

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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1 APPEARANCES:
2 MATTHEW S. HELLMAN, ESQUIRE, Washington, D.C.; on
3 behalf of the Petitioner.
4 MASHA G. HANSFORD, Assistant to the Solicitor General,
5 Department of Justice, Washington, D.C.; for the
6 United States, as amicus curiae, supporting the
7 Petitioner.
8 STEPHEN J. PETRANY, Solicitor General, Atlanta,
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 -- from the death sentence itself. And the
2 state has good reasons for doing that. That is
3 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
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 the 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 I'm -- far as I'm concerned, are you aware of
12 any legal impediment, constitutional or
13 otherwise, that would prevent the Georgia --
14 Georgia from amending its law to permit
15 execution by firing 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 -- well, two parts.
11 One, the question is what is the habeas writ,
12 and this isn't about invalidating a sentence.
13 But then, to the feasibility point that you are
14 -- you are talking about, the only way a
15 claimant gets relief under the Eighth Amendment
16 standard is to show that his proposed
17 alternative is 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 well, what would you say about the guilt-phase
25 argument?

1 MR. HELLMAN: If the guilt -- if the
2 conviction -- it's -- if I am to 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 -- the
14 claimant, 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 --

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 proposed 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 the -- as a legal matter, they are not
25 foreclosed from using it by any relief that we

1 would be able to obtain. And so to have these
2 questions turn on speculation as to what method
3 might ultimately be adopted and to take our
4 proposal and assume that is the one the state
5 might use 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 to look 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 talk about in the
22 briefing, many questions often where a proposed
23 alternative drug is given as the alternative,
24 but it might require licensing by a federal
25 government or -- or some other state actor, not

1 the Department of Corrections, to approve the
2 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 -- then step two really does
11 focus on the unique aspect or the -- I shouldn't
12 say unique -- nearly unique aspect of this kind
13 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 superadds 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: Pick up all that old
13 law -- I thought AEDPA was intended to get rid
14 of 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. Is to
15 change --

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

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

23 JUSTICE GORSUCH: I understand that
24 for Eighth Amendment purposes. But it does mean
25 that, as a practical matter, the state cannot

1 carry out the sentence or it must change its law
2 to do so, right?

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

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

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

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

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

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

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

1 JUSTICE GORSUCH: Still goes to 1983,
2 doesn't go to habeas then?

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

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

14 MR. HELLMAN: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

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

22 And on page 50 of the state's brief,
23 the state says that there would be an avenue for
24 pursuing that kind of claim in state court and
25 state post-conviction proceedings, and I just

1 wondered if you had a reaction to that.

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

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

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 MR. HELLMAN: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Ms. Hansford.

25

1

2

ORAL ARGUMENT OF MASHA G. HANSFORD

3

FOR THE UNITED STATES, AS AMICUS CURIAE,

4

SUPPORTING THE PETITIONER

5

MS. HANSFORD: Mr. Chief Justice, and

6

may it please the Court:

7

There's no sound reason to carve off

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claims like Petitioner's from the general rule

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that method-of-execution challenges must proceed

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under Section 1983. And to Justice Kavanaugh

11

and Justice Kagan's questions, a dual track

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system would add procedural complexity, creating

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delay and inviting gamesmanship.

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For instance, a claim that alleges

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multiple alternatives could proceed in separate

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actions in different venues, or a case may have

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to restart in a different court if a prisoner

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amends his complaint or if an appellate panel

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revives an alternative rejected by the Court.

20

And there's no compelling doctrinal

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reason for that approach. In fact, it would

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expand the scope of habeas to hold that a purely

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state law problem that does not invalidate a

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criminal judgment can somehow transform an

25

action into a core habeas claim.

1 I welcome the Court's questions.

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

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

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

24 JUSTICE SOTOMAYOR: Can I follow up on
25 that? As I know there are 10 states that --

1 like Georgia who allow -- who specify one method
2 in their law, and there are seven states who
3 allow multiple methods.

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

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

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

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

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

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

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

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

1 into account other reasons that an alternative
2 would be difficult to implement, like licensing
3 and other concerns.

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

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

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

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

24 And I -- I -- I think one of the
25 things that's difficult in this case is the

1 intuition that it's hard to see a lethal
2 injection challenge succeeding on the merits.

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

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

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

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

1 that that is not an attack on the validity of
2 the judgment but just the manner of carrying out
3 that judgment.

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

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

9 JUSTICE ALITO: Okay.

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

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

25 JUSTICE ALITO: Well, if it's a

1 question of state law, then what do we say about
2 Georgia law? Well, we predict that Georgia will
3 do what all these other states have done? Is
4 that what we -- we're supposed to do?

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

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

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

24 JUSTICE GORSUCH: I'm sure it's just
25 me, but I guess I'm a little confused. Could a

1 state make the method of execution part of its
2 judgment in such a way that any attack on it
3 would be required to go to habeas?

4 MS. HANSFORD: Yes, Justice Gorsuch.

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

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

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

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

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

23 JUSTICE GORSUCH: No, I understand
24 that.

25 MS. HANSFORD: -- in several --

1 JUSTICE GORSUCH: I understood that
2 point. So I guess it really does boil down to
3 what Georgia law says here then?

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

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

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

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

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

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

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

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

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

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

23 MS. HANSFORD: Yeah, I -- I -- I -- I
24 -- I -- I don't.

25 JUSTICE GORSUCH: Okay.

1 MS. HANSFORD: I think that the -- the
2 Malloy decision has crossed that bridge.

3 JUSTICE GORSUCH: All right. Thank
4 you.

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

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

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

24 We -- we recognize there are difficult
25 questions on both sides, and we take Bucklew to

1 say that kind of the standard basic difficulty
2 of changing the law isn't enough, but we do
3 think that the option is open to potentially
4 take into account if there are some extreme
5 difficulties.

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

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

19 So, if something is so important to
20 the state that it's in the constitution, perhaps
21 there would be a legitimate penological reason.
22 It's hard to imagine the state codifying just
23 one method of execution for no particular
24 reason. But, you know, if the state does
25 something extreme like in the

1 burning-at-the-stake example, it -- it does seem
2 like -- that the answer should probably be that
3 that case --

4 JUSTICE KAVANAUGH: Yeah. Back to --

5 MS. HANSFORD: -- that should go
6 forward on the merits.

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

13 MS. HANSFORD: I think --

14 JUSTICE KAVANAUGH: The first prong
15 being you haven't shown severe pain as
16 shorthand.

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

1 competing stays being entered, which -- which is
2 also not helpful to the litigation.

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

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

20 So there are a lot of protections for
21 the states. We don't want to in any way suggest
22 that the state's sovereignty considerations are
23 not significant here. But we -- we just submit
24 that that's not the test for whether AEDPA
25 applies or not. The application of AEDPA turns

1 on whether the validity of the judgment is being
2 attacked, and in this case, it is not.

3 If there are no further questions.

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

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

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

25 JUSTICE SOTOMAYOR: Thank you,

1 counsel.

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer, anything further?

4 Justice Alito?

5 Justice Kagan? No?

6 Okay. Thank you, counsel.

7 MS. HANSFORD: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Petraný.

9 ORAL ARGUMENT OF STEPHEN J. PETRANY
10 ON BEHALF OF THE RESPONDENTS

11 MR. PETRANY: Mr. Chief Justice, and
12 may it please the Court:

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

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

25 Execution is a distinct form of

1 custody. That's why prisoners can challenge
2 capital punishment in habeas to begin with.
3 And, here, Nance seeks to bar his custodian from
4 exercising that custody over him. That's habeas
5 relief. It doesn't matter whether someone
6 someday might be able to execute Nance if
7 Georgia were to authorize a different criminal
8 punishment.

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

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

23 Simply put, Nance could have filed in
24 state court. He could have filed a 1983
25 complaint that did not seek to bar lethal

1 injection entirely. Or he could have chosen not
2 to abandon his similar claims on
3 post-conviction. But what he can't do is get
4 around AEDPA by challenging his execution via
5 Section 1983.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Counsel, is the
8 method of execution a part of the sentence,
9 capital sentence, in this case?

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

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

23 And if they change what they say it
24 is, that might be subject to federal constraints
25 in terms of ex post facto and so forth, but

1 there is nothing that says that a state must
2 resentence a prisoner in order to change their
3 sentence.

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

9 And so I think, if you go down the
10 road of allowing these challenges to custody in
11 1983, the Court is effectively saying we are
12 telling states this is not part of their
13 sentence.

14 JUSTICE KAGAN: Well, Mr. Petraney,
15 doesn't Georgia law itself separate the sentence
16 of death from the method of execution?

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

23 And then there's another provision,
24 just by death. Another provision that says,
25 "all persons who have had imposed upon them a

1 sentence of death shall suffer such punishment
2 by lethal injection."

3 So your own statutes are clearly
4 saying there's the -- it shall be punished by
5 death, there's the sentence. And if you're
6 given that sentence of death, here's the way we
7 propose carrying it out.

8 MR. PETRANY: So a few points on that,
9 Justice Kagan.

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

16 I mean, I think that's for states to
17 say.

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

23 And -- and that's why nobody needed a
24 resentencing when you changed your method of
25 execution. So I guess I just don't see what

1 argument you have here.

2 MR. PETRANY: Well, so a couple
3 points, Your Honor.

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

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

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

23 And so, while my friends from the
24 other side focus again and again and again on
25 sentences, they're really talking about a

1 different question. The question is whether
2 custody is being stopped here, not whether the
3 sentence is being vacated.

4 And, in fact --

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

11 Mr. Nance is saying he concedes the
12 validity of the sentence of death.

13 MR. PETRANY: Well, so a couple of
14 points, Your Honor.

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

23 And so similarly here, even if the,
24 you know, the sentence per se still exists in
25 some form, if you no longer can be executed,

1 then that's a bar against custody, but also Heck
2 made clear, and I think the follow-on cases as
3 well, it used the term "validity." It didn't
4 use the term "vacate."

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

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

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

23 103 of the Petitioner's appendix, the
24 relief that he requested was to enjoin the use
25 of any lethal injection at all. So, if this --

1 if -- if Nance were to succeed, his custodian
2 could not exercise this custody over him.

3 That is mainline habeas relief. And I
4 think that this focus on the sentence is really
5 an attempt to get away from that particular
6 point, and I also think that it creates a lot of
7 practical problems in terms of looking at state
8 law.

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

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

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

24 JUSTICE KAVANAUGH: You -- sorry, keep
25 going.

1 MR. PETRANY: Well, I was just going
2 to say, on the other hand, I think that any
3 practical concerns with our approach are -- are
4 vastly overblown. And I can get into those.
5 But, of course, Justice Kavanaugh, if you have a
6 question.

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

11 MR. PETRANY: Well, most of --

12 JUSTICE KAVANAUGH: That doesn't
13 preclude your argument here. I'm just -- is
14 that accurate?

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

20 And there are lots of reasons to
21 dismiss Mr. Nance's claim. And so we relied on
22 something else.

23 JUSTICE KAVANAUGH: And it was
24 dismissed here under 1983 because it was too
25 late, right?

1 MR. PETRANY: I'm sorry? I didn't --
2 I apologize.

3 JUSTICE KAVANAUGH: Because it was too
4 late? There had been delay?

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

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

12 MR. PETRANY: It -- it did, although,
13 as my friend on the other side points out, at
14 least one appellate court judge disagreed with
15 --

16 JUSTICE KAVANAUGH: Right.

17 MR. PETRANY: -- that conclusion.

18 JUSTICE KAVANAUGH: So I guess that
19 leads to my bigger-picture question, which I've
20 indicated to the other side as well, we've
21 largely shaped the interaction of 1983 and
22 habeas -- we're not, kind of interpreting a
23 statute here, figuring out where our precedents
24 lead and what makes the most sense in terms of
25 the interaction of the two things, the two

1 routes here.

2 And so we have some discretion, I
3 think, a gray area, and it seems like we've been
4 on a 15-year effort to organize how these
5 method-of-execution claims should proceed,
6 culminating in Bucklew, which gave pretty clear
7 directions about that and also repeated the Hill
8 versus McDonough thing about undue delay and too
9 late.

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

16 MR. PETRANY: Well, so a couple of
17 points, Your Honor.

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

1 AEDPA.

2 And I think that to the extent that
3 this is a challenge to custody -- and that's our
4 argument --

5 JUSTICE KAVANAUGH: Let me -- let me
6 supplement and say I think both sides have good
7 arguments, at least plausible arguments about
8 how to characterize the sentence.

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

20 And so I think that that's one
21 indication of where the Court should go. I
22 also, to just get into some of the supposed
23 practical problems here, I -- I haven't really
24 heard any particularly difficult practical
25 problems.

1 My friend from the United States
2 suggests, well, maybe someone would amend their
3 complaint. That happens a lot. And, yeah, if
4 you amend your complaint and now you have a
5 different claim or a different theory or
6 something, that can change where things go. I
7 mean, to just use Balisok as an example --

8 JUSTICE KAVANAUGH: What about new
9 facts? You know, you -- you've gotten older and
10 you have a new medical condition that will make
11 the lethal injection feel like torture?

12 MR. PETRANY: Well, then you -- then
13 you raise that claim, of -- of course. I mean,
14 -- and -- and we -- and we think they absolutely
15 can.

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

24 But even if that weren't the case,
25 even if Georgia were to someday decide, well,

1 you know, in our own system, we want to put
2 these into a different box, Owen versus Hill
3 makes clear that you can raise those challenges
4 in a declaratory judgment action in Georgia
5 state court. So there is no question that you
6 can raise that claim.

7 The only -- I mean, in a lot of
8 circumstances, of course, it's going to fail
9 because of timeliness or the merits or something
10 like that, but it's definitely cognizable in
11 Georgia state court.

12 And so what this ultimately boils down
13 to is, you know, to paraphrase Justice Scalia,
14 Nance just wants another federal district court
15 to rule on one of his claims.

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

24 And it seems as though that's exactly
25 what Bucklew said should not happen. Bucklew,

1 all nine justices agreed on one point, which is
2 that somebody in Mr. Nance's position was
3 entitled to raise a alternative method of
4 execution that had not been authorized by state
5 law.

6 And the Court said we see little
7 likelihood that an inmate facing a serious risk
8 of pain will be unable to identify an available
9 alternative for that reason, because he was
10 entitled to identify an alternative that was not
11 authorized. There was a concurrence that really
12 underscored that point.

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

21 Now is that really a -- a reading of
22 Bucklew that would not be, I don't know,
23 embarrassing?

24 MR. PETRANY: No, Your Honor, I don't
25 think that's at all what we're saying. Nance

1 can absolutely file this sort of a claim in
2 state court any times he wants. And, of course,
3 he can file it on his initial post-conviction
4 time, which he did. He filed very similar
5 lethal injection claims. He also included a
6 claim in his federal habeas petition that his
7 counsel was ineffective for failing to raise
8 these sorts of claims. So Nance himself is kind
9 of the advertisement for the fact that these are
10 available all the way along the line.

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

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

1 No matter what, of course, this Court
2 would have certiorari review if there were some
3 extreme breakdown in state court. And in most
4 cases, I think that petitioners are going to be
5 able to raise these across-the-board
6 no-lethal-injection-whatsoever kind of claims in
7 their first federal habeas petition. But I
8 don't see this as cutting back on Bucklew at
9 all, any more than Heck or any of these other
10 cases cut back on substantive rights.

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

20 Is it really the case that the state
21 courts would be wide open for -- you're --
22 you're saying wide open has a forum. Is that
23 really true in these kinds of claims?

24 MR. PETRANY: I think it is, Your
25 Honor. Of course, if someone has had a ripe

1 claim for eight years or something along those
2 lines and then tries to file it and gets booted
3 out of court, that's not unique to this area of
4 the law. It's not unique to Georgia courts.
5 Federal courts would do the same thing. So
6 there might be timeliness concerns or merits
7 concerns.

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

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

24 JUSTICE BARRETT: You say in the
25 footnote on this page that if, in a hypothetical

1 situation, you say that would be unlikely to
2 occur, there were no state forum in which this
3 kind of Bucklew claim could be pressed, that the
4 Petitioner could raise a due process challenge
5 saying, you know, I just had no forum for my
6 claim.

7 What would be the procedural vehicle
8 for asserting that? 1983?

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

20 I don't think that, you know, the
21 distinction at that point between 1983 and
22 habeas is going to be as important because we're
23 in, again, a -- an unrealistic hypothetical
24 world where you've had no opportunity over the
25 course of, you know, your entire time in prison

1 to bring this sort of a claim.

2 But I think, again, this is getting
3 very far away from what is, in this case, a
4 mainline case. This is a petitioner who says
5 you cannot execute me by the only way you're
6 authorized to execute me. At the end of the
7 case, the warden would not be able to exercise
8 this custody over the Petitioner if he
9 succeeded.

10 That makes it habeas. That makes it
11 AEDPA.

12 JUSTICE SOTOMAYOR: Counsel, how is
13 this different from any of the cases where
14 states have said a particular form of medical
15 treatment is too expensive, we don't have the
16 budget for it?

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

1 All of these things require changes
2 either in state statutory law or regulatory law,
3 and we've never suggested that curing a
4 violation on its face because a law prohibits
5 something stops a 1983.

6 But I just experienced in the news
7 Florida changing its law with respect to one of
8 its state citizens in a matter of weeks, if not
9 days. Is there something that stops Georgia
10 from acting expeditiously if the Court were to
11 rule in its favor? You have lots of reasons why
12 the Court shouldn't in a 1983 action, but let's
13 do the worse.

14 MR. PETRANY: Well, so I think, as to
15 your first point, Justice Sotomayor, I want to
16 be clear. We're not saying that 1983 actions
17 don't reach state law. They do. They just
18 don't reach state -- or they just don't reach,
19 excuse me, challenges to custody.

20 So you could have to rewrite your
21 entire constitution --

22 JUSTICE SOTOMAYOR: Well, that --

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

24 JUSTICE SOTOMAYOR: -- we get back --

25 MR. PETRANY: -- wherever.

1 JUSTICE SOTOMAYOR: -- to our main --

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

3 JUSTICE SOTOMAYOR: -- argument, which
4 is --

5 MR. PETRANY: That's --

6 JUSTICE SOTOMAYOR: -- what's the
7 judgment? Is it custody or is it death? And is
8 the method of execution separate from that? But
9 that's assuming that argument, you win on that
10 argument, which I still have a hard time
11 understanding how you do because, in Dawson, the
12 Georgia Supreme Court saw the two as different
13 in the statute.

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

18 JUSTICE SOTOMAYOR: Well, could you
19 just answer my bottom-line question?

20 MR. PETRANY: Yeah. I -- if you could
21 remind me --

22 JUSTICE SOTOMAYOR: Can -- can --

23 MR. PETRANY: -- Justice Sotomayor,
24 what the -- what the question is.

25 JUSTICE SOTOMAYOR: -- change a

1 budget, change a law, change a regulation -- is
2 there anything that precludes the state from
3 doing that if it were to become necessary?

4 MR. PETRANY: Well, they can do --
5 they can do that. The -- the Court --

6 JUSTICE SOTOMAYOR: And they could do
7 it in a reasonable amount of time if they chose?

8 MR. PETRANY: Well, I suppose it
9 depends, I mean, depending on the -- the -- the
10 hypothetical situation, but, yeah, I mean, at --
11 at some point, a state can -- can change its
12 laws, of course, or if it's constitutional, it's
13 going to be very difficult.

14 JUSTICE SOTOMAYOR: You're not
15 suggesting that, unlike the -- our U.S.
16 Constitution, that you need two-thirds of the
17 state to change the law, two-thirds of the --

18 MR. PETRANY: Well, I --

19 JUSTICE SOTOMAYOR: -- districts to
20 change?

21 MR. PETRANY: -- Your Honor, I can't
22 speak to every state constitution. I'm sure
23 some of them are -- are very difficult to amend.
24 But my -- my underlying point is --

25 JUSTICE SOTOMAYOR: Well, this is not

1 a constitutional issue, but I'm asking you.

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

3 JUSTICE SOTOMAYOR: All right. It's a
4 statutory change.

5 MR. PETRANY: Yeah, I mean, Georgia
6 theoretically could do it, but the warden can't.
7 And the order is going to the warden. I mean,
8 this is an injunction against a particular
9 person who wants to exercise a particular form
10 of custody over Nance. And that's habeas
11 relief. That's classic habeas relief. And
12 that's the bottom of our argument.

13 JUSTICE SOTOMAYOR: Thank you,
14 counsel.

15 MR. PETRANY: I just want to very
16 briefly touch on the second or successive issue.
17 The text of 2244 is exceedingly clear. My
18 friend on the other side has barely even
19 mentioned the text and I think for good reason.

20 It does not do him any favors. If we
21 -- if the Court were to adopt a rule that said,
22 well, if you couldn't have done this before or
23 if this wasn't ripe at the time of your first
24 habeas petition, we're not going to apply the
25 second or successive bar, we would, in fact, as

1 Justice Alito indicated, just be back in abuse
2 of the writ days.

3 This Court has explicitly acknowledged
4 that's not what Congress wanted. It very
5 specifically picked the first half of a two-part
6 test and said, if it's second or successive,
7 it's barred with these very narrow exceptions,
8 which themselves would be all but meaningless if
9 one adopted Nance's rule in this case.

10 And, again, none of this goes to
11 whether or not Mr. Nance can file this claim
12 somewhere. He is going to be able to file the
13 claim. It's just a question of is it in state
14 court or is it in a federal district court.

15 If the Court has no further questions.

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

24 Well, can he file this one or not?

25 MR. PETRANY: Well, in -- in federal

1 court, if he's already filed a prior application
2 --

3 JUSTICE BREYER: No, I'm just saying
4 to you, in your opinion, if we decide for you
5 and you win, can the individual file the claim
6 that this method they're going to execute me is
7 unconstitutional? Can he do it or not?

8 MR. PETRANY: In state court,
9 absolutely. We think he'll lose.

10 JUSTICE BREYER: In -- oh, in -- in
11 habeas.

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

14 JUSTICE BREYER: No, okay. So you're
15 --

16 MR. PETRANY: -- litigated a federal
17 habeas petition, yes.

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

20 MR. PETRANY: Well, Your Honor, he
21 did, in fact, file claims that were very similar
22 to this one.

23 JUSTICE BREYER: No, no, no, no. But
24 I'm -- take my case. Ten years passes. There
25 was an old way that he didn't object to. Now

1 they changed the law. The new way he does
2 object to.

3 MR. PETRANY: Yes, Your Honor. There
4 are some claims that are not going to be able to
5 be brought in a habeas petition. And this Court
6 has recognized this on numerous occasions. Just
7 --

8 JUSTICE BREYER: Well, that's what I'm
9 saying.

10 MR. PETRANY: Yes. Just --

11 JUSTICE BREYER: It's a new claim. I
12 mean, it's not a new -- sorry, it's a new method
13 of execution. He thinks it's torture and it
14 wasn't there before while he filed 15 other
15 habeas petitions.

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

19 And can he do it or not?

20 MR. PETRANY: Not in a federal habeas
21 petition. He could do it under state law, where
22 he would have to establish, you know, the -- the
23 merits of his claims. But that is -- again,
24 that's not unlike plenty of other claims that
25 drop out because of the way Congress wrote

1 AEDPA.

2 So, to just take one example, in
3 Burton versus Stewart, the Court held that
4 various claims that the Petitioner had were just
5 gone for good because he had already filed and
6 litigated a first habeas petition, and at the
7 time, those other claims were not available.

8 He couldn't file them at that time
9 because they were not exhausted yet. So
10 Congress was aware, and this Court has said on
11 numerous occasions that, yeah, every once in a
12 while there's going to be a type of a claim or
13 something that comes up that doesn't get federal
14 district court initial review. And we --

15 CHIEF JUSTICE ROBERTS: Well, you --

16 MR. PETRANY: -- trust state courts to
17 do that.

18 CHIEF JUSTICE ROBERTS: -- mentioned
19 earlier that -- you're -- you're saying he
20 should go into state court, and you mentioned
21 earlier that he was likely -- would be likely to
22 lose there.

23 MR. PETRANY: On the merits, Your
24 Honor, or because he -- his -- you know,
25 everything was untimely, which would be the same

1 in Section 1983. It would be either way. And
2 wherever he goes, we think his claims would be
3 untimely. But he's at least got a cognizable
4 cause of action in state court. It's just we
5 think he would lose for other reasons.

6 CHIEF JUSTICE ROBERTS: Okay. Well,
7 he -- you say go there and he's going to lose.
8 And yet you -- you're saying that he can't file
9 in federal court because he filed a prior habeas
10 petition, but the claim was not there when that
11 prior habeas petition was filed, Justice
12 Breyer's hypothetical about, you know, a change
13 in his medical condition, that it is now a
14 different situation to have lethal injection.
15 And now that does seem like a pretty daunting
16 Catch-22.

17 MR. PETRANY: So, Your Honor, two
18 points.

19 First, just to be clear, that isn't
20 actually the case here. It was ripe at the time
21 --

22 CHIEF JUSTICE ROBERTS: Well, yeah.

23 MR. PETRANY: -- of his first federal
24 habeas petition, but, yes, there are theoretical
25 possibilities of this happening, but Congress

1 was well aware of that, and, in fact, the very
2 terms in Section 2244 make that clear.

3 The fact that Congress exempted such
4 narrow categories from the second or successive
5 bar shows --

6 CHIEF JUSTICE ROBERTS: But, by that,
7 you're -- you're assuming that AEDPA, when
8 Congress passed it, they understood that it
9 would have this kind of coverage.

10 MR. PETRANY: I -- well, I think that
11 Congress absolutely knew it would have this kind
12 of coverage. In fact, this was the point of
13 AEDPA. The reason that Congress enacted 2244 in
14 its current form was to narrow and/or, to use
15 this Court's terms, make more stringent the bar
16 on successive petitions.

17 Previously, at --

18 CHIEF JUSTICE ROBERTS: Well, I know.
19 But this is, I mean, from, you know, the Ford
20 case, for example, the question of how you want
21 to interpret successive petitions. I mean, I'm
22 sure that you've consulted your interests
23 carefully, but you're going to be confronting
24 difficult challenges if you prevail here.

25 MR. PETRANY: Well, I think that the

1 point of AEDPA was that state courts getting
2 these difficult challenges is what was supposed
3 to happen. I mean, AEDPA was, again, which this
4 Court has confirmed, was Congress's decision
5 that state courts is where almost all of this
6 should happen, and only in extreme circumstances
7 should a federal court be getting involved.

8 And so it's not at all surprising that
9 state courts would be the ones to deal with
10 these constitutional issues. In fact, that is
11 the entire point of AEDPA, was to force them
12 into state courts so that states could, in fact,
13 effectuate their own judgments and in many cases
14 just avoid an unnecessary clash of sovereigns.

15 And that happens all the time. States
16 stay their own executions all the time. They
17 rule for prisoners all the time. So states are
18 more than capable of carrying out their federal
19 constitutional duties. And that was what
20 Congress thought when it passed AEDPA.

21 So it's --

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

25 MR. PETRANY: Well, I think that his

1 claims are untimely. He -- he claims
2 essentially that his veins are problematic and
3 that he's -- and that Gabapentin might interfere
4 with the -- the lethal injection.

5 The veins he has known about for
6 decades. His filings repeatedly, again and
7 again and again, said, I have bad veins due to
8 long intravenous drug use and so forth.

9 The Gabapentin he pleaded that he had
10 started in 2016, which was roughly four years
11 before he filed his 1983 --

12 CHIEF JUSTICE ROBERTS: And you think
13 --

14 MR. PETRANY: -- complaint.

15 CHIEF JUSTICE ROBERTS: -- were --
16 were the facts otherwise, this was, in fact, a
17 new condition that developed, I mean, that you
18 -- you -- he would prevail in state court?

19 MR. PETRANY: Well, he would at least
20 get past the timeliness bars. Then he has to
21 make the claim, you know, the Bucklew claim. Is
22 this, in fact, a feasible alternative? Does the
23 state not have a legitimate penological interest
24 in what it's doing? Will lethal injection
25 actually cause the kind of pain that he claims

1 and so forth?

2 You know, he has to win on the merits,
3 but, yes, it would be there for him to make that
4 claim as long as he gets it in, you know, on
5 time.

6 JUSTICE KAVANAUGH: Were our recent
7 string of religious advisor cases properly
8 bought -- brought in 1983 to the extent that it
9 required a change in state law?

10 MR. PETRANY: So, Your Honor, as I
11 understand those cases, they didn't require a
12 change in state law. It was just a practice.
13 And so they were, in fact, properly filed in
14 1983.

15 JUSTICE KAVANAUGH: Suppose they were
16 in state regulations that had to be changed,
17 though.

18 MR. PETRANY: Yeah, so, of course,
19 that -- that case isn't actually presented here.
20 And there are slightly --

21 JUSTICE KAVANAUGH: Right. Would --
22 would --

23 MR. PETRANY: -- different concerns.

24 JUSTICE KAVANAUGH: So, if a state
25 puts no religious advisors into the execution

1 room into the state law starting tomorrow --

2 MR. PETRANY: Mm-hmm.

3 JUSTICE KAVANAUGH: -- will those
4 claims now have to be brought in habeas rather
5 than 1983 and then barred?

6 MR. PETRANY: Yes. So I think that
7 they would have to be filed in state court and
8 they would have very good chance of succeeding.
9 And so I think states are very unlikely to
10 handicap --

11 JUSTICE KAVANAUGH: But no -- no
12 federal forum available for that claim?

13 MR. PETRANY: Well, of course, to the
14 extent that, you know, state court goes
15 completely rogue, there's still, you know,
16 review by this Court available at the end, which
17 is what Congress --

18 JUSTICE KAVANAUGH: By federal
19 district court, I should say.

20 MR. PETRANY: Yes. Yes. No.
21 Exactly, no federal district court review in
22 that very unlikely and, as far as I'm aware,
23 like, essentially, you know, never happens kind
24 of circumstance, but I think to --

25 JUSTICE KAVANAUGH: Well, it does

1 point out the oddity, I think, that -- I don't
2 -- I don't know that anyone paused to say, boy,
3 this religious advisor claim should be in
4 habeas.

5 MR. PETRANY: Well, Your Honor, at
6 least as I understand it, it didn't need to be
7 in habeas because it was not, in fact, a legal
8 requirement. It was just something the warden
9 could or could not do.

10 JUSTICE KAGAN: But one could easily
11 imagine -- I mean, you said very rare. One can
12 easily imagine those -- these sorts of
13 requirements appearing in prison regulations,
14 which have the status of law.

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

19 Now, if it is a legal regulation that
20 would, in fact, be something that the warden
21 can't get around, that would change things
22 potentially.

23 But there are two points here. The
24 first is states have no real incentive to make
25 their own judgments harder to effectuate by

1 making parts of them details they don't really
2 care about. If they really care about the
3 details, then maybe they put them into statutes,
4 but, if they don't, you're in a situation where
5 they can't carry out a sentence or something
6 like that because, you know, someone said, I
7 want a -- I want a religious minister in the
8 room, and under state law, they can't have them
9 in there. That means now they can't execute
10 this person.

11 And also, to the extent that there
12 are --

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

17 MR. PETRANY: Well, no. It's -- they
18 do make it part of their law, Your Honor. And I
19 think that to the extent there's any concern
20 about, well, what could states do or so forth,
21 as I understand it, my friend on the other side
22 does not contest that if a state said, well,
23 you'd have to be resentenced, you know, a court
24 would just have to check a box that says, all
25 right, now we're sentencing you to death by this

1 new method or something like that, that that
2 would, in fact, require these to go to habeas.
3 This -- this focus on the sentence, I think, is
4 improper.

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

9 And, again, they have no incentive to
10 do that. There's a reason that they don't put
11 details they don't care about into their
12 statutes and regulations. There's a reason that
13 Mr. Nance has not been able to come up with any
14 particularly problematic state statute or
15 anything like that, because if then there is a
16 problem with that drug.

17 If you -- if you say in your statute,
18 well, it can only be pentobarbital, well, if
19 they can't get any pentobarbital or if there's
20 something wrong with pentobarbital, then all the
21 executions stop, all the criminal judgments
22 can't be effectuated.

23 JUSTICE BARRETT: Can I ask a
24 clarifying question about the religious advisor
25 one? I -- I -- I'm probably just not tracking

1 the position. But I guess, if a religious
2 advisor claim was brought and we said that it
3 was unconstitutional for the state to have a law
4 or regulation prohibiting a religious advisor
5 from being in the room, why wouldn't the
6 execution go forward then with a religious
7 advisor because the state law would essentially
8 be unenforceable in that situation? Why would
9 it stop the execution?

10 MR. PETRANY: Well, they're not -- to
11 be clear, Your Honor, they wouldn't be
12 conflicting. If the federal court ordered the
13 warden to perform the execution, then, yeah, the
14 -- the state law would kind of have to give way.

15 But what the federal court would be
16 doing was just entering an injunction saying
17 don't execute this person without a religious
18 advisor in the room. And because state law
19 doesn't let him do that, he's just in a
20 situation where he can't execute that person.

21 And to some extent, that explains the
22 big difference between death penalty-like claims
23 and just your ordinary 1983 challenge to, you
24 know, a condition of prison confinement or
25 something, where just because you enjoin some

1 prison regulation or even statute doesn't mean
2 you're releasing the prisoners.

3 JUSTICE BARRETT: Mm-hmm.

4 MR. PETRANY: It's not -- it's
5 understood they're still going to be in prison,
6 whereas, here, if you stop them from doing it
7 the only way the state has authorized, well,
8 then the execution just stops, and that's habeas
9 relief.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas, anything further?

13 Justice Breyer?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kagan?

17 Justice Gorsuch?

18 JUSTICE KAVANAUGH: I have -- sorry --
19 two quick ones just to follow up on Justice
20 Barrett's. If the Court ruled that you had to
21 have the religious advisor present in the room
22 and state law did not allow that, wouldn't the
23 -- I guess I'm -- maybe I'm missing this, but
24 state law would have to change, or I guess the
25 state law just would be deemed unenforceable?

1 That might be her question.

2 MR. PETRANY: Yeah, the state law
3 would have to change in order to carry out the
4 execution. Right? The state doesn't have to
5 change its law. Maybe it could --

6 JUSTICE KAVANAUGH: And your -- and
7 your point --

8 MR. PETRANY: -- it could just not
9 carry out the execution -- the warden could just
10 not carry out the execution.

11 JUSTICE KAVANAUGH: And that would be
12 a habeas situation.

13 MR. PETRANY: Yes. No. Yes, we do
14 think that would be a habeas situation, very
15 unlikely to arise, but, yes, and you would have
16 to go to state court first, then a federal
17 habeas petition after.

18 JUSTICE KAVANAUGH: And second
19 question, don't take it the wrong way, but if
20 you were to lose in this case, is it better for
21 the State of Georgia to lose on the 1983 point
22 or to lose on the second or successive point?

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

1 It's hard for me --

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

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

5 JUSTICE KAVANAUGH: -- what we're
6 talking about.

7 MR. PETRANY: -- hard for me to say
8 that I have, you know, a preference given that I
9 -- I think we're correct on both issues. I
10 think that it would very much depend on what the
11 Court said about the first question and what the
12 Court said about the second question.

13 If -- if the Court was able to come up
14 with some way on the first question that was --
15 you know, did not damage habeas law, the
16 understanding of habeas as a challenge to
17 custody and all those things, I -- again, I
18 don't think the Court can do that, but then
19 maybe that wouldn't be such a -- you know, such
20 a problem.

21 Similarly, with second or successive,
22 if -- if it was another Panetti-like one-off
23 carveout, that's very different from a rule that
24 says, well, actually, just any claim that wasn't
25 available previously.

1 So it's -- it's very hard for me to
2 say --

3 JUSTICE KAVANAUGH: Yeah.

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

6 JUSTICE KAVANAUGH: Very helpful.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Rebuttal, Mr. Hellman?

11 REBUTTAL ARGUMENT OF MATTHEW S. HELLMAN

12 ON BEHALF OF THE PETITIONER

13 MR. HELLMAN: Thank you, Mr. Chief
14 Justice. Just a few quick points.

15 First of all, as to what Georgia law
16 contains, I do refer the Court to Dawson v.
17 State, which is crystal-clear from the Georgia
18 Supreme Court that the method of execution is
19 not part of the sentence of death.

20 And I think my friend on the other
21 side more or less concedes that because he says
22 -- he says it does not matter to his argument
23 because his argument is about custody.

24 Well, let's talk about custody for a
25 moment. Point number one, characterizing this

1 claim as seeking release from custody is odd to
2 say the least to begin with because, of course,
3 the death sentence remains in place and the
4 state may use any legal method of execution to
5 carry it out. That leaves my friend to say but
6 the warden might not be able to adopt particular
7 procedures.

8 Method-of-execution claims of all
9 stripes involve alternatives where there will be
10 a question about what the warden can or cannot
11 do on his own or her own, for example, whether
12 or not the warden could obtain a particular
13 drug, whether or not the warden would need
14 approval from some other regulatory entity,
15 perhaps a federal entity or a state entity, in
16 order to carry out the execution.

17 Making the habeas/1983 question turn
18 on the answer to that inquiry, which will often
19 require factual findings and complicated
20 assessments, is a recipe, as I said at the
21 beginning, for delay, confusion, and
22 arbitrariness in these cases. So we recommend
23 the Court not go down that road, which takes us
24 to Section 1983, which has been here for 150
25 years and provides the tools to courts to deal

1 with dilatory claims, estopped claims, and any
2 -- any other claim that does not warrant relief.

3 All we are asking for is the Court to
4 apply its 1983 precedents and allow this claim
5 to be heard on the merits so that those
6 questions may be determined.

7 We ask the Court to reverse. Thank
8 you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 1:17 p.m., the case was
12 submitted.)

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