No. 21-439

In the Supreme Court of the United States

MICHAEL NANCE, PETITIONER

v.

TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL.

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, ARIZONA, FLORIDA, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH DAKOTA AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a state capital inmate's as-applied method-of-execution challenge must be raised in a habeas petition instead of through a section 1983 action if the inmate pleads an alternative method of execution not currently authorized by state law.

2. Whether, if such a challenge must be raised in habeas, it constitutes a successive petition where the challenge would not have been ripe at the time of the inmate's first habeas petition.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arkansas, Arizona, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Dakota and Utah.[1] Several States exercise their sovereign prerogative to employ the death penalty to punish society's vilest offenders, provide the victims of those crimes with closure, and deter repetition of such heinous acts. They have done so because they are duty-bound to fulfill their citizens' will as expressed by statutes consistent with the Constitution. Both Congress and this Court have recognized the vital importance of these goals to States and to their people. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214 (AEDPA); *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *see also Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam).

Unsurprisingly, death row inmates often spend decades avoiding their sentences by bringing seriatim, frequently frivolous challenges either to the fact or method of their sentences—often long after the deadline for challenging the fact of their execution. The States have weathered these delay tactics ranging from constantly shifting health concerns to religious objections from individuals who have never professed such religious requirements before. Here, Nance seeks an order invalidating lethal injection—the only means of execution authorized by the State of Georgia (as well as numerous other States).

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

The latest strategy in prisoner litigation is to demand States adopt methods of executions they have never attempted, long renounced, or found against their public policy. This strategy, like so many before it, should be rejected. Prisoners have no constitutional right to an execution suited to their personal preferences. And they should not be permitted to use endless litigation regarding the means of execution to avoid their death sentences.

SUMMARY OF ARGUMENT

I. Because petitioner seeks to challenge the only method of execution that the State has authorized, he must press his claim through a writ of habeas corpus and satisfy AEDPA's strict standards for granting relief. This Court has long held that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). A state prisoner's challenge to the only legally authorized method of his execution is such a challenge: it implies the invalidity of the prisoner's sentence because if the prisoner prevails, the State cannot legally carry out that death sentence.

Nance's gambit is only the latest in an unending series of novel litigation techniques developed to stave off lawful capital sentences. If successful, no doubt every capital defendant will copy his claims, flooding courts with last-minute challenges to scheduled executions. States will be forced to pass new laws and put into place entirely new execution procedures, which will only start the litigation process anew. But while capital murderers may benefit from this extended procedural wrangling, victims' families experience anguish with each new delay. That a State may adopt new legislation as a work-around

to these disguised habeas claims is hardly a remedy, as this process encourages capital defendants to challenge any method adopted by the State to escape a lawful capital sentence and frustrate the State's policy of enacting capital punishment altogether.

In adopting AEDPA's strict standards, Congress sought to prevent such an endless cycle of litigation. Habeas comes with significant procedural safeguards that preserve a State's ability to assess the legality of its own actions in the first instance, and to carry out a prisoner's sentence once that sentence has been confirmed by federal habeas review. Under section 1983, by contrast, no State court can first review the merits of a capital defendant's challenges to a State's capital-punishment system. And unlike under AEDPA's strict regime preventing seriatim litigation, section 1983 claims permit a prisoner to haul States into court again and again each time the State makes the slightest alteration to its method of execution, or some new alleged "fact" purports to cast it into doubt.

II. The United States frets (at 9) that dividing challenges to a State's method of execution from procedures used to implement that method will be difficult for courts and the relevant parties. But federal courts are called upon to make far more complicated decisions than this on a regular basis. And the United States' parade of horribles—States changing their methods of execution mid-litigation; state prisoners shifting their demands for relief after discovery; pleadings that demand the prisoner have access to multiple methods of execution, only some of which are legal under State law; and so on—simply employs dire language to describe humdrum issues faced by courts every day. Mootness, amended complaints, stays of one

proceeding to allow another, and dismissal of unexhausted claims are common tools that belie the United States' protests that requiring method-of-execution challenges to be brought in habeas will cause mass chaos amoung courts.

ARGUMENT

I. Petitioner's Challenge to Georgia's Only Legally Adopted Method of Execution Is a Challenge to His Sentence Which Must Be Brought via Habeas.

For nearly three decades, this Court has recognized that habeas petitioners cannot evade the strict standards Congress imposed on habeas relief by bringing their claims under section 1983. *Heck*, 512 U.S. at 489; *see also, e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). Where a claim may be brought in habeas, federal courts must "deny the existence of a cause of action" under section 1983. *Heck*, 512 U.S. at 489.

A challenge to the State's only legally permissible method of execution sounds in habeas. In *Hill v. McDonough*, this Court permitted a state prisoner to challenge the means by which the State would carry out his execution under section 1983 because his "suit did not challenge an execution procedure required by law, so granting relief would not imply the unlawfulness of the lethal injection sentence." 547 U.S. at 580-81 (citing *Nelson v. Campbell*, 541 U.S. 637, 647 (2004)). Nance's claim is precisely the opposite: because Georgia has no other legally authorized means of carrying out his sentence, if Nance's claim is successful, Georgia will be unable to legally fulfil his sentence. He therefore must bring his claim through a habeas petition, with AEDPA's attendant restrictions.

A. A state prisoner seeking to challenge the validity of his sentence must do so through habeas under AEDPA.

Petitioner (at 28-29) and the United States regale the Court (at 8-9) with an ode to section 1983. The United States begins by describing the statute as "exist[ing] to vindicate the supremacy of the federal Constitution and laws" with the purpose, "in large part," of "overrid[ing] portions of state law that conflict with an individual's federal constitutional rights." But this Court has *repeatedly* recognized that Congress weighed the benefits of an all-encompassing section 1983 against "the principles of comity, finality, and federalism," and courts have limited section 1983 accordingly. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). When, as here, a prisoner seeks to challenge the validity of his sentence on constitutional grounds, section 1983 "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements." *Nelson*, 541 U.S. at 643.

1. The most obvious example of this Court limiting section 1983's scope is also the one most relevant here: Congress enacted AEDPA "to reduce delays in the execution of state and federal criminal sentences, *particularly in capital cases*," *Woodford*, 538 U.S. at 206 (emphasis added) (citing *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law")). And this Court has held that "[t]he deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are

peculiarly questions of legislative policy.'" *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (citation omitted).

In other words, Congress and this Court have confirmed that where state-court criminal sentences are at issue, States take the lead, and federal courts' authority is circumscribed, due to the "profound societal costs" when federal courts upset state convictions. *Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986)). That arrangement "reflect[s]" both Congress' and this Court's "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Id.* at 554. Such finality "is essential to both the retributive and the deterrent functions of criminal law," and without it, "the criminal law is deprived of much of its deterrent effect." *Id.*

2. Because section 1983 and AEDPA establish fundamentally different legal regimes, this Court has required courts to distinguish between the two claims for nearly three decades. Section 1983 authorizes a prisoner to bring suit "against any person who, under color of state law, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution." *Nelson*, 541 U.S. at 643 (cleaned up). That includes constitutional claims that "challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief." *Id.*

This Court recognized the boundary of section 1983 in *Heck v. Humphrey*. There, the Court held that a civil rights damages action that, if successful, would "necessarily imply" the invalidity of the inmate's conviction or sentence could *not* be brought via section 1983 because permitting such an action would enable habeas

petitioners to evade the strict limitations Congress imposed on federal habeas relief. 512 U.S. at 487. That is, a suit "where an inmate seeks injunctive relief challenging the *fact* of his conviction or the *duration* of his sentence" is one that "fall[s] within the 'core' of habeas corpus" and is not "cognizable when brought pursuant to § 1983." *Nelson*, 541 U.S. at 643 (emphasis added).

3. Preserving this distinction is vital. Where the United States sees section 1983 as a method of vindicating federal supremacy, AEDPA reflected Congress's respect for comity, finality, and federalism instead, especially once an inmate's guilt has been affirmed by both state and federal courts. In such cases, section 1983 has distinct disadvantages that thwart, rather than further, those principles.

For example, section 1983 claims may significantly delay a State's ability to carry out a sentence. "[T]he filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure." *Preiser v. Rodriguez*, 411 U.S. 475, 495-96 (1973). Such a proceeding, "with its discovery rules and other procedural formalities," "can take a significant amount of time, very frequently longer than a federal habeas corpus proceeding." *Id.* at 496.

Section 1983 also allows inmates practically unlimited opportunities to hale States into court and delay their executions. For example, Florida changed its method of execution from electrocution, *see* Fla. Stat. § 922.105 (1999), to lethal injection in 2000, although prisoners still had the option to choose electrocution, *see* Fla. Stat. § 922.105(1) (2005). In 2005, Clarence Hill used his third motion for post-conviction relief in state court to argue that execution by lethal injection constitutes cruel and

unusual punishment under the Eighth Amendment. *Hill v. State*, 921 So.2d 579, 582 & n.1 (Fla. 2006) (per curiam). The trial court denied his motion as procedurally defaulted, and the Florida Supreme Court affirmed. *Id.* at 582. This Court denied review. *Hill v. Florida*, 546 U.S. 1219 (2006). Four days before his scheduled execution date, Hill brought an action in federal district court under section 1983, citing a medical journal and contending that lethal injection violated the Eighth Amendment. Brief for the United States as Amicus Curiae Supporting Respondents at 5, *Hill v. McDonough*, 547 U.S. 573 (2006) (No. 05-8794), 2006 WL 897024. He sought a preliminary injunction "barring defendants from executing [him] in the manner they currently intend." *Id.*

Section 1983 actions enabled Hill to bring his repetitive, meritless lawsuits, with all their attendant delays. And Hill could *keep* delaying his execution by challenging any improvements a State made to its method of execution until a *federal* court finally held that his claims were for no other purpose than delay. That is why section 1983 can, if this Court's limitations are ignored, provide an end-run around state court review. AEDPA's rules of presentment and default ensure that state courts may first assess the constitutionality of state action—thereby preserving important federalism concerns. *See Baldwin v. Reese*, 541 U.S. 27, 32 (2004). Although a State's ability to carry out an inmate's sentence is also at stake in a section 1983 suit, state courts have no inherent ability to address constitutional challenges brought through that mechanism. Even with the additional precautions afforded by the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), requiring a prisoner to exhaust state remedies, a prison

grievance system is hardly equipped to upend a State's entire execution regime.

4. None of these characteristics of section 1983 claims further the principles this Court and Congress have determined reign paramount once "a federal court of appeals issues a mandate denying federal habeas relief." *Thompson*, 523 U.S. at 556. At that point, "finality acquires an added moral dimension." *Id.* "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* And "[t]o unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (internal quotation marks omitted) (citation omitted). "When society promises to punish by death certain conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system." *Middlebrooks v. Parker*, 22 F.4th 621, 627 (6th Cir. 2022) (Thapar, J., statement respecting denial of rehearing en banc) (quoting *Coleman v. Balkcom*, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting from denial of certiorari)).

Requiring state prisoners to proceed through a petition for a writ of habeas corpus does not preclude those individuals from receiving the protections of federal constitutional law, but it does "leave[] primary responsibility" for enforcing that law "with the state courts." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Congress decided that "promoting comity, finality, and federalism" would be best served "by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance." *Id.* at 185 (alteration in original). In fact, as this Court observed, allowing

constitutional claims to sidestep state courts "frustrates the State's ability to honor [a petitioner's] constitutional rights." *Cone v. Bell*, 556 U.S. 449, 465 (2009).

5. Petitioner's counter-narrative—echoed by the United States—begins and ends with the fundamental misconception that state prisoners are entitled to have their constitutional claims decided by a federal court. But the idea that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises," has no support in either the Constitution or section 1983. *Allen v. McCurry*, 449 U.S. 90, 103 (1980). This Court has rejected arguments borne out of "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." *Id.* at 105. It should do so once more here.

B. A challenge to the validity of the only method of carrying out an execution challenges the validity of the sentence itself.

This Court's precedents addressing the overlap between section 1983 and habeas corpus require courts to take a nuanced approach to method-of-execution challenges. At some point, method-of-execution challenges can amount to attacks on a State's ability to implement lawful death sentences. When a capital defendant does so, he raises a claim which must be brought in habeas, as his challenge prevents the execution of an otherwise lawful death sentence altogether. Petitioner's challenge to the validity of the only means of carrying out his execution is a challenge to his sentence itself—and thus it must be brought in habeas. The counterarguments presented by petitioner and his aligned amici are without merit for

the reasons discussed in Respondent's brief. Rather than burden this Court with repetitive arguments, this brief will focus on the arguments presented by the United States.

1. This Court's precedents reveal why petitioner's claim must be brought in habeas. When this Court addressed David Nelson's method-of-execution challenge in 2004, it acknowledged that "[n]either the 'conditions'" of confinement label—referring to a section 1983 claim—"nor the 'fact or duration' label"—referring to a habeas claim—"is particularly apt" when an inmate "seek[s] to enjoin the use of a particular method of execution." 541 U.S. at 643-44. But it also recognized that "imposition of the death penalty presupposes a means of carrying it out." *Id.* at 644. In a State "where the legislature has established [the challenged method of execution] as the preferred method of execution, a constitutional challenge seeking to permanently enjoin the use of [that method of execution] may amount to a challenge to the fact of the sentence itself." *Id.* (citation omitted). Such a challenge must be brought in habeas—subject to all the strictures that Congress has imposed through AEDPA.

By contrast, in *Hill*, the Court concluded that relief that would cause only an "incidental delay" that would "not cast on [Hill's] sentence the kind of negative legal implication that would require him to proceed in a habeas action." 547 U.S. at 583. Nevertheless, in doing so, the Court again warned that "[i]f the relief sought [by an inmate's suit] would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper." *Id.* at 582.

The Court reiterated this distinction in *Bucklew v. Precythe*, where it recognized that "existing state law might be relevant to determining the proper procedural

vehicle for the inmate's claim," 139 S. Ct. 1112, 1128 (2019). The Court distinguished *Hill* by noting that "if the relief sought in a 42 U.S.C. § 1983 action would 'foreclose the State from implementing the [inmate's] sentence under present law,' then 'recharacterizing a complaint as an action for habeas corpus might be proper.'" *Id.* (alteration in original) (quoting *Hill*, 547 U.S. at 582-83).

Three times ought to be the charm: method-of-execution challenges are fundamentally different from those asking a State to modify other execution procedures. Because any new method, assuming a State is even able and willing to adopt it, requires new training, may necessitate new facilities, and will inevitably trigger new litigation, a successful method-of-execution claim will cause far more than "incidental delay." *Hill*, 547 U.S. at 583. Habeas is the only "proper procedural vehicle" for such a claim.

2. The United States responds to (at 24-25) this Court's eighteen-year concerns over method-of-execution claims with a shrug, contending that even if a State's execution procedure were held to be unconstitutional, the inmate's sentence remains "valid." The State, it says (at 24-25), can simply amend its execution method to authorize a constitutional one.

The United States attempts (at 14) to distinguish method-of-execution claims "from those that wholly foreclose the State from implementing the sentence," such as insanity claims under *Ford v. Wainwright*, 477 U.S. 399 (1986). In *Ford*, the Court held that the Eighth Amendment would be violated if Ford were executed while he was insane. *Id.* at 410. Thus, the United States explains (at 14), habeas is appropriate for those claims because the State would be constitutionally barred from

"carrying out the death sentence in any manner, unless and until the inmate regains competence." The United States' "distinction" only highlights why habeas is appropriate here: a method-of-execution challenge from an inmate that targets a State's sole legal method of execution would *also* "foreclose the State from implementing the sentence" until some future, uncertain date.

This argument ignores the practical realities attending both legislation and capital litigation with which the United States is no doubt familiar. When brought under section 1983, method-of-execution challenges allow prisoners to engage courts and States in a type of sentencing "Whac-a-Mole," *Middlebrooks*, 22 F.4th at 624 (Thapar, J., statement respecting denial of rehearing en banc). With each new method-of-execution change, "new facts" allow a prisoner back into federal court. *Id.* at 624-25. And even those States that have attempted *ex ante* to prevent the flood of method-of-execution challenges with more flexible legislation have legal limits on the methods they can adopt and the preferences of their citizenry to consider. *See, e.g.*, *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 868 (11th Cir. 2017) (citing Ala. Code. § 15-18-82.1(c), which allows Alabama inmates to choose between lethal injection and electrocution, and only if those two methods are held unconstitutional allowing any other constitutional method of execution).

For example, Nelson was sentenced to death in 1978, and 26 years later, three days before his scheduled execution, this Court was required to address one of what would prove to be several of Nelson's challenges to Alabama's execution procedures. In an almost unparalleled show of gall, Nelson first convinced courts to require the State to adopt his proposed alternative procedure, only then to challenge *that* procedure as unconstitutional. *See*

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In *Middlebrooks*, Judge Thapar observed that "Middlebrooks has been challenging his sentence in one form or another for thirty-two years—more than twice the time [the boy he tortured and killed] ever got to enjoy on Earth." 22 F.4th at 629 (Thapar, J., statement respecting denial of rehearing en banc). Middlebrooks first argued that Tennessee's lethal injection protocol was unconstitutional because of the State's use of pentobarbital. *Id.* at 622. Eight years later, he contended that midazolam would be unconstitutional, and demanded the State use pentobarbital. *Id.* "What changed? Tennessee can no longer access pentobarbital." *Id.*

This type of gamesmanship is all but universal in capital litigation. As a result, this Court has adopted an elaborate system of jurisprudence to ensure that "challenges to lawfully issued [capital] sentences" are resolved "fairly and expeditiously" precisely because prisoners with nothing to lose "attempt[] to use such challenges as tools to interpose unjustified delay." *Bucklew*, 139 S. Ct. at 1134.

3. But even setting aside the United States' newfound naiveté regarding capital litigation, this Court has made clear that the effect on the States is far more significant than the United States admits. As this Court has recognized, States have a sovereign interest in enforcing both their laws and their legally valid judgments. *See Nelson*, 541 U.S. at 644.

However unpopular capital punishment may be in particular circles, many States have decided that some crimes are so heinous that only the forfeiture of the offender's life can satisfy what justice requires. *Cf. With*

Death Penalty Back, Nebraska Looks Ahead to Executions, N.Y. TIMES (Nov. 9, 2016) (explaining how Nebraska voters overrode State legislators' attempt to end the death penalty). These States and their citizens are entitled to carry out these sentences in a timely manner even if some of their fellow countrymen do not approve.

Likewise, obligating a State to change the method through which it imposes a death sentence trenches on the will of the citizens of that State. Not all methods of execution are created equal in the eyes of the citizenry, even when those methods are plainly constitutional. Execution by firing squad, for example, "requires trained marksmen who are willing to participate," *McGehee v. Hutchinson*, 854 F.3d 488, 494 (8th Cir. 2017) (per curiam). Either as a result of "democratic pressures," history, or public policy, States have "shifted between various methods for executing the condemned in search of more humane execution methods." Bryce Buchmann, *Humane Proposals for Swift and Painless Death*, 19 Rich. J.L. & Pub. Int. 153, 163 (2016); *see also Bucklew*, 139 S. Ct. at 1125 (noting that changes in methods of execution to be more humane "occurred not through this Court's intervention, but through the initiative of the people and their representatives").

A State's selected method of execution also affects that State's penal system in other ways. Juries *think* about what a sentence of death will entail. In response to a defense counsel's objection when he sought to remind a Virginia jury (in 1988) that the defendant would be "strap[ped] in an electric chair and [given] twenty-five hundred volts," the judge responded that there was no need to "remind the jury that the method of execution prescribed in [Virginia] (as it has been for 79 years) is electrocution," as it is "something they surely already

knew." *Turner v. Commonwealth*, 364 S.E.2d 483, 489 (Va. 1988). New Hampshire's Supreme Court referred to the legislative history of its capital punishment statute as evidence that the reason for changing to lethal injection "was to make capital punishment more likely to be imposed in [the] state." *State v. Addison*, 87 A.3d 1, 157 (N.H. 2013) (citing N.H.S. Jour. 599 (1986)); *see id.* (quoting N.H.S. Jour. 599 (1986): "If we are going to have a death penalty we should be prepared to use it and this bill provides for the most humane and effective means of accomplishing what is unfortunately a necessary part of our state law.").

Changing the method of execution would require a "statutory amendment or variance," which represents both a significant invasion of state sovereignty and concomitant harm to our federal system. *Nelson*, 541 U.S. at 644. Requiring such a change before a State may execute the inmate "impos[es] significant costs on the State and the administration of its penal system." *Id.* Congress passed AEDPA to minimize such intrusions into state sovereignty without *at minimum* allowing the State's court system to address the claim in the first instance. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011).

4. The United States insists (at 8) that "nothing justifies differential treatment of method-of-execution claims based on whether state law currently authorizes the identified alternative." In support, it relies on the fact that "an inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." United States Br. at 15 (quoting *Bucklew*, 139 S. Ct. at 1128). But that argument goes to the *merits* of a method-of-execution challenge, not to the appropriate procedural vehicle for one.

That assertion likewise contradicts this Court's teachings, which plainly establish the significance of the then-existing laws under which a State sentences a criminal to death. In *Hill*, this Court noted that section 1983 was appropriate for Hill's challenge as "the injunction Hill seeks would not necessarily foreclose the State from implementing the lethal injection sentence *under present law*, and thus it could not be said that the suit seeks to establish 'unlawfulness [that] would render a conviction or sentence invalid.'" 547 U.S. at 583 (alteration in original) (emphasis added) (quoting *Heck*, 512 U.S. at 486). In other words, a suit that *would* prevent the State from implementing its execution sentence under present law *would* be an attempt to "establish unlawfulness [that] would render a conviction or sentence invalid." *Id.* (alteration in original).

That does not mean that a lawfully adopted method of execution chosen by a State cannot be unconstitutional as applied to a state prisoner. It does mean, however, that if the only legal method of implementing a death sentence is held to be unconstitutional, such "unlawfulness" may effectively invalidate the conviction or sentence itself. *See id.*

Moreover, the United States' myopic focus again overlooks another reason method-of-execution claims should be addressed first and foremost by state courts: leaving States as the primary adjudicators of constitutional claims against state sentences preserves the States' role as fellow sovereigns and laboratories of democracy. For example, although this Court has upheld the constitutionality of death by electrocution, *In re Kemmler*, 136 U.S. 436 (1890), and the firing squad, *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878), some States have rejected those methods. *See, e.g.*, *In re*

Kemmler, 136 U.S. at 444 (describing the Governor of New York recommending the State Legislature find a "less barbarous manner" of execution than hanging); *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (Nebraska Supreme Court holding that considering new facts concerning electrocution, that method is forbidden by the Nebraska Constitution). "While [this] Court has tolerated continuity in this area, the democratic processes have demanded change." *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007). By demanding that all constitutional objections to States' methods of execution *must* be heard by a federal court, petitioner and the United States seek to short circuit that process and minimize the import of the federalist system that lies beneath it.

II. Courts Are Perfectly Capable of Addressing Method-of-Execution Claims in Habeas.

While vigorously defending the view that federal courts should decide any and all constitutional challenges through plenary civil litigation, the United States also makes (at 20-23) the somewhat paradoxical argument that it will be "difficult" for federal courts to implement a rule acknowledging this Court's and States' concerns about method-of-execution challenges. Federal courts have no warrant to ignore a litigation regime created by Congress on the basis that such decisions may involve close calls or complex litigation: that is what federal courts exist to do.

A. After 18 years of this Court considering whether method-of-execution claims must be heard in habeas, and nearly 28 years since *Heck v. Humphrey*, courts have had plenty of notice—and practice—looking beyond a capital defendant's pleadings to determine whether a

challenge sounds in section 1983 or in habeas. For example, courts have developed rules to decide whether particular prison disciplinary actions challenge the fact of a sentence or merely its method, *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (per curiam), and whether a particular alleged breach of a plea bargain will or will not invalidate the entire sentence, *Mann v. Denton County*, 364 F. App'x 881, 883 (5th Cir. 2010) (per curiam), or even whether certain forms of deferred adjudication are convictions that trigger the *Heck* doctrine at all, *DeLeon v. City of Corpus Christ*i, 488 F.3d 649, 656 (5th Cir. 2007) (citing *McClish v. Nugent*, 483 F.3d 1231, 1251-52 (11th Cir. 2007)).

Nor is there any question that federal courts are perfectly capable of determining how to address when litigants have chosen the wrong vehicle and informing the parties to a suit of the ramifications of their pleadings. In fact, several federal and state courts, including this Court, have addressed method-of-execution challenges either brought in habeas or that those courts believed should have been brought in habeas. *See, e.g.*, *Stewart v. LaGrand*, 526 U.S. 115 (1999) (per curiam) (rejecting inmate's method-of-execution challenge in habeas because inmate had selected one of two methods offered by the State).

B. But the United States frets (at 9) that the potential "dual-track approach" for method-of-execution claims "add[s] unnecessary complexity to capital cases" because classifying claims "would turn on state-law distinctions that may be difficult for a federal court to discern and may be impossible to assess at the pleading stage" and courts would need to react if those classifications changed mid-litigation, such as if "an inmate revises his proposed alternative," or "the course of

discovery and other proceedings sheds new light on an alternative, or a State amends its law during the litigation." Moreover, according to the United States, "claims could bounce back and forth between different venues"; "multiple claims by the same inmate could be split"; "and the treatment of similar federal constitutional claims could differ based solely on the otherwise-irrelevant specificity of the execution-procedure law of the relevant States." United States Br. 9.

In other words, the United States seems to fear that, should courts begin to distinguish between types of method-of-execution claims, courts will forget how to: understand state law despite copious practice with habeas, diversity jurisdiction, and various joint federal-state programs and respond to unclear pleading by imposing pleading standards; address amended complaints, partial dismissals, and mootness; dismiss claims brought through the wrong vehicle; and oversee parallel, simultaneous, and concurrent litigation or enter stays if one case's result may moot another case.

The States give federal courts more credit than the United States apparently does. These are the fundamental functions of a federal court. *See generally* CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE (3d ed. 2021) (explaining how federal courts address these and other issues involved in complex litigation). Any concerns about federal courts proving unequal to the task of sorting section 1983 claims from habeas claims are both overblown and farfetched.

Addressing the United States' concerns one-by-one, the United States first claims (at 9) that Georgia's position is difficult because "[t]he proper classification of a claim would turn on state-law distinctions that may be difficult for a federal court to discern and may be

impossible to assess at the pleading stage." Assuming that the federal government is concerned—as it sounds—that federal courts will have difficulty with state law, that concern implicates far more legal areas than method-of-execution claims. Federal judges "assess at the pleading stage" state law every day. *See, e.g.*, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 483 (2020) (holding that an Arkansas statute is not preempted by a federal law); *Zurich Am. Ins. Co. v. Arch Ins. Co.*, 20 F.4th 250, 254 (5th Cir. 2021) (construing an insurance policy in accordance with Illinois state insurance law); *Santoro v. County of Collin*, No. 4:18-CV-00660-ALM-CAN, 2019 WL 5692186 at *4 (E.D. Tex. Aug. 16, 2019), *report and recommendation adopted*, No. 4:18-CV-660, 2019 WL 4686361 (E.D. Tex. Sept. 26, 2019) (construing Texas governmental immunity laws). Diversity jurisdiction is premised on the proposition that federal courts are equal to these sometimes difficult tasks—even in the capital context.

As for method-of-execution claims, federal courts can look at state statutes to determine what methods of execution are legally available in that State. This Court did as much in *Hill* and *Nelson* alike. And federal courts may always, when in doubt, require a party to clarify the scope or basis for his requested relief.

The United States' next set of concerns appears to doubt courts' ability to handle issues such as amended pleadings and mootness. The United States fears (at 9) that courts will need to react when "an inmate revises his proposed alternative," or "the course of discovery and other proceedings sheds new light on an alternative, or a State amends its law during the litigation." Moreover, courts would have difficulty disposing of method-of-execution claims that "could bounce back and forth between

different venues," or should be split between habeas and section 1983. United States Br. 9.

Again, federal courts have used stays to account for direct criminal appeals, AEDPA's one-year statute of limitations, and the limitations assigned to section 1983 claims under state law. *See, e.g.*, *Bucy v. Stroman,* No. A-15-CA-1040-SS, 2016 WL 4492195 *4 (W.D. Tex. Aug. 23, 2016) (staying a section 1983 case while the underlying criminal case was being prosecuted); *Hicks v. Swanhart*, No. 12-1633 (FLW), 2012 WL 6152901 *3 (D.N.J. Dec. 10, 2012) (staying a case while a criminal appeal was underway); *Guillory v. Wheeler*, 303 F. Supp. 2d 808, 811 (M.D. La. 2004) (staying section 1983 claim in federal court while a state criminal appeal was taking place). In fact, this Court addressed the appropriateness of a stay in a similar situation when some claims were unexhausted. *See, e.g., Rhines v. Weber*, 544 U.S. 269, 272-73 (2005). Although this Court found such stays generally inappropriate, it was clear that courts were familiar with the procedure. A litigant uninterested in pursuing a claim that "changes venue," or a court determining that such a change is sought for delay, can also simply "delete" the offending claim. *Id.* at 278.

Finally, if discovery changes an inmate's trial strategy, the court may allow an amended complaint. *See* Fed. R. Civ. P. 15(a)(2). If the State changes its authorized method of execution, the court will likely dismiss the claim as moot—another procedure that is very familiar to the lower federal courts. These garden-variety federal jurisdictional issues do not become insurmountable merely because a prisoner is required to raise a method-of-execution challenge in habeas rather than section 1983.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2022

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