> 65:18 <b>aftermath</b> <sup>[1]</sup> 47:5 <b>agree</b> <sup>[9]</sup> 28:17 29:2,5,7,9 34:2 36: 9 38:8 39:13 <b>agreed</b> <sup>[2]</sup> 47:15 63:20 <b>agrees</b> <sup>[2]</sup> 7:14 28:19 <b>AL</b> <sup>[1]</sup> 1:8 <b>Alabama</b> <sup>[2]</sup> 35:11,24 <b>ALITO</b> <sup>[28]</sup> 10:10,15 11:3,19,21 12: 18 13:19 21:17,18 22:24 23:12,24 34:1,6 36:9,14 37:6,17 38:18 39:3, 7,8,24 40:4 44:4 49:1 73:20 88:5 <b>Alito's</b> <sup>[1]</sup> 60:8 <b>alleges</b> <sup>[1]</sup> 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