RECEIVED

Dec 27 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

FREDDIE EUGENE OWENS, BRAD KEITH SIGMON, GARY DUBOSE TERRY, and RICHARD BERNARD MOORE, *Respondents-Appellants*,

v.

BRYAN P. STIRLING, in his official capacity as the Director of the South Carolina Department of Corrections, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; and HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina, *Appellants-Respondents*.

AMENDED FINAL BRIEF OF RESPONDENTS-APPELLANTS

Lindsey S. Vann (No. 101408)
Emily Paavola (No. 77855)
Allison Franz (No. 105189)
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
506 Pettigru (29601)
P.O. Box 6938
Greenville, SC 29606

John H. Blume (No. 743)
CORNELL LAW SCHOOL
112 Myron Taylor Hall
Ithaca, NY 14853

John Christopher Mills (No. 9067)
J. CHRISTOPHER MILLS, LLC
2118 Lincoln Street
Columbia, SC 29202

Counsel for Respondents-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

SOUTH CAROLINA CASES

TABLE OF AUTHORITIES—Continued

Page(s)

CASES FROM OTHER JURISDICTIONS

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

APPELLANTS' STATEMENT OF THE ISSUES ON APPEAL

I. Whether electrocution and the firing squad are constitutional methods of execution under article I, section 15 of the South Carolina Constitution.

II. Whether Act 43 violates the State and Federal Ex Post Facto Clauses when Respondents' punishment was—and remains—death.

III. Whether "available" in Act 43 has a discernable meaning that provides an intelligible principle for SCDC and Director Stirling to carry out the General Assembly's directive.

IV. Whether Respondents' two statutory claims, which account for less than a page of analysis in the circuit court's order, provide any basis for affirming the circuit court's decision to enjoin the use of methods of execution and declare Act 43 unconstitutional.

RESPONDENTS' RESTATEMENT OF THE ISSUES ON APPEAL

I. Whether death in the electric chair violates article I, section 15 of the South Carolina Constitution, where the record supports the trial court's findings that it is a cruel, unusual and corporal punishment.

II. Whether death by firing squad violates article I, section 15 of the South Carolina Constitution, where the record supports the trial court's findings that it is a cruel, unusual and corporal punishment.

III. Whether Act 43 is either unconstitutionally vague or an unconstitutional delegation of legislative authority to an executive agency.

IV. Whether the term "available" in Act 43 requires the Director of the Department of Corrections to take any affirmative steps so that condemned inmates may select between the three statutory methods of execution.

V. Whether Act 43's provision of a "statutory right of inmates to elect the manner of their execution" means that death-sentenced inmates must be given a choice between at least two constitutional methods of execution.

VI. Whether a change of methods of execution from lethal injection to electrocution or firing squad constitutes *ex post facto* legislation.

VII. Whether Respondents are entitled to sufficient information about lethal injection drugs to reasonably ensure that their constitutional rights are protected.

INTRODUCTION

Over the past three decades, South Carolina has executed 39 individuals almost entirely by lethal injection.[1] As has been its historical practice, the South Carolina Department of Corrections ("SCDC") provided each of those inmates, if requested, detailed information about the execution process before the inmate was required to elect either lethal injection or electrocution. For example, for lethal injection SCDC disclosed the type of drugs to be used, the qualifications of the members of the execution team, information regarding quality control measures, and the procedural steps that would be taken to carry out the execution. Similar information was disclosed for executions by electrocution.

In November of 2020, Richard Moore became the first person in South Carolina since 2008 to exhaust his capital case appeals and receive an execution notice from this Court.[2] Counsel for Moore requested information about SCDC's execution protocols. Rather than be forthcoming as it had in the past, SCDC made an abrupt turn and refused to provide *any* information about how it intended to carry out Moore's execution.[3] As far as undersigned counsel is aware, no inmate in the country has ever been put to death with such little transparency about how he or she would be executed. SCDC's unprecedented position prompted litigation regarding access to information about how executions would be carried out in South Carolina. After lawsuits were filed in state

[1] Three severely mentally ill men chose to die in the electric chair, but the remainder died by lethal injection after it was made the legislatively prescribed default method of execution in 1996.

[2] In 2011, Jeffrey Motts waived his direct appeal and volunteered for execution. The last non-volunteer execution in South Carolina took place in 2008.

[3] In support of its argument that Moore was not entitled to the requested information, SCDC relied on a prior version of what it now calls "the Shield Law." S.C. Code Ann. § 24-3-580 (Supp. 2022).

and federal court, SCDC formally announced that it did not have lethal injection drugs, and this Court stayed Moore's execution as well as those of Sigmon and Owens, which followed.[4]

Shortly thereafter, Governor McMaster signed Act 43 into law, resulting in the current litigation. Following a four-day trial, Judge Jocelyn Newman issued an order declaring Act 43 unconstitutional. While Appellants' appeal to this Court remained pending, the legislature amended S.C. Code Ann. § 24-3-580 (2023) (the "Shield Law"), which now provides that lethal injections drugs can be obtained from *anyone*, without the participation of a licensed pharmacist or physician. After contacting over 1,300 potential "contacts," many of whom "immediately refused to entertain the idea of selling lethal injection drugs to the Department," Affidavit of Bryan P. Stirling, Owens v. Stirling, No. 2022-001280 at ¶ 6 (S.C. Sept. 19, 2023), Appellants say SCDC obtained enough pentobarbital to carry out the executions of "those condemned inmates who have exhausted their direct and collateral appeals," assuming "no unjustified delays." Reply in Support of Motion to Life Abeyance at 10. They invoke the Shield Law as strengthening Appellants' position that a death-sentenced inmate has no right to additional information about the drugs they plan to use in executions. In fact, Appellants claim that *no one*, not even this Court, is entitled to make any inquiry regarding how they intend to carry out lethal injection executions. *Id*. at 9-10.

Respondents have conceded, and they continue to concede, that execution by lethal injection using a single dose of pentobarbital is constitutional *if* properly administered using reliable and effective drugs. But what Appellants want is something no other jurisdiction has asked for or been awarded: blind trust without any disclosure obligations or judicial oversight. Before

[4] This Court has since stayed the executions of Mikal Mahdi and Marion Bowman in light of this litigation. Gary Terry and John Wood also exhausted their appeals but their execution orders have been stayed due to a pending intellectual disability and competency to be executed claims, respectively.

allowing executions to go forward with SCDC's new lethal injection protocol, this Court should require Appellants to disclose to someone (either Respondents' counsel, this Court, or both) basic information needed to determine whether SCDC is capable of carrying out a humane execution using effective lethal injection drugs. If this Court does not do so, there is a possibility of a catastrophic event during one or more of the executions SCDC intends to carry out.

STATEMENT OF THE CASE AND RELEVANT FACTS

I. SOUTH CAROLINA'S HISTORY OF EXECUTIONS

For most of South Carolina's history, executions were carried out by hanging in the counties where the capital conviction was obtained. *E.g.*, 1878 S.C. Acts Reg. Sess., No. 541; S.C. Rev. Code Ch. CXXVIII § 21 (1873). Hanging as a method of execution was notoriously prone to error, and many people executed by this method choked to death slowly when their necks did not break on the fall. In other hangings, the drop was too long, and the person executed was decapitated. The gruesome spectacle of botched hangings prompted states to seek new methods of execution, and in 1885, the governor of New York instructed that state's legislature as follows:

> The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature.

In re Kemmler, 136 U.S. 436, 444 (1890). In response, the New York legislature appointed a commission tasked with finding "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases," and the commission adopted the electric chair. *Id.* Significantly, the New York legislature based its decision on what was then understood about how electricity operates on the human body: "application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, *must result in instantaneous, and consequently in painless, death*." *Id.* at 443-44 (quotation marks

omitted). Later that year, William Kemmler became the first person to be executed in the electric chair, though the process was far from "instantaneous" or "painless" as the legislature had predicted. *E.g.*, *Far Worse than Hanging*, N.Y. TIMES, Aug. 7, 1890, at 1.

In 1912, South Carolina became the eighth state to adopt the electric chair as a method of execution. *See* 1912 S.C. Acts. 702, No. 402 § 1. That year, the Department of Corrections purchased an electric chair from the Adams Electric Company of Trenton, New Jersey, at a cost of $2800. *First Electrocution in this State Today*, HERALD & NEWS, Aug. 6, 1912, at 3. Since William Reed—a Black man convicted in Anderson County of attempted assault on a white woman—was executed later that same year, 247 people have been put to death in South Carolina's electric chair. Many were, by any definition, botched.

From 1962, when an unofficial national moratorium on the death penalty began, until 1985, South Carolina did not carry out any executions. However, following the Supreme Court of the United States's 1976 approval of Georgia's newly adopted death penalty statute, states, including South Carolina, slowly began to resume executions. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979). By the mid-1980s, states were back to carrying out large numbers of executions each year, mostly in the electric chair, and a handful of southern states—most notably, Florida—drew international attention for a series of horrifically botched judicial electrocutions. *See* Br. for Pet., *Bryan v. Moore*, No. 99-6723, 1999 WL 1281714, at *2 (Dec. 15, 1999).[5] As it became increasingly clear that the electric chair was, at a minimum, an

[5] For example, "[a]s current was applied during Florida's 1990 electrocution of Jesse Tafero, flame and smoke shot up around his head. When the electricity was turned off, Mr. Tafero's head was 'nodding back and forth.' His chest 'was moving in.' He seemed 'to be gasping for air.'" *Id.* (internal citations omitted). The executioners had to apply two more rounds of current before Tafero was declared dead, and at autopsy, his head "was burned and charred, his face was seared by flames, and his eyebrows, eyelashes, and facial hair were burned." *Id.* (quoting *Jones v. State*, 701 So. 2d 76, 87 (Fla. 1997) (Shaw, J., dissenting)). In 1997, Florida executed Pedro Medina in

unreliable (and sometimes torturous) method of execution, states amended their laws to make lethal injection the preferred method. *See* U.S. DEP'T OF J., BUREAU J. STATS. BULL., *Capital Punishment 1996*, at 4 (Dec. 1997), https://bjs.ojp.gov/content/pub/pdf/cp96.pdf. They did so because, as the Supreme Court of the United States has recognized, it is the most humane method available. *Baze v. Rees*, 553 U.S. 35, 62 (2008) (plurality opinion); *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam).

In 1995, South Carolina joined the ranks and became the 25th state to adopt lethal injection. 1995 S.C. Acts No. 108 § 1, *codified at* S.C. Code Ann. § 24-3-530(B) (1995). From 1996, when the law went into effect, until 2021, lethal injection was the default method of execution in South Carolina and no inmate could be executed by electrocution unless he explicitly chose that option.[6]

In 2021, Act 43 changed South Carolina's default method of execution from lethal injection to electrocution and added firing squad as a third option. Respondents filed suit, asserting multiple violations of South Carolina constitutional and statutory requirements.

---

the electric chair, and again "smoke and then flame rose from Mr. Medina's head." *Id.* "[S]moke filled the chamber." *Id.* "After the electricity was turned off, Mr. Medina 'took a gasping breath. There was an interval, he took a second gasping breath. There was another interval, and he took the third gasping breath." *Id.* (cleaned up). Only then did Medina's body slump. Like Tafero, his head "was burned and charred and his face was scalded." *Id.* (quoting *Jones*, 701 So.2d at 87 (Shaw, J., dissenting)). And in 1999, Florida executed Allen Lee ("Tiny") Davis in the electric chair. When executioners turned on the current, "witnesses saw blood coming from beneath the mask, dripping down onto Mr. Davis' collar, a pool of blood beginning to form a dinner-plate sized stain on his shirt. After Mr. Davis' body stopped tensing, witnesses saw his chest move 'back and forth several times.'" *Id.* (internal citations omitted).

[6] According to the sponsor of the bill, South Carolina made lethal injection its default method of execution because it is "more humane than dying in the electric chair." *Legislative Watch*: *Death Penalty*, The Times & Democrat (Orangeburg, S.C.), Mar. 2, 1995, at 2B.

II. TRIAL AND REMAND

In August of 2022, Judge Newman heard from eight witnesses whose testimony is discussed below in the relevant argument sections. Judge Newman ruled in Respondents' favor, enjoining Appellants from executing Respondents by electrocution or firing squad and declaring Act 43 unconstitutional. R. p. 1–39.[7] Following Appellants' appeal and Respondents' cross-appeal, this Court heard oral argument and remanded the case to the circuit court for the parties to conduct discovery regarding the State's efforts to procure the drugs for lethal injection. *Owens v. Stirling*, 438 S.C. 352, 882 S.E.2d 858 (2023).

The discovery ordered by this Court never happened. Respondents sought a stay of the proceedings on remand while the Legislature considered and ultimately passed a "Shield Law," which amended South Carolina Code section 24-3-580 to expand the confidentiality of the "execution team" to include "any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence." 2023 S.C. Acts No. 16, *codified at* S.C. Code Ann. § 24-3-580 ("Act 16"). The Act also exempted the purchase and production of lethal injection drugs from regulatory and licensing requirements, S.C. Code Ann. § 24-3-580(D), (E), (F) (2023), and eliminated a provision that allowed for disclosure of identifying information "upon a court order under seal." S.C. Code Ann. § 24-3-580(C) (2022).

Following ratification of the Shield Law, the Department of Corrections informed this Court that it "made more than 1,300 contacts in search of lethal injection drugs" and was "eventually able to secure pentobarbital for carrying out an execution by lethal injection of a one-

[7] Given the expedited time frame, the trial court's order was drafted without the benefit of a transcript of the hearing.

drug protocol." Affidavit of Bryan P. Stirling, ¶¶ 6, 7 (Sept. 19, 2023). Respondents have not disclosed any information about the drugs obtained beyond the name of the drug, asserting that disclosure of information such as the qualifications of the source, the date manufactured or compounded, and other quality control information is prohibited by the Shield Law. Reply to Motion to Lift Abeyance, Dismiss Appeal, and Vacate Circuit Court Order, at 10 (Oct. 2, 2023).

Respondents then moved to dismiss this appeal and vacate the circuit court's order, which this Court denied. Pursuant to the Court's order, this brief is amended to address the effect of the Shield Law on the merits of the appeal and to include arguments related to the Shield Law itself. Order, *Owens v. Stirling*, No. 2022-001280 (Oct. 31, 2023).

STANDARDS OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018). "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). Thus, when a cause of action seeking declaratory relief sounds in law, "the lower court must be affirmed where there is 'any evidence' to support its findings." *Id.* (quoting *Townes Assocs*, 266 S.C. at 86, 221 S.E.2d at 776).

"An order granting or denying an injunction is reviewed for an abuse of discretion." *Lambries v. Saulda Cnty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (cleaned up). "An abuse of discretion occurs when the trial court's decision is *based upon an error of law* or upon factual findings that are without evidentiary support." *Id.* (cleaned up).

ARGUMENT

I. ARTICLE I, SECTION 15 OF THE SOUTH CAROLINA CONSTITUTION IS MORE PROTECTIVE THAN THE EIGHTH AMENDMENT

In interpreting the South Carolina Constitution, this Court has always read the text in a way that allows it "to meet and be applied to new conditions and circumstances as they may arise." *Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963). Thus, although "historical background" has a role in constitutional interpretation, the constitution "is not to be viewed solely in the light of conditions existing at the time of its adoption." *Id.* Instead, the Court is "guided by the 'ordinary and popular meaning of the words used.'" *Richardson v. Town of Mt. Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002) (quoting *Abbeville Cnty. Sch. Dist. v. State*, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999)).

According to Appellants, the sole source of information for ascertaining the "ordinary and popular meaning" of article I, section 15 is "leading English-language dictionar[ies]" from "the late eighteenth century." Br. of Apps. at 17. This form of interpretation, which they (mistakenly) insist is "originalism," has never been how this Court analyzes the state constitution, and for good reason; to do so would lead to patently absurd results and would prevent the constitution from "meet[ing] and be[ing] applied to new conditions and circumstances." *Knight*, 242 S.C. at 4, 129 S.E.2d at 747.[8] Despite Appellants' efforts to muddy the waters, this Court has a well-established methodology for interpreting the state constitution, and the Court should apply it here.

It is axiomatic that the federal constitution "sets the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643-44, 541 S.E.2d

[8] In earlier stages of this litigation, for example, Appellants went so far as to suggest that, as a matter of South Carolina law, the death penalty may be constitutional "for far more than murder" because that was permissible "during the colonial era," R. p. 319, and that hanging remains constitutional, notwithstanding the "horror stories" of "botched hangings," R. p. 447, lines 17-23.

836, 840 (2001). The question, then, is whether the federal standard applies or if, instead, the South Carolina Constitution "provide[s] greater protection." *Id*. at 644, 541 S.E.2d at 840. To answer that question, this Court first considers the textual differences between the two documents and clues from state legislative history. *Id.* at 644-47, 541 S.E.2d at 840-42. The next step is to survey parallel language in other states' constitutions and, where other states have language similar to that in our constitution, any judicial opinions interpreting that language. Finally, this Court looks to whether any newly proposed interpretation of the state constitution is consistent with past precedent. *Id.* at 645-48, 541 S.E.2d at 841-42. Applying *Forrester*'s methodology to article I, section 15 makes clear that in South Carolina, a condemned inmate may not be executed by a method that risks a painful or torturous death; that has never or only rarely been used in the United States or has been retired from use for an extended period; or that mutilates and damages the body.

A. The Text of the State Constitution Is Broader Than the Federal Constitution's

Article I, section 15 provides, in relevant part: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained." S.C. Const. art. I § 15; *cf.* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). As a matter of plain language interpretation, the differences between the South Carolina and federal constitutions are significant. First and most obviously, the drafters of the South Carolina constitution elected to use a disjunctive framing, while the federal constitution is conjunctive. In standard English usage, a disjunctive indicates alternatives, suggesting that the South Carolina constitution provides more protection than its federal counterpart: a punishment need only be cruel *or* unusual *or* corporal, not all three, to violate the state constitution. *See Jennings v. Jennings*, 401 S.C. 1, 11-12, 736 S.E.2d 242, 247 (2012) (Toal, C.J., concurring); *see also* Commentary to 1998 Amend., Fla. Const. art. 1 § 17 (explaining that the Florida legislature

amended the state constitution by substituting the word "and" for "or" because the "change conforms the prohibition with the parallel statement in the federal constitution" and "also raises the bar on the part of a defendant by requiring proof of both prohibitions rather than one or the other"); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) ("The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." (quotation omitted); *People v. Anderson*, 493 P.2d 880, 885 (Cal. 1972) (en banc) ("[T]he delegates modified the California provision . . . to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state." (footnotes omitted)), *superseded by* Cal. Const. art. I § 27.

This conclusion is reinforced by the fact that the South Carolina Constitution includes three distinct categories of punishment that the drafters understood to be unconstitutional: cruel punishment; corporal punishment; and unusual punishment. This constitutional language is unique among all American jurisdictions, including those that prohibit cruel or unusual punishments.[9] The drafters of our constitution presumptively intended to give meaning to all three words.

[9] *Compare* S.C. Const. art. I § 15 ("nor shall cruel, nor corporal, nor unusual punishment be inflicted") *with, e.g.*, Ala. Const. art. I § 15 ("excessive fines shall not be imposed nor cruel or unusual punishment inflicted"); Ark. Const. art. II § 9 ("nor shall cruel or unusual punishments be inflicted"); Cal. Const. art. I § 6 ("nor shall cruel or unusual punishments be inflicted"); Haw. Const. art. I § 12 ("nor cruel or unusual punishment [shall be] inflicted"); Kan. Const. Bill of Rights § 9 ("nor cruel or unusual punishment [shall be] inflicted"); La. Const. art. 1 § 20 ("No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment."); Mass. Const. Pt. 1, art. 26 ("No magistrate or court of law shall . . . inflict cruel or unusual punishments."); Md. Const. art. 9002 § 25 ("nor [shall] cruel nor unusual punishment [be] inflicted"); Me. Const. art. I § 9 ("nor [shall] cruel nor unusual punishments [be] inflicted"); Mich. Const. art. I § 16 ("cruel or unusual punishment shall not be inflicted"); Minn. Const. art. I § 5 ("nor [shall] cruel or unusual punishments [be] inflicted"); Miss. Const. art. III § 28 ("Cruel or unusual punishment shall not be inflicted."); N.C. Const. art. I § 27 ("nor [shall] cruel or unusual punishments [be] inflicted"); N.D. Const. art. I § 11 ("nor shall cruel or unusual punishments be inflicted"); N.H. Const. art. I § 33 ("No magistrate or court of law shall . . . inflict cruel or unusual

The limited legislative history that is available confirms that this unique language choice was not accidental. The precursor to the cruel punishment provision first appeared in the South Carolina constitution in 1790, which provided that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." S.C. Const. art. IX § 4 (1790); *see also id.* (1861) (same); S.C. Const. art. IX § 5 (1865) (same). In 1895, the legislature amended the language in the 1865 Constitution. *See* Journal of Proceedings, South Carolina Constitutional Convention at 443-44 (1895). At the time, the constitutions of the newly admitted western states—most of which had a disjunctive phrasing of the prohibition on cruel or unusual punishments—provided "models" that "reflected a concern on the part of their drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed." *Anderson*, 493 P.2d at 884-85. In South Carolina, however, the drafters did not follow those models but went even further and adopted the following language: "Excessive fines shall not be imposed, nor cruel and unusual punishments inflicted, nor shall witnesses be unreasonably detained. Corporal punishment shall not be inflicted." Journal of Proceedings, South Carolina Constitutional Convention, at 136 (first reading); *id.* at 277 (final reading).

In the late 1960s, the General Assembly set out to again amend the constitution and appointed a committee, the West Committee, to do so. Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 at 10 (June 1969). The purpose of the Committee was to "strengthen the [constitution] and render it capable of meeting modern needs and future expectations." *Id.* at 8. On September 15, 1967, the members of the Committee assigned to study

---

punishments."); Nev. Const. art. I § 6 ("nor shall cruel or unusual punishments be inflicted"); Okla. Const. art. II § 9 ("nor [shall] cruel or unusual punishments [be] inflicted"); Tex. Const. art. I § 13 ("nor [shall] cruel or unusual punishment [be] inflicted"); Wyo. Const. art. 1 § 14 ("nor shall cruel or unusual punishment be inflicted").

the Declaration of Rights met to discuss what became article I, section 15 (former Sections 19 and 20) and decided to substitute the disjunctive "nor" for the conjunctive "and." They compared the South Carolina Constitution to the Model Constitution[10] and although "[t]he committee fully agreed that the protections provided in these sections should remain," they settled on combining the sections and rewording the language. Book I, Proceedings of the Committee to Make a Study of the Constitution of South Carolina, 1895, at 11 (Aug. 25, 1966–Dec. 29, 1967); *see also* Final Report at 19 (noting the Committee's intent to "modernize the language" in article I, section 15). The drafters explicitly decided "to accept the recommendation of the Model, but to make two additions: retain the restriction on using corporal punishment and retain the protection for witnesses." Book I, Proceedings of the Committee at 11.

The language of article 1, section 15 is no accident. Against a backdrop of the federal constitution, other state constitutions, and a model constitution—none of which use the words "nor cruel, nor corporal, nor unusual"—the drafters specifically selected those words. Together, the text of article I, section 15, and the legislative history that gave rise to that text "favor[] an interpretation offering a higher level of . . . protection than the [Eighth] Amendment." *Forrester*, 343 S.C. at 645, 541 S.E.2d at 841.

Appellants' response—that in the late 1960s and early 1970s, when the voters ratified the amendment, electrocution was the only method of execution in use and was therefore understood

[10] The Model Constitution was an effort to offer states a plan of government premised on civic responsibility and based on a review of the language in state constitutions in effect at the time of its drafting. *See* Introduction *in* MODEL STATE CONSTITUTION (6th ed. 1963). The cruel and unusual prohibition in the Model provided: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." *Id.* at 33, section 1.06(b). At the time the Model Constitution was drafted in 1963, all states other than Illinois and Connecticut had prohibitions on cruel or unusual punishment in their constitutions. *Id.* at 34.

to be constitutional, Br. of Apps. at 24—misses the mark.[11] The question at this step of the analysis is not what the legislature thought about electrocution given what information they had at the time, it is about the constitution. If the legislature intended to give greater protections to South Carolina citizens than what is granted by the federal constitution, then the constitution must be interpreted to give effect to that intent.

In that same vein, in the 1970s, electrocution was still widely (and mistakenly) understood to be a relatively painless method of execution, and it was, by any objective measure, an improvement over hanging. When executions resumed in large numbers in the late 1980s, however, advances in science and medicine began to reveal the truth about the electric chair. Though the scientific and medical realities of death in the electric chair did not change from 1912 to 1996 (when South Carolina adopted lethal injection), our ability to understand those realities did. This Court has never endorsed a method of constitutional interpretation that binds the state not only to language from the 1800s and earlier, but also to science and medicine as it was understood in the 1800s and earlier. Following *Forrester*'s methodology, it is clear that the text and legislative history support a reading of article I, section 15, that applies more broadly than the Eighth Amendment.

[11] In the 1960s and early 1970s, when the State amended article I, section 15, no executions were being carried out in the United States by any method because of the national *de facto* moratorium. Indeed, whether capital punishment was consistent with the Eighth Amendment at all was very much in doubt. *E.g.*, *Rudolph v. Alabama*, 375 U.S. 889, 890-91 (1963) (Goldberg, J., dissenting from the denial of certiorari, joined by Douglas, J. and Brennan, J.) (urging the Court to grant certiorari to consider whether the death penalty for rape violated the Eighth Amendment); *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion) (invalidating all then-existing capital punishment schemes as violations of the Eighth Amendment).

B. Past Precedent Supports a Broad Reading of Article I, Section 15

Although this Court has never interpreted article I, section 15 in the context of a methods-of-execution challenge, it has decided similar issues under that provision, and those decisions confirm that the South Carolina constitution is more protective than the Eighth Amendment. In *State v. Brown*, this Court addressed the question whether a judge could, consistent with the state constitution, sentence three men convicted of sexual assault to their choice of thirty years' imprisonment or castration. 284 S.C. 407, 326 S.E.2d 410 (1985). Castration is a form of punishment for sexual assault that is generally accepted as consistent with the federal constitution.[12] Nevertheless, in *Brown*, this Court explicitly held that "[c]astration, a form of mutilation, is prohibited by Article I, § 15"—meaning that, at a minimum, the state constitution prohibits mutilation that the Eighth Amendment permits. 284 S.C. at 412, 362 S.E.2d at 411.[13]

---

[12] Eight states and territories currently authorize castration as a form of punishment for at least some sexual offenders, and challenges to those statutes as violations of the Eighth Amendment have been unsuccessful. *See* Ala. Code. § 15-22-27.4; Cal. Penal Code § 645; Fla. Stat. Ann. § 794.0235; Ga. Code Ann. § 16-6-4; Iowa Code § 903B.10(1); La. Rev. Stat. Ann. § 15:538; Mont. Code Ann. § 45-5-512; Tex. Gov't Code § 501.061; Wis. Stat. § 304.06.

[13] Appellants' response—that *Brown* is not relevant because castration "is a form of bodily punishment that is distinct from capital punishment," Br. of Apps. at 23—ignores the basic fact that to adopt Appellants' reading of the state constitution would require this Court to abrogate *Brown* to the extent it held that a punishment that is permissible under the federal constitution is barred by the state constitution. Appellants also cite *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992), for the proposition that the Eighth Amendment ought to guide this Court's interpretation of article I, section 15, "despite the textual differences in those provisions." Br. of Apps. at 12. *Wilson*, however, involved a completely different context. First, the argument in that case about the scope of article I, section 15, was "not properly before [this Court] because it [was] not embodied in any exception," *id.* at 511, 413 S.E.2d at 27. Second, the question in *Wilson* involved a proportionality challenge, and the Court noted that any textual differences between the state and federal constitutions was "of no importance in [the] case" because "the United States Supreme Court effectively treats the 'and,' as an 'or' in their Eighth Amendment analysis." *Id.* Thus, in *Wilson*, the Court *assumed* that the state constitution might be more protective than the federal constitution but rejected the arguments anyway because the petitioner in that case lost under either standard. *See id.*

More recently, this Court reaffirmed that point in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) (plurality opinion). *Aiken* involved the question of whether all juvenile offenders in South Carolina who were sentenced to life without the possibility of parole were entitled to resentencing hearings—even though that outcome is not required by the Eighth Amendment. *Compare id.* 410 S.C. at 545, 765 S.E.2d at 578 (Pleicones, J., concurring) (South Carolina Constitution requires resentencing) *with Montgomery v. Louisiana*, 577 U.S. 190 (2016) (Eighth Amendment does not require resentencing for all juveniles sentenced to life without parole). Justice Pleicones, the third vote to grant resentencing hearings, concurred in the judgment but wrote separately to highlight that the majority's opinion "exceeds the scope of current Eighth Amendment jurisprudence." *Aiken*, 410 S.C. at 546, 765 S.E.2d at 578. Nevertheless, Justice Pleicones joined the outcome "under S.C. Const. art. I, § 15." *Id.*; *see also State v. Key*, 431 S.C. 336, 345, n.2, 848 S.E.2d 315, 319, n.2 (2020) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977), for the proposition that when a majority of the Court agrees on an outcome but no single rationale for reaching that outcome gains a majority of votes, the holding of the Court is the narrowest opinion). Thus, *Aiken*, like *Brown*, reached an outcome that is not required by the Eighth Amendment, and both cases did so under article I, section 15. This Court's prior precedent supports a more expansive reading of article I, section 15, than is required by the Eighth Amendment.

C. Other States With Similar Language Have Interpreted Their Constitutions Broadly

Eighteen states other than South Carolina use "or" or "nor" instead of "and" in their constitutional prohibitions on forms of punishment. Of those eighteen, courts in nine states have interpreted their constitutions as extending beyond what is required under the Eighth

Amendment.[14] *See Anderson*, 493 P.2d at 884-87 (California); *State v. Baxley*, 656 So. 2d 973, 977 (La. 1995); *State v. Dobbins*, 215 A.3d 769, 784 (Me. 2019); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 283 (Mass. 2013); *Bullock*, 485 N.W.2d at 872 (Michigan); *State v. Vang*, 847 N.W. 2d 248, 263 (Minn. 2014); *State v. Kelliher*, 873 S.E.2d 366 (N.C. 2022), *overruling State v. Green*, 502 S.E.2d 819 (N.C. 1998); *Johnson v. State*, 61 P.3d 1234, 1249 (Wyo. 2003); *see also State v. Bassett*, 428 P.3d 343, 349 (Wash. 2018) (explaining that the Washington Constitution is more protective than the Eighth Amendment because the Washington Constitution "prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual" (internal quotation omitted)); *State v. Enderson*, 804 A.2d 448, 454-55 (N.H. 2002) (acknowledging that the state constitution is at least as protective as the Eighth Amendment). Only two of the eighteen states—Kansas and Texas—have expressly held that the disjunctive phrasing does not extend further than the Eighth Amendment. Moreover, even in states that use the conjunctive form, legislative history supports the idea that the disjunctive form sweeps more broadly. For example, when Florida amended its constitution in 1998 to expressly preserve capital punishment, legislators also changed the word "or" to the word "and" because, they explained, that amendment "raise[d] the bar on the part of a defendant by requiring proof of both prohibitions rather than one or the other." Commentary to 1998 Amend., Fla. Const. art. 1 § 17.

Nationwide, then, the consensus view is that when a state's constitution prohibits cruel *or* unusual punishment, the state constitution is more protective than the federal constitution.

[14] Courts in the following states have not expressly ruled on the question of whether their constitutions are co-extensive with or more protective than the Eighth Amendment: Alabama; Arkansas; Hawai'i; Maryland; Mississippi; Nevada; North Dakota; and Oklahoma. Courts in Kansas and Texas, respectively, have held that their constitutions are coextensive with the Eighth Amendment: *State v. Scott*, 961 P.2d 667, 670 (Kan. 1998); *Reyes v. State*, 557 S.W.3d 624, 631 (Tex. Ct. App. Mar. 29, 2017).

Significantly, none of those states have prohibitions on corporal punishment, but courts in some of those states have nevertheless concluded that their constitutions prohibit more conduct than is permitted under the Eighth Amendment.

D. The Appropriate Interpretive Methodology Supports Respondents' Interpretation of Article I, Section 15

The constitution does not require that the people of South Carolina be forever bound to historical understandings of science and medicine in such a way to "obstruct the progress of the state." *Knight*, 242 S.C. at 4, 129 S.E.2d at 747. Instead, the constitution must be interpreted in a manner that ensures it can "meet and be applied to new conditions and circumstances as they arise." *Id.* Applying *Forrester*'s methodology to article I, section 15 makes clear that the state constitution offers greater protection than the Eighth Amendment. Specifically, the South Carolina Constitution incorporates a heightened dignity interest that prohibits the state from carrying out executions by means that are: (1) cruel, meaning unnecessarily painful or that "involve torture or a lingering death . . . something more than the mere extinguishment of life," *Kemmler*, 136 U.S. at 933; (2) unusual, meaning they have fallen out of use as "new methods, such as lethal injection, thought to be less painful and more humane than traditional methods," have become available, *see Barr*, 140 S. Ct. at 2591; or (3) corporal, meaning they cause "mutilation" or damage to the human body beyond what is essential to effectuate a punishment, *see Brown*, 284 S.C. at 412, 362 S.E.2d at 411.[15] This understanding of the state constitution is consistent with how the drafters of the state

[15] Each of the words—"cruel," "corporal," and "unusual"— must do some work in article I, section 15. *See Lawrence v. Gen. Panel Corp.*, 425 S.C. 398, 402, 822 S.E.2d 800, 802 (2019) ("the Court should seek a construction that gives effect to every word of a statute," including the constitution, "rather than adopting an interpretation that renders a portion meaningless" (internal quotation marks omitted)). To adopt Appellants' argument would render the world "corporal" superfluous because their proposed definition of that word is, essentially, the same as any reasonable definition of "cruel." *See* Br. of Apps. at 22. Specifically, Appellants argue that the phrase "corporal punishment" cannot be read to prohibit any method of capital punishment because "corporal punishments" in the colonial era also included things like "branding," "cropping the ears," "sitting

constitution understood it when they ratified article I, section 15, in the 1970s—as evidenced by the fact that *Brown* was decided just over a decade after the amendments took effect, not more than 200 years before that. *Compare* Br. of Apps. at 21-23 (urging this Court to adopt a definition of "corporal" that was in place before the turn of the 20th century) *with Reese v. Talbert*, 237 S.C. 356, 358, 117 S.E.2d 375, 376 (1960) ("When the language of a constitutional amendment is of doubtful import, the object of judicial inquiry as to its meaning is to ascertain the intent of *its framers* [i.e., the framers of the amendment] and of the people who adopted it. And in attempting to attain that object, the courts may consider the history of the times *in which the amendment was framed*." (emphases added) (citations omitted)).[16] It is also consistent with "the ordinary and popular meaning of the words used." *Richardson*, 350 S.C. at 294, 566 S.E.2d at 525 (internal quotation marks omitted). Because, as the court below found, both the electric chair and the firing squad are torturous methods of execution that desecrate the bodies of condemned inmates and have fallen out of use across the country, they violate article I, section 15.

in the stocks," "flogging," "whipping," "pillory," and "blows on the bare back." Br. of Apps. at 22 (internal quotation marks omitted). This is a distinction with no difference because, of course, a punishment can be capital and corporal (like the firing squad, *see* R. p. 23); capital but not corporal (like lethal injection, which, when carried out properly, does not mutilate the body, *see Barr*, 140 S. Ct. at 2591); or corporal but not capital (like castration, *see Brown*, 284 S.C. at 412, 362 S.E.2d at 411).

[16] Appellants cite *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014), for the proposition that this Court must interpret the state constitution "in light of the intent of its framers and the people who adopted it." But *Long* involved an amendment to the South Carolina Constitution and to interpret the amendment, this Court considered how the drafters of the *amendment* would have understood it in the 1970s—not based on how people living in Stuart England or colonial South Carolina would have understood it. *Id.*; *see also Miller v. Farr*, 243 S.C. 342, 346-47, 133 S.E.2d 838, 841 (1963).

II. THE ELECTRIC CHAIR VIOLATES THE SOUTH CAROLINA CONSTITUTION

A. Operation of South Carolina's Electric Chair

The South Carolina electric chair uses high- and low-voltage AC power. The current is applied to the top of a prisoner's head through a copper cap and to the prisoner's leg through a copper cuff. *See* R. p. 1156. The South Carolina protocol calls for two applications of high-voltage current (2000 and 1000 volts for 4.5 and 8 seconds, respectively), followed by a prolonged application of low-voltage current (120 volts for two minutes). R. pp. 7, 1159-60.

SCDC's Director of Security and Emergency Operations testified that he did not create the protocol; he does not know who created the protocol or when it was created; and he does not know why the protocol involves the current and timing that it does. R. pp. 1100-02. When asked to describe his understanding of electricity, the Security Director responded only that "it keeps my house cool and lighted." R. p. 1101, lines 19-21. Significantly, despite his own lack of subject-matter expertise, the Security Director acknowledged that since he became the Director of Security in 2007, he never consulted any experts about the electric chair protocol or asked anybody with subject-matter expertise whether the protocol is appropriate or likely to be effective. R. p. 1102, line 24-p. 1103, line 11. Additionally, Appellants' expert, Dr. Ronald K. Wright, testified that with respect to the three applications of current in SCDC's electric chair protocol, "the second one's probably unnecessary." R. p. 1444, line 24.

B. The Trial Testimony and the Circuit Court's Findings

At trial, one of the main points in dispute was how, precisely, the electric chair accomplishes death. Respondents called Dr. Jonathan Arden and Dr. John P. Wikswo, Jr., and the Appellants called Dr. Wright.[17] There was no dispute that it is impossible to study the effects of

[17] Dr. Wright was qualified as an expert in forensic pathology. R. p. 1441, lines 9-10. He acknowledged that he is not a physicist, an electrical engineer, a biomedical engineer, a

judicial electrocution on the human body using controlled scientific studies because those studies are ethically impermissible.[18] Accordingly, the experts who testified all relied on secondary information about how judicial electrocutions work[19]—data about medical uses of electricity, as in with electro-convulsive therapy (ECT); information from veterinarians about humane slaughter of animals using electric stunning; peer-reviewed articles related to electricity and human physiology; accounts of industrial and other kinds of high-voltage electrical accidents; and autopsy reports from judicial electrocutions, both in South Carolina and in other states.

According to Respondents' experts, the mechanisms of death in a judicial electrocution are a combination of fibrillation of the heart, thermal heating (cooking), and cessation of brain function, either from a lack of oxygen or from destruction of the brain's electrical systems. R. p. 1197, line 6-p. 1198, line 13; R. p. 1201, lines 8-25; R. p. 1322, line 13-p. 1323, line 5. Dr. Wikswo, who is an expert on the electrical circuits in the human heart, testified about fibrillation, a process by which the heart beats faster and faster until its electrical circuitry is disrupted and it can no

---

physiologist, an electrophysiologist, or a cardiologist—fields that involve the study of electricity. R. p. 1458, line 12-p. 1459, line 6. Dr. Wikswo was qualified as an expert in all three fields in which he is tenured: biomedical engineering, molecular physiology and biophysics, and physics. R. pp. 1566-1642; R. p. 1141, lines 9-13; R. p. 1166, lines 18-21. Dr. Arden was permitted to testify as an expert in forensic pathology. R. pp. 1643-47; R. p. 1321, lines 9-11.

[18] As Dr. Wright testified, "[s]ince we won the war and hanged all those guys, you can't do that kind of experimentation anymore. In fact, it has become so fraught with negative pressure that . . . you can't have medical professionals—either paraprofessionals or medical professionals kill somebody on purpose." R. p. 1463, line 24-p. 1464, line 5.

[19] Appellants attempt to turn this simple scientific fact into an argument that the circuit court shifted the burden of proof. *E.g.*, Br. of Apps. at 26-27. Of course, the information in question (whether death in the electric chair is painful) must, by its nature, be indirect because dead people cannot testify. But this has nothing to do with the burden of proof. To the contrary, this is precisely the sort of situation in which expert testimony is necessary: Experts in electricity and medicine cannot say with absolute certainty what anybody who dies in the electric chair experiences, but they can say to a reasonable degree of scientific certainty how the human body interacts with electricity and what the human body likely experiences when it is electrocuted.

longer pump oxygenated blood through the body. R. p. 1197, line 10-p. 1198, line 2. He explained that a heart in fibrillation no longer beats with a "beautiful rhythmic contraction from the bottom to the top," but instead has a current that "travels around the heart in a circle," causing it to "look[] like a small bag of earthworms just quivering," and the heart stops pumping. R. p. 1197, line 17-p. 1198, line 2. *See also* R. p. 1424, lines 4-18 (testimony of Dr. Jorge Alvarez confirming the same).

According to Dr. Arden, fibrillation without any medical intervention can eventually cause the heart to stop pumping blood and thereby cause brain death, but it does not automatically cause death. R p. 1325, lines 10-17. This, Dr. Arden explained, is because the human heart is capable of spontaneously regaining function after it enters fibrillation, meaning it can resume pumping oxygenated blood. R. p. 1325, lines 10-17. Additionally, as Dr. Wikswo testified (and as Dr. Wright confirmed), the heart has an "upper limit of vulnerability" beyond which a current will not induce fibrillation. R. p. 1198, lines 6-22; R. p. 1466, lines 6-15. That upper threshold is approximately 1000 volts, and South Carolina's protocol calls first for 12.5 seconds of a strong current that the experts agreed is unlikely to induce fibrillation in most people, R. p. 1198, lines 6-22; R. p. 1466, line 6-p. 1467, line 10—meaning that most inmates who are electrocuted in South Carolina's electric chair will not die from loss of oxygen to the brain after the first two shocks but will instead remain alive for some period of time.

The question, then, is what an inmate experiences during a judicial electrocution if he is alive and sensate after the first two shocks. Dr. Wikswo testified that the human skull is significantly more resistive than the skin, the muscles, and the connective tissue around the head. R. pp. 1193-96. As a result, when current is applied to the top of the head, it does not all enter the brain; instead, the muscles in the neck and face "are very good electrical conductors and they are

helping to take the current from the scalp all the way down into the musculature of the neck and then it goes down through the thoracic muscles." R. p. 1196, lines 2-16. If an insufficient portion of the current enters the brain, the inmate will remain alive and sensate during the electrocution.

In terms of what an inmate feels during an electrocution, Drs. Wikswo and Arden both testified that the electrical current stimulates the major muscles in the body, and that causes them to tetanize, or "lock[] up," as they fully contract. R. p. 1199, lines 4-7. As Dr. Arden explained, the "tetanic contraction of skeletal muscles [is] painful unto itself, that kind of uncontrolled extreme contraction of all your muscles." R. p. 1352, lines 7-11.[20] The tetany also includes "intercostal muscles and the diaphragmatic muscles," which are responsible for respiration, meaning that during a judicial electrocution, the "person will be aware of the extreme muscular contraction and not be able to breathe." R. p. 1201, lines 8-20; R. p. 1352, lines 14-16.[21] Additionally, Dr. Arden testified that the experience of electricity passing through the body "itself would be painful and excruciating." R. p. 1352, lines 4-5.

Dr. Wikswo also testified that when current flows through the body, from the head to the leg and then in reverse, it encounters resistance. R. p. 1202, lines 16-25. When electrical current encounters resistance, it generates heat. R. p. 1202, lines 16-25. In the case of the electric chair,

---

[20] *See also* R. p. 1200, lines 11-16 (Dr. Wikswo's explanation that as "electrical current is flowing through both nerves and skeletal muscle, some alternating current, it's causing the skeletal muscles to immediately contract," and "nerves that are on that pathway are also being stimulated and they can cause muscles to contract that don't have the current going through them").

[21] One factual dispute at trial was whether the heart muscle can tetanize. This matters because if the heart could tetanize, it would presumably stop working and cause brain death. However, Dr. Wikswo and Dr. Jorge Alvarez, an expert in cardiology for the Appellants, testified that heart muscle does not tetanize. R. p. 1199, lines 14-16; R. p. 1427, lines 5-11. Dr. Arden, a forensic pathologist, did not know whether heart muscle tetanizes. R. p. 1326, lines 1-9. And Dr. Wright, also a forensic pathologist, testified that the heart muscle "will tetanize as long as the amount of current hand to hand or head to foot or head to foot is more than—and we don't know exactly, but it's between one and two amps." R. p. 1459, lines 11-15.

the current generates enough heat to cause burning, charring, and arcing—a phenomenon in which electricity jumps through the air, as with a lightning strike or a spark. R. p. 1208, line 17-1210, line 13. Arcing can cause burns to appear on parts of the body that are not touching electrodes. *E.g.*, R. p. 1209, line 15-1210, line 18 (describing arcing burns from judicial electrocutions). Dr. Wikswo testified that one of the autopsies he reviewed from South Carolina documented that the fleshy portion of the prisoner's nose had been burned off, which he explained was likely caused by arcing. R. p. 1201, line 9-p. 1202, line 3; R. p. 1725.

Dr. Arden testified that he reviewed more than eighty autopsy reports from electric chair executions across the United States and that all of those autopsies showed severe injuries. R. p. 1332, lines 20-23; *see also* R. pp. 1753-56. 14. In all of the autopsies, including those from South Carolina, Dr. Arden confirmed that he observed severe burning, charring, and "thermal damage . . . which is the equivalent of cooking." R. p. 1347, lines 6-16; R. p. 1348, lines 18-24; *see also* R. pp. 1702-42 (Pls. Exs. 1–5); R. pp. 1762-86 (Pls. Ex. 17-18). Specifically, Dr. Arden described one South Carolina autopsy that shows "cratering" and "full thickness burning, meaning all the way through the skin," on the deceased's right shin, as well as severe, "dark brown burning" around his head. R. p. 1336, lines 21-24; R. p. 1338, lines 2-23; R. pp. 1753-56 (Pls. Ex. 5). Dr. Wikswo also testified that in the autopsies he reviewed, he observed damage consistent with severe electrical and thermal burns, including "severe charring"; "blackened flesh"; "charring [of] the skin, both on the scalp and the legs," with "severe burns of the head and the leg"; "a circular band of tissue of the scalp that's literally destructed"; and "a rendering of the subcutaneous fat," meaning an electrical burn "liquefied the fat . . . [and] you can see a sloughing off of skin on—on the side of the face." R. p. 1187, lines 3-7, R. p. 1203, lines 1-7; R. p. 1206, line 18-p. 1207, line 9.

With respect to the Appellants' assertions that any damage to the body from a judicial electrocution happens post-mortem, Dr. Arden testified that although it is not possible to distinguish between all pre- and post-mortem injuries, it is possible for some injuries. *E.g.*, R. p. 1372, lines 16-20. Specifically, Dr. Arden testified that some of the injuries could only have happened pre-mortem, including bruising, which Dr. Arden observed in many of the autopsies he reviewed, including from South Carolina. R. p. 1351, lines 6-21. According to Dr. Arden, "you don't bruise if you don't have a heartbeat and blood pressure;" therefore bruising is an indication that the executed person did not die immediately. R. p. 1351, lines 2-21.

Dr. Arden also testified that of the eighty non-South Carolina autopsies he reviewed, at least eight included objective evidence that the executions were "botches," meaning they did not go according to plan. R. p. 1387, lines 7-10. Some of the botches involved inmates surviving and remaining conscious past the first application of current, as indicated by voluntary movement, breathing, or in one case, a "scream" or "muffled scream." R. p. 1388, lines 16-25. In addition, Dr. Arden testified that at least one of the South Carolina autopsies appeared to have been botched, as the deceased had a burn "going over his left eye," indicating that "the ring electrode appears to have moved or slipped during the application of current burning the scalp." R. p. 1337, lines 1-14; R. p. 1732-33 (Pls. Ex. 5).

Finally, Dr. Wikswo described significant problems with South Carolina's electric chair. According to him, "protocols designed for judicial electrocution . . . are always done without scientific justification," and "[t]here are no measurements to prove that the brain is rendered insensate from the early shocks." R. p. 1169, lines 11-16. In contrast, Dr. Wiskwo testified, it is possible to study the effects of electrical stunning on animals for slaughter and to use the animal studies "as a model of a human system to understand the physiology which has substantial parallels

between species."[22] R. p. 1171, lines 12-16. Those studies make clear that the use of a head-to-foot electrode arrangement (like in South Carolina's electric chair protocol) is scientifically unsound and unlikely to produce a humane death, and that "the animal husbandry community after intense work has concluded that they would not do to an animal in a slaughterhouse what is done in South Carolina's death chamber." R. p. 1171, line 17-p. 1172, line 5. In sum, Drs. Wikswo and Arden opined that "[t]here is no proof that a judicial electrocution, whether botched or not, is instantaneous and painless," and that death in the electric chair is "painful and excruciating." R. p. 1282, lines 20-23; R. p. 1352, lines 3-4.

Appellants' expert had a very different view of judicial electrocution. Dr. Wright testified that "what happens with an electrocution is the entire body is depolarized" and "that means that even though it might hurt, it doesn't hurt because there's no place to feel hurt." R. p. 1447, lines 13-14; R. p. 1448, lines 21-23.[23] Alternatively, he opined that judicial electrocution causes instantaneous loss of sensation because "you get poration of the nerves and those are in the brain."

---

[22] "[T]hey have placed electroencephalogram electrodes on the heads of cattle being slaughtered. They have placed—they're called cortical electrodes on the surface of the brain beneath the skull. They've recorded all sorts of other physiological signals and these provide data that a—a reasonable engineer would expect to be provided for a system under study." R. p. 1171, lines 2-8.

[23] Dr. Wright maintained during trial that the human skull is not particularly resistive and that it is "more conductive than skin, less than muscles or blood vessels." R. p. 1459, lines 20-24. He endorsed this view even after he was confronted on cross-examination with a peer-reviewed article that reviewed more than fifty other articles and concluded that the skull is far more resistant than the scalp, muscle, the brain, or blood. R. p. 1462; *see* Hannah McCann, Giampaolo Pisano, & Leandro Beltrachini, *Variation in Reported Human Head Tissue Electrical Conductivity Values,* 32 BRAIN CARTOGRAPHY 825 (2019). Dr. Wright attempted to discount the review article by saying that the studies had only been done using low voltage, R. p. 1462, lines 3-10, but he did not explain why a lower voltage would matter, given that electrical currents are defined by Ohm's law, which is a ratio, and a current's voltage therefore varies directly with resistance, R. p. 1175, line 16-p. 1176, line 4. The circuit court discounted his testimony about skull resistance. R. pp. 16, 26 (finding that "the human skull is significantly more resistant than other parts of the head and upper body" and that "not all of the electrical current applied in the first two rounds of current will enter an inmate's brain").

R. p. 1449, lines 10-11. Poration, he testified, "is basically punching holes caused by the electricity and that is a permanent change." R. p. 1449, lines 12-13. Dr. Wright did not explain his theories of instantaneous poration or instantaneous depolarization or offer any affirmative proof to support those theories. R. p. 15. To the contrary, Dr. Wright acknowledged that a person whose brain is instantaneously porated could not move, breathe, or scream. R. p. 15; R. p. 1468, lines 9-18. Dr. Wright acknowledged that medical applications of electricity, as with ECT, never involve a head-to-leg electrode arrangement like what is used in South Carolina's electric chair, R. p. 1465, lines 21-24; that ECT protocols today require the use of a powerful muscle relaxant and anesthetic drugs to reduce the risk of pain and musculoskeletal damage during administration of the electrical shock, R. p. 1465, lines 15-20; and that low voltage electricity is "much more dangerous than high voltage" and "will hurt" if the person being electrocuted in not unconscious and insensate, R. p. 1450, lines 8-10, 15-16. Dr. Wright also acknowledged that if a person were not rendered instantly insensate by the first two rounds of high-voltage current in South Carolina's electric chair, the person would experience pain and suffering during the third application of current. R. p. 1470, lines 1-8.

After considering the testimony, the circuit court credited the testimony of the Respondents' experts and found the following facts:

- "[T]here is no evidence to support the idea that electrocution produces an instantaneous or painless death."
- "If the inmate is not rendered immediately insensate in the electric chair, they will experience intolerable pain and suffering from electrical burns, thermal heating, oxygen deprivation, muscle tetany, and the experience of high-voltage electrocution."
- The South Carolina electric chair "causes severe damage to an inmate's body, some of which occurs pre-mortem."
- "[T]he human skull is significantly more resistant than other parts of the head and upper body, [so] not all of the electrical current applied in the first two rounds of current will enter an inmate's brain. This increases the likelihood that a person will survive the

initial shocks in the electric chair, even if the lower voltage third round of current does eventually kill them by fibrillating their heart, cooking their organs, or preventing them from breathing."

- "[I]nmates executed by electrocution continue to move, breathe, and even scream after the shock is administered. The inmate may also regain heart function and spontaneously resume breathing during the process."
- "[A] substantial percentage of individuals [killed by electrocution] survive and remain sensate long enough to experience excruciating pain and suffering."
- "[T]here is no scientific or medical justification for the way South Carolina carries out judicial electrocutions," and "the head-to-leg electrode protocol is not designed to reduce pain and suffering."
- "The South Carolina electric chair causes grave damage to the body, but it is unlikely to immediately cause grievous harm to the two organs most important to maintaining consciousness: the brain and the heart."
- "As a result of the inherently unpredictable nature of electrocution and the occurrence of human error, an intolerably high percentage of judicial electrocutions do not go according to plan and cause extreme pain and suffering."

R. pp. 26-27.

C. The South Carolina Electric Chair Is Cruel, Unusual, and Corporal

As the circuit court held, the electric chair violates the South Carolina Constitution because it is "cruel," "corporal," and "unusual." It is cruel because it carries an inherent and unacceptable risk of "intolerable pain and suffering from electrical burns, thermal heating, oxygen deprivation, muscle tetany, and the experience of high-voltage electrocution." R. p 26. It is unusual because South Carolina has only executed seven people in the electric chair since 1976 and other jurisdictions have abandoned it as a method of punishment entirely. R. p. 26. And it is corporal because it "causes grave damage to the body." R. p. 26. "The punishment is, at a minimum, no longer viewed as a reliable method of administering a painless death, and the underlying assumptions upon which the electric chair is based, dating back to the 1800s, have since been disproven." R. p. 27.

Moreover, in answering the question of whether the electric chair violates the state constitution, this Court need not write on a blank slate. Courts in three other states have already addressed the question: the Supreme Court of Florida in 1999, the Supreme Court of Georgia in 2001, and the Supreme Court of Nebraska in 2008. *See Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (per curiam); *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001); *State v. Mata*, 745 N.W.2d 229 (Neb. 2008). The Georgia and Nebraska courts held that the electric chair violates those states' constitutions, while the Florida court held the opposite in *Provenzano v. Moore*, 744 S.2d 413. However, after *Provenzano* was decided, the Supreme Court of the United States granted certiorari review. In response, the Florida legislature amended the state's method of execution statute to make lethal injection the default method and the Supreme Court dismissed the petition "[i]n light of the representation by the State of Florida, through its Attorney General, that petitioner's 'death sentence will be carried out by lethal injection.'" *See Bryan v. Moore*, 528 U.S. 1133 (2000) (describing "recent amendments to Section 922.10 of the Florida Statutes"). Thus, although it is true that the Florida Supreme Court's decision has not been overturned, it was effectively abrogated when the Florida legislature—after the Supreme Court had agreed to review the constitutionality of the electric chair—amended that state's methods of execution statute to remove the possibility of an involuntary execution by electrocution.

In *Dawson*, the Supreme Court of Georgia held that the electric chair violates the Georgia Constitution for three independent reasons. First, the court noted that, in 2001, "the evidence establishes that it is not possible to determine conclusively whether unnecessary pain is inflicted in the execution of the death sentence." 554 S.E.2d at 142-43. In essence, the court held that the prisoner had not satisfied his burden of proof on the question of "unnecessary conscious pain suffered by the condemned prisoner." *Id.* at 143. Second, however, the court held that the electric

chair violates the Georgia Constitution because it "unnecessarily mutilate[s] or disfigure[s] the condemned prisoner's body," regardless of "whether or not the electrocution protocols are correctly followed and the electrocution equipment functions properly." *Id.* The court noted that the electric chair leaves prisoners' bodies "burned and blistered with frequent skin slippage from the process" and "the brains of condemned prisoners are destroyed in a process that cooks them." *Id.* Third, the court held that the electric chair is cruel and unusual "in light of viable alternatives which minimize or eliminate the pain and/or mutilation." *Id.* Thus, the court concluded, "death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition on cruel and unusual punishment" in the Georgia Constitution. *Id.* at 144.

Mata, decided less than a decade later, reached largely the same conclusions, but did so on the basis of a more developed record with the benefit of additional scientific and medical testimony. Notably, two of the experts who testified in *Mata*—Dr. Ronald Wright and Dr. John P. Wikswo, Jr.—also testified to essentially the same information in this case. *See Mata*, 745 N.W.2d at 273-75; R. p. 25. Unlike *Dawson*, the *Mata* court, crediting Wikswo's testimony and rejecting Wright's, explicitly held that "death and loss of consciousness is not instantaneous for many condemned prisoners" and that the condemned prisoner had met his burden of proving that "electrocution inflicts intense pain and agonizing suffering." 745 N.W.2d at 277-78. The electric chair, *Mata* held, has a "proven history of burning and charring bodies" that is "inconsistent with both the concepts of evolving standards of decency and the dignity of man." *Id.* at 278. "Examined under modern scientific knowledge, 'electrocution has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of state prisons.'" *Id.* (quoting *Jones*, 701 So.2d at 87 (Shaw, J., dissenting)).

Thus, as other courts have previously observed after reviewing evidence similar to what was before the circuit court in this case, even if "it is not possible to determine conclusively whether unnecessary pain is inflicted [in a judicial electrocution]," the affirmative evidence that does exist strongly indicates that in an intolerably large number of cases, judicial electrocution amounts to torture. *Dawson*, 554 S.E.2d at 142-43; *Mata*, 745 N.W.2d at 278; R. pp. 26-27. The risk of a torturous death in the electric chair is, as the circuit court held, even more intolerable in light of the fact that South Carolina authorizes execution by lethal injection—a method that is known to be more humane and less painful, when it is properly administered. R. p. 28; *see also Baze*, 553 U.S. at 62 ("The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection."). Simply put, "[e]lectrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man. Other states have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty." *Mata*, 745 N.W.2d at 278. "After more than a century of use, it is time to retire the South Carolina electric chair as a violation of the Article I, section 15 of the South Carolina Constitution." R. p. 28.

III. THE FIRING SQUAD VIOLATES THE SOUTH CAROLINA CONSTITUTION

A. South Carolina's Firing Squad

In 2022, SCDC developed, for the first time in the history of this state, a protocol for carrying out an execution by firing squad. Specifically, SCDC Director of Security developed the protocol through internet research and conversations with at least one official from Utah. R. p. 1107, lines 21-22; R. p. 1108, lines 12-14, 21-24. The Security Director acknowledged that he is not an expert on the firing squad, he is not a doctor, and he is not a ballistics expert. *See* R. p. 1112, lines 6-25. Nevertheless, in the course of developing the protocol—including the ammunition,

number of weapons, the target, and other details—he did not consult government or military officials outside of Utah, he did not talk to any ballistics experts, and he made no efforts to work with a physician. R. p. 1108, lines 15-20; R. p. 1109, line 24-p. 1110, line 4; R. p. 1119, lines 4-9. In essence, the Security Director invented the protocol by himself, based on what he could find on Google, and built the structure depicted below (chair in the back left of the frame):

Plaintiffs' Exhibit 11, R. p. 1562

SCDC's protocol calls for the condemned prisoner to be strapped into the backless metal chair depicted in the image above. Once the prisoner is restrained, an SCDC employee will cover the inmate's head with a hood and a physician will place what the Security Director called an "aiming point" over his heart. R. pp. 1746-47. Three people will stand approximately fifteen feet away, each armed with a rifle loaded with live .308 Winchester 110 grain TAP urban ammunition. R. pp. 1563-65, 1743, 1748. This ammunition was selected because it is designed to fragment and cause greater damage to the chest of the inmate, with each bullet creating a four or six inch cavity in the "area where the bullet hits." R. p. 1113, lines 5-23; R. pp. 1563-65.[24] On command, the executioners will aim at the "aiming point" and fire their rifles. R. p. 1478. If, following this volley, the inmate appears unresponsive, a physician will check for vital signs and will do so every sixty

[24] The chamber includes a "catch basin" around the chair, which is "to catch the blood and other matter that will result from the firing squad." R. p. 1088, lines 3-10.

seconds until there are no vital signs, at which point the physician will certify death. R. pp. 1478-79. If, however, the inmate is not dead after ten minutes, the executioners will shoot him again. R. p. 1750. This process will repeat, up to three times, until the inmate dies. R. p. 1749.

B. The Trial Testimony and the Circuit Court's Findings

In contrast to the electric chair, the parties and their experts agreed on the mechanisms that cause death by firing squad. The disputed facts about the firing squad instead related to how long an individual will remain conscious and sensate after having been shot in the chest.

Dr. Arden testified for Respondents that the firing squad causes death by destroying the heart and stopping the circulation of oxygenated blood to the brain. R. p. 1352, lines 23-25. He explained that after a person's heart stops beating, they will remain conscious and sensate for "approximately fifteen seconds" because "the blood that remains in the blood vessels in the brain, even though it is no longer circulating as it should be, still contains oxygen and the brain cells can continue to extract the oxygen." R. p. 1323, lines 18-24, R. p. 1353, lines 6-14. Dr. Arden explained that the fifteen second estimate is "widely known and accepted" and is published and documented "in the major forensic textbooks." R. p. 1325, lines 2-4. If, however, "the wounds managed to damage the heart or other structures internally but did not completely and totally eliminate circulation"—because, for example, the executioners did not hit the inmate's heart directly—"then you have that approximate fifteen seconds plus some more depending upon how much circulation did continue in a compromised state." R. p. 1353, lines 14-20. During the period when blood is still circulating, a person would remain conscious and experience "the pain and suffering that was attendant to the result of [the gunshot] wounds." R. p. 1353, lines 12-14. Those wounds, he explained, would include damage to the flesh and skin from the bullet holes, and "[i]n order for the gunshots . . . to enter the body and damage the heart, they have to go through the chest wall," including "various ribs" and "the sternum or breastbone." R. p. 1355, line 22-p. 1356, line 4.

"[F]resh fractures in general are extremely painful injuries," and "fractures of the ribs are notorious for being extremely painful when they are fresh." R. p. 1356, lines 14-17. Moreover, "if someone were to be shot like that and then have a brief period of consciousness and were to breathe or move, that person would be experiencing excruciating pain." R. p. 1356, lines 22-24.

Although there are no autopsies from South Carolina firing squad executions because none have taken place, Dr. Arden testified about an autopsy report from a firing squad execution in Utah. R. pp. 1757-61 (Pls. Ex. 15). One of the "pathological diagnoses" in that autopsy report, Dr. Arden explained, was "fragmentation of anterior chest wall, heart, left lung, liver, stomach and pancreas," meaning the inmate suffered "multiple bone fractures as a part of the gunshot wounds." R. p. 1363, lines 7-18. The bullets all exited the inmate's body, leaving "blood clots and bleeding that . . . dripped," with three or four entrance wounds on the chest. R. p. 1362, lines 7-23; R. p. 1364, lines 18-19. When he was asked to compare the autopsy from Utah with what he would expect from South Carolina's firing squad, Dr. Arden noted that "the damage to the body in the South Carolina protocol would be very similar," with the one exception being "the type of ammunition that is proposed to be used in South Carolina . . . and it is unlikely that the rounds that South Carolina is going to use would exit." R. p. 1364, line 24-p. 1365, line 6. During an execution by firing squad, Dr. Arden opined that "[q]uite simply the person would feel the impact of multiple rifle rounds simultaneously, would feel the effects of the breakage of the bones and the damage to the soft tissue," and "[t]here would be a brief period of consciousness," during which the condemned person "would feel the pain of the disruptive soft tissue, and, most importantly, the broken bone." R. p. 1365, lines 14-23.

The Appellants called three experts. First, Dr. Wright was qualified as an expert in forensic pathology. When he was asked for his opinion about the firing squad, he simply responded: "It

hurts." R. p. 1471, line 6. Second, Appellants called Dr. Jorge Alvarez, whom the court qualified as an expert in cardiology. R. p. 1417, lines 20-22. Dr. Alvarez agreed with Dr. Arden that the mechanism of death in the firing squad would be disruption of the heart and surrounding vessels, which would stop blood circulation. R. p. 1419, lines 11-17. He also agreed with Dr. Arden that the heart is located "behind a series of bones, your ribs," and "the sternum," and that the sternum covers between half and one-third of the heart, although "everyone's a little bit different." R. p. 1432, lines 2-11.

Regarding consciousness, Dr. Alvarez testified that damage from the firing squad would likely cause "relatively immediate cessation of blood flow, . . . leading to a rapid decline in consciousness and awareness and ultimately death." R. p. 1419, lines 14-17. Dr. Alvarez estimated that, after a person's heart stops beating entirely, they remain conscious "less than ten seconds," R. p. 1420, lines 1-2, but on cross examination, he acknowledged that this estimate was based on an assumption that the shooters would hit the heart and that the heart would be completely destroyed or suffer enough "penetrating trauma" that it would "cease to work," R. p. 1428, lines 6-25.

Finally, the Appellants called Dr. D'Michelle DuPre and the Court qualified her as an expert in forensic pathology. R. p. 1437, lines 20-21; R. p. 1477, lines 4-8. Like Drs. Arden and Alvarez, Dr. DuPre testified that the firing squad accomplishes death by damaging the heart and stopping circulation of oxygenated blood to the brain. R. p. 1480, lines 3-12. She also testified that when the specific ammunition the Security Director selected for the firing squad hits its target—the inmate—"it's going to break up and all of those pieces of the bullet will do damage to that target." R. p. 1479, lines 11-15. This process of fragmentation will increase the size of the hole produced by each bullet, and "every piece of that bullet is also going to have a temporary cavity

associated with it, which causes some additional waves of damage." R. p. 1479, lines 17-21. Unlike Drs. Arden and Alvarez, however, Dr. DuPre opined that death by firing squad would cause the heart to "immediately stop bleeding—stop beating," and that as a result, the inmate would "lose consciousness almost immediately" or at least "so quick that they would not experience pain at all." R. p. 1480, lines 10-12; R. p. 1482, lines 5-15. She also testified that shooting and killing another person is difficult and that an inadequately trained or prepared executioner "certainly could" make that person more likely to flinch or miss and cause a botched execution. R. p. 1485, line 23-p. 1486, line 13. Dr. DuPre acknowledged that her belief that the firing squad is instantaneous and painless was premised on her beliefs about how the execution would be carried out, including that the executioners would not miss, R. p. 1486, lines 6-17, and the court found that her testimony "[wa]s based on a series of unsupported assumptions," R. p.18.

The circuit court made the following findings of fact about the firing squad:

- The firing squad has historically been "used mainly as a military punishment for soldiers, not civilians."
- Fewer than one percent of executions in the United States have been carried out by firing squad, "with only thirty-four since 1900, all but one of which were in Utah."
- "[I]t is clear that the firing squad causes death by damaging the inmate's chest, including the heart and surrounding bone and tissue. This is extremely painful unless the inmate is unconscious," which the court found to be "unlikely."
- "[T]he inmate is likely to be conscious for a minimum of ten seconds after impact," but "[t]he length of the inmate's consciousness—and, therefore, his ability to sense pain—could even be extended if the ammunition does not fully incapacitate the heart."
- The firing squad causes "excruciating pain resulting from the gunshot wounds and broken bones. This pain will be exacerbated by any movement [the inmate] makes, such as flinching or breathing."
- The firing squad "constitutes torture, a possibly lingering death, and pain beyond that necessary for the mere extinguishment of [life]."
- "The firing squad clearly causes destruction to the human body." A person who is killed by firing squad is, "by any objective measure, mutilated."

- SCDC intentionally selected "frangible ammunition because it would break open upon impact and inflict maximal damage to the inmate's body," including "cavitation (a hole in the inmate's chest) up to six inches in diameter, at a depth of 45 inches into the body."
- SCDC anticipates that the firing squad will produce "carnage, as it created a firing squad chamber that includes a slanted trough below the firing squad to collect the inmate's blood and covered the walls of the chamber with a black fabric to obscure any bodily fluid or tissues that emanate from the inmate's body."

R. pp. 21-24.

C. The Firing Squad Is Cruel, Unusual, and Corporal

i. The Firing Squad is Unusual

Giving the word "unusual" its common and ordinary meaning, the circuit court held that the firing squad is unusual because it has never been used in South Carolina; it has fallen out of use in other parts of the country; and it is not a newly created or discovered means of execution but "a reversion to a historic method of execution." R. pp. 21-22. The Supreme Court of the United States recognized nearly a century and a half ago that the punishment was used mainly as a military punishment for soldiers, not civilians. *See Wilkerson v. Utah*, 99 U.S. 130, 135 (1878). In 1972, in the course of voting to invalidate all then-existing death penalty statutes in the United States, Justice Brennan noted that executions by "shooting [had] virtually ceased" following the adoption of supposedly more humane methods, including electrocution and lethal gas. *Furman*, 408 U.S. at 296-97 (Brennan, J. concurring). Since then, only three of more than 1500 total executions in the United States (less than one percent) have been carried out by firing squad, all in the state of Utah. *See Arthur v. Comm'r, Ala. Dep't Corr.*, 840 F.3d 1268, 1316 (11th Cir. 2016), *abrogated in part on other grounds by Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *see also* U.S. DEP'T OF J., *Capital Punishment, 2020—Statistical Tables* at 20 (Dec. 2021), available at https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf. Thus, South Carolina has never used the firing

squad and other death penalty jurisdictions have almost entirely abandoned it as new and more humane methods have become available. This makes it unusual and therefore unconstitutional.

ii. The Firing Squad Is Cruel

"Punishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life." *Kemmler*, 136 U.S. at 933. The firing squad causes death by destroying the prisoner's heart, which the circuit court found involves "broken bones" and the destruction of the inmate's "heart and surrounding bone and tissue." R. p. 22. The court found that an inmate "will feel excruciating pain resulting from the gunshot wounds and broken bones" for a minimum of ten seconds, and the "pain will be exacerbated by any movement he makes, such as flinching or breathing." R. p. 22. The duration of the inmate's pain could "be extended if the ammunition does not fully incapacitate the heart." R. p. 22. And SCDC did not adopt the protocol it did in any effort to minimize pain and suffering; to the contrary, the agency did not consult any medical or ballistics professionals, and there was no dispute at trial that the ammunition the Security Director picked was designed to "hit the bone in front of the inmate's heart causing it to fragment." R. p. 23. These factors, taken together, "constitute[] torture, a possibly lingering death, and pain beyond that necessary for the mere extinguishment of life." R. p. 22. Given these factual findings by the circuit court, and given that South Carolina has authorized lethal injection, the South Carolina firing squad is cruel and therefore unconstitutional.

iii. The Firing Squad Is Corporal

The firing squad is corporal, given the extent to which it will cause "destruction to the human body." R. p. 23. The Security Director testified that he chose frangible ammunition precisely because "it would break apart upon impact and cause maximal damage to the inmate's body," leaving a hole in the inmate's chest up to six inches in diameter, three times. R. p. 23. The circuit court found that this damage was almost certain to happen, given the extent of the damage

inflicted on the body of the last person executed by firing squad in Utah. R. p. 23 (citing R. pp. 1757-61 (Pls. Ex. 15)). The autopsy photos and report from that execution "depict multiple entrance wounds in the inmate's chest" and show soaked clothes from the "large volumes of blood [that] poured out" of the condemned man's body. R. p. 23. "The inmate's body has been, by any objective measure, mutilated." R. p. 23. Thus, the firing squad is corporal and therefore unconstitutional.[25]

IV. ACT 43 IS UNCONSTITUTIONALLY VAGUE AND/OR VIOLATES SOUTH CAROLINA'S NON-DELEGATION DOCTRINE

The most important term in Act 43 is the word "available," which gives the Director of SCDC the sole authority[26] to dictate the method(s) of execution South Carolina will use for any given inmate's execution.[27] As the trial court recognized, however, there are two fundamental

[25] As is true of the electric chair, if this Court determines that article I, section 15 is co-extensive with the Eighth Amendment, the Circuit Court's findings support a conclusion that the firing squad "superadds pain" as compared to lethal injection and is unconstitutional.

[26] This unique feature of the statute makes it unlike any other jurisdiction that still retains the death penalty. Although some other states allow inmates to select from multiple legislatively authorized methods of execution, no other jurisdiction conditions that "choice" by limiting it only to methods deemed "available" by a bureaucrat at the Department of Corrections.

[27] Stirling testified he is "essentially in charge of the operations of the Department"—"[t]he whole kit and caboodle." R. p. 1060, lines 22-25. However, he has never seen an execution and does not know whether SCDC keeps historical records of executions. R. p. 1061, lines 3-4, 17-21. Stirling does not know how old SCDC's electric chair might be or when it was last updated. R. p. 1065, lines 2-3; R. p. 1067, lines 2-4. He is not involved in decisions related to the execution process, such as development, testing or evaluation of the electrocution protocol. R. p. 1068; R. p. 1071 line 21-p. 1072, line 20; R. p. 1075, lines 2-11. Likewise, Stirling has never seen a death by firing squad, nor has he "ever reviewed records from a death by firing squad to get any kind of understanding about how it works." R. p. 1082, lines 17-22. He had no role in redesigning the execution chamber for the firing squad. R. p. 1086, lines 12-21. Stirling testified he relies on unspecified "subject matter experts" for any decisions related to SCDC's execution process, R. p. 1068, lines 4-12, but Appellants refused to identify any such experts under the provisions of the Protective Order.

flaws with the word "available" in Act 43 that render the statute unconstitutional "beyond a reasonable doubt." *Curtis v. State*, 345 S.C. 557, 570, 549 S.E.2d 591, 597 (2001).

First, because the law does not define the word "available" or provide any standards for determining what the word means in context, it fails to give "fair notice to those persons to whom the law applies" and is therefore impermissibly vague. *In re Amir X.S.*, 371 S.C. 380, 391-92, 639 S.E.2d 144, 150 (2006). As this Court has recognized, a statute is unconstitutionally vague "if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598. In Act 43, the words "available" and "unavailable" do not have clear, unambiguous meanings independent of their statutory context.[28] While Appellants argue that "available" plainly means "present or ready for immediate use," Br. of Apps. at 44, that is by no means self-evident. The word could also mean "accessible, obtainable," or "capable of being gotten; obtainable." *Available*, Merriam-Webster Dictionary (2022), https://www.merriam-webster.com/dictionary/available; *Available*, American Heritage Dictionary (2022), https://ahdictionary.com/word/search.html?q=available. The various definitions of "available" demonstrate that the meaning of the word depends on the context in which it is used, and this is therefore not a case in which "the statute's language is plain, unambiguous, and conveys a clear, definite meaning," leaving no room for judicial interpretation.[29] *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010).

[28] *Brannon v. McMaster*, 434 S.C. 386, 864 S.E.2d 548 (2021) is not to the contrary. While the statute at issue did contain the term "available" ("all advantages available under the provisions of the Social Security Act"), this Court determined that the "manifest intent of the legislature" was evident and that, in context, the meaning of the provision was unambiguous. *Id.* at 389, 864 S.E. 2d at 550.

[29] This Court's orders staying two of Respondents' execution dates in June of 2021 also implicitly rejected the argument that "available" has a plain meaning of "present and ready for immediate

Appellants maintain that the legislative intent in amending the execution method statute was to change the default method of execution to electrocution, thereby making "a condemned inmate's choice subject to there being multiple ways to carry out a scheduled execution." Br. of Apps. at 46. Thus, they ask this Court to interpret "available" in the context of the Legislature's decision to amend the statute after SCDC announced that it could not obtain drugs necessary to carry out executions by lethal injection, one of the methods specifically authorized by the new execution statute. However, "context," as a matter of statutory interpretation, is not a broad reference to legislative debate or public opinion. Instead, "context" requires this Court to consider not only "the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *S.C. Energy Users Comm.*, 388 S.C. at 492, 697 S.E.2d at 590.

This is not a case in which the legislature "announced a purpose of the Act." *Contra id.* at 494-95, 697 S.E.2d at 592 (noting the Legislature's explanation of the challenged law's purpose); *Savannah Riverkeeper v. S.C. Dep't of Health & Envt.*, 400 S.C. 196, 202-03 & n.2, 733 S.E.2d 903, 906 (2012) (noting that the Legislature expressed its intent in the law's title). Given the lack of a clear statement, therefore, this Court must derive a purpose based on the whole statute. While Appellants argue that legislative history proves that the purpose of Act 43 was to restart executions, even when SCDC did not have lethal injection drugs, Br. of Apps. at 45-46, the choice to retain an election between methods (including lethal injection) and to add firing squad to the statute

---

use." As described above, following enactment of Act 43, the Director certified that neither lethal injection nor firing squad were "available" and SCDC planned to carry out executions by electrocution. However, after he provided his explanation why the firing squad was "unavailable," this Court vacated the execution notices previously issued and stayed all executions because the "firing squad [was] currently unavailable due to [SCDC's failure to implement it]." Orders, *Sigmon & Owens*, Nos. 2002-024388, 2021-000584, No. 2006-038802.

indicates the General Assembly intended to do more than merely restart executions by a method other than lethal injection. What these dual purposes fail to do is provide the Court, the Director of SCDC, or Respondents, with a definition for the term "available" because the Legislature failed to provide a definition or standards for determining availability and the statute's purpose leaves the term open to multiple definitions. The statute is, therefore, unconstitutionally vague.

Second, the new execution law impermissibly gives the Director unfettered discretion to determine what the law is in violation of the non-delegation principle. "At its simplest, the constitutional division of powers can be described as '[t]he legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws.'" *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) (quotations omitted). Although "the legislature may not delegate its powers to make laws," it may authorize the executive branch "'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 232-33, 246 S.E.2d 869, 876 (1978) (quotation omitted). Thus, unless a law makes a clear delegation, executive branch "policymaking is an intrusion upon the legislative power." *Hampton*, 403 S.C. at 404, 743 S.E.2d at 262; *see also West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (nondelegation ensures that "when agencies seek to resolve major questions, they at least act with clear [legislative] authorization and do not exploit some gap, ambiguity, or doubtful expression in [the legislature's] statutes to assume responsibilities far beyond those the people's representatives actually conferred on them" (cleaned up)).

Appellants' proposed definition of the word "available" does not fix this issue because "present or ready for immediate use" puts no onus on the Director to make all legislatively

authorized methods of execution available to all condemned inmates at the time their executions are scheduled. Rather, regardless of their ability to access or obtain the means to implement a method, if they do not happen to have the means immediately at hand, (*i.e.*, guns, lethal injection drugs, electric chair, etc.), the Director could certify the methods' unavailability. The legislative intent, and this Court's recent orders staying executions where only electrocution was certified to be "available," demonstrate that the statute places at least some duty on the Director to make a bona fide effort to give each inmate who is scheduled to die a choice between all three methods, including lethal injection. But because the statute is silent as to what that effort must be, there is no way for this Court, Respondents, members of the public, or even SCDC to know whether the Director has complied with the law, and that constitutes an impermissible delegation.

Moreover, as the trial judge correctly recognized, Act 43 infringes on the judicial province by purporting to give the Director the authority to declare what the word "available" means because that authority—the authority to "interpret[] and declare[] the law," *Hampton*, 403 S.C. at 403, 743 S.E.2d at 262—belongs to the judicial branch. *See State v. Langford*, 400 S.C. 421, 434-35, 735 S.E.2d 471, 478 (2012) (holding that a statute that gave solicitors the power to prepare court dockets violated the separation of powers because the statute vested "a member of the executive branch with the exclusive authority to perform an inherently judicial function"). As explained above, the word "available" is susceptible to many different meanings, and the statute offers no guidance on which meaning controls. As a result, the statute gives the Director a judicially unreviewable power; once he has declared that a method is or is not "available," there is no means under the statute by which a condemned person may challenge that determination.

Appellants' response boils down to a request that this Court simply trust the Director to "take the steps necessary (within South Carolina law, of course), to try to make each method

available for each execution." Br. of Apps. at 47-48. But that rings hollow, given that the Director is the sole authority on the meaning of "available." Ultimately, declaring what the law means is "an inherently judicial function," and under Appellants' reading of Act 43, the executive branch has usurped that power. *See Langford*, 400 S.C. at 435, 735 S.E.2d at 478. The lack of a statutory definition of available is a failure to create an "intelligible principle," and that gives the Director "undefined discretion" over executions. *Bauer*, 271 S.C. at 232-33, 246 S.E. 2d at 876.

V. ACT 43 REQUIRES SCDC TO MAKE AT LEAST TWO CONSTITUTIONAL METHODS OF EXECUTION "AVAILABLE"

The plain language of Act 43 provides a death-sentenced inmate a "right to elect[]" death by "electrocution, firing squad, or lethal injection." S.C. Code Ann. § 24-3-530(A) (2021); *see also id*. at § 24-3-530(E) (stating the Department of Correction must provide written notice of the inmate's "right to election"). This language is consistent with the previous version of the statute, which provided a right to elect either lethal injection or electrocution. S.C. Code Ann. § 24-3-530 (1995).

In addition, this Court has explicitly stated that Act 43 provides a statutory right of inmates to elect the manner of their execution. In May of 2021, the Court issued execution notices for Respondents Sigmon and Owens after counsel for SCDC announced that, due the passage of Act 43, "the Department is now able to carry out executions by electrocution," Letter, Plyler to Shearouse (May 19, 2021). However, the Court also instructed Director Stirling to "provide an explanation as to why two methods of execution under the statute, lethal injection and firing squad, are currently unavailable." Letter, Shearouse to Stirling (June 4, 2021). Stirling responded that lethal injection was not available because SCDC had been unable to acquire the necessary drugs and the firing squad was not "available" because "SCDC [did] not have the necessary policies and

protocols" to conduct "an execution by firing squad."[30] Letter, Stirling to Shearouse (June 8, 2021). This Court then vacated the execution notices, explaining:

> Under these circumstances, in which only a single method of execution is available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice.

Order, *State v. Owens*, No. 2006-038802 (June 16, 2021); *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (same). Moreover, in its Order remanding the discovery issue to the trial court, this Court stated that "[t]he amended statute now provides that any person sentenced to death has a 'right of election' among electrocution, the firing squad, or lethal injection." *Owens v. Stirling*, 438 S.C. 352, 355, 882 S.E.2d 858, 860 (2023).

In order for the statutory right of election to have any meaningful effect, SCDC must, at a minimum, present a death-sentenced inmate with a choice between two constitutional methods of execution. As this Court has already concluded, a purported "choice"—when there is only one option offered—is merely pretext. Likewise, a "choice" between one constitutional method of execution and one or more that violate article I, section 15 is equally meaningless. It is therefore imperative that death-sentenced inmates and their counsel have the Court's guidance regarding which alternative methods, if any, are constitutional choices. The trial court found that both the firing squad and the electric chair are unconstitutional. If this Court upholds those findings (as it should), then Act 43 cannot stand as written because (among other reasons) there would be no way for death-sentenced inmates to exercise their statutory right of election.

[30] In other words, SCDC's view was that the firing squad was not "present and ready for immediate use."

VI. RESPONDENTS ARE ENTITLED TO REASONABLE INFORMATION ABOUT THE DRUGS SCDC PURPORTS TO HAVE

Respondents maintain that lethal injection by a single dose of pentobarbital is constitutional if the execution is carried out properly, using reliable and effective drugs. Oral Argument, 1:09:46 ("**[D]one properly**, then lethal injection is clearly a humane method of execution." (Blume) (emphasis added)). The only way to know whether SCDC is capable of conducting such an execution using its newly acquired drugs (and recently developed but undisclosed protocol) is to require disclosure of some basic facts about the drug's creation, quality, and reliability. This is especially true in light of the Shield Law's provision that SCDC's purchase of drugs "shall be exempt from licensing, dispensing, and possession laws, processes, regulations, and requirements of or administered by the Department of Labor, Licensing and Regulation, the Board of Pharmacy, or any other state agency or entity." S.C. Code Ann. § 24-3-580 (2023).

However, Appellants claim that the Shield Law prevents disclosure of *any* information about the drugs—not just the names of the supplier, but also the supplier's qualifications, the date on which the drugs were manufactured, and any procedures used in manufacturing or compounding the drugs. Reply in Support of Motion to Lift Abeyance at 10. Such a complete lack of judicial or Legislative oversight will substantially increase the risk of a botched execution.[31] By its own admission, SCDC had to make over 1,300 contacts before obtaining pentobarbital, which raises concerns about the legitimacy, efficacy, and purity of drugs obtained from the Department's 1301st choice. Affidavit of Bryan P. Stirling, *Owens v. Stirling*, No. 2022-001280, at ¶ 6 (S.C. 2023).

[31] For an in-depth discussion, see the Affidavit of Dr. Michaela Almgren. Attachment A to Respondents-Appellants' Motion to Supplement the Record.

Respondents submit that to have assurances that the drugs obtained by SCDC are of the quality to be effective and reliable, the Court should order disclosure of the following information:

- The licensure status of the supplier(s) and/or compounder(s) of the lethal injection drugs (and any supplier(s) of the components to be used in compounding);
- The date or dates on which the drugs were manufactured or compounded;
- If the drugs were compounded, the procedure followed by the compounder;
- Information about quality control measures used to ensure the purity and efficacy of the lethal injection drugs, including the results of any tests or analyses performed on the drugs;
- Information about storage and handling of the lethal injection drugs;
- The expiration dates of lethal injection drugs to be used in the executions, including, if relevant, the expiration dates of any stabilizing compounds and the expiration dates of the active execution drug; and
- The dose of the lethal injection drug to be administered during the execution.

This Court should either (1) order SCDC to disclose this information directly to counsel for Respondents under a protective order; (2) remand for limited discovery on lethal injection drug quality and reliability issues; or (3) require independent quality testing prior to each execution, as some other state courts have suggested. *E.g.*, *Owens v. Hill*, 758 S.E.2d 794, 800 (Ga. 2014).

A. The Shield Law Does Not Create a Blanket Exemption from Disclosure of All Information Remotely Related to the Execution Process

i. The Plain Language of the Shield Law Does Not Protect the Information Respondents Seek

The Shield Law explicitly protects only the identities of the suppliers of the drug, not information regarding the drug itself or quality controls surrounding the drug. § 24-3-580 provides as follows, in pertinent part:

(A) As used in this section, the term:

> (1) "Execution team" shall be construed broadly to include any person or entity that participates in the planning or administration of the execution of a death sentence, including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence.
>
> (2) "Identifying information" shall be construed broadly to include any record or information that reveals a name, date of birth, social security number, personal identifying information, personal or business contact information, or professional qualifications. The term "identifying information" also includes any residential or business address; any residential, personal, or business telephone number; any residential, personal, or business facsimile number; any residential, personal, or business email address; and any residential, personal, or business social media account or username.

§ 24-3-580(A). The Shield Law makes no reference to any information about how the drugs are prepared, including whether they were compounded, the license status of the preparing entity, the dates on which the drugs were manufactured or compounded, any quality control measures taken to ensure the quality and efficacy of the drug, information about how the drugs are stored and otherwise handled, or the expiration dates of the drugs and any stabilizing compounds. Appellants can disclose this information to Respondents without disclosing the identities of anyone involved, and they could do so under a protective order, to avoid disclosures prohibited by the Shield Law.[32]

[32] At oral argument, this Court recognized—and the State conceded—that the State could turn over otherwise sealed information to Respondents under a protective order:

> Q (Few, J.): I'm talking about a protective order that says they can have it, but it's sealed, and it can't be disclosed outside of a very small circle of people. If you got that now, what's the legal basis on which this Court is not entitled to know what the department did to try to satisfy, to comply with the statute?
>
> A (Plyler): I am not aware of any legal basis that this Court couldn't order [SCDC] to provide that information to you.
>
> Oral Argument at 2:29:20–41.

Moreover, other courts in states with similar shield laws have determined that shield statutes do not extend to information other than the identity of the drug provider.[33] For example, Georgia's description of identifying information is virtually identical to South Carolina's, *compare* Ga. Code § 42-5-3(d)(1) and S.C. Code § 24-3-580(A)(2), and Georgia further classifies this information "as a confidential state secret." Ga. Code § 42-5-36. Even with this classification, the Georgia Court of Appeals ruled the secrecy law did not exempt the State from turning over information related to "purchase, acquisition, transportation, and handling of the drugs used in lethal injection." *Blau v. Dep't of Corr.*, 873 S.E.2d 464, 469–70 (Ga. Ct. App. 2022) (rejecting an argument that documents containing any information protected by the shield law were completely exempt from disclosure as opposed to disclosing redacted documents to avoid violating the Secrecy Act).[34] Appellants' representation that they should be allowed to operate in total blindness from the public eye or without quality assurance contradicts practices across the country.

The vast majority of jurisdictions have weaker non-disclosure language than the language of § 24-3-580, and no other jurisdiction has allowed for an interpretation of the shield law that does not provide the person to be executed with at least some information about the protocol to be

[33] *See, e.g.*, *Cover v. Idaho Bd. Of Corr.*, 476 P.3d 388 (Idaho 2020) (recognizing that individuals are entitled to protocol information, including the drugs to be used and the procedures to be undertaken to carry out an execution by lethal injection, but not information about the individuals involved in making the drugs); *State ex rel. BH Media Group v. Frakes*, 943 N.W.2d 231 (Neb. 2020) (ordering disclosure of records related to the Nebraska Department of Correctional Services' efforts to obtain lethal injection drugs on the grounds that they were not protected by Nebraska's Shield Law); *State ex rel. Hogan Lovells U.S., L.L.P. v. Dep't of Rehab. & Corr.*, 123 N.E.3d 928 (Ohio 2018) (requiring disclosure of correspondence from the director of the Ohio Department of Rehabilitation and Correction related to the Department's acquisition and supply of lethal injection drugs); *Lockett v. Evans*, 330 P.3d 488, 491 (Okla. 2014) ("The identity of the drug or drugs and the dosage of the drugs are not covered by the provision.").

[34] Notably, even with the protections of Georgia's shield law in place, the state had voluntarily provided some information to the petitioner, including that the drugs had been obtained from a compounding pharmacy. *Owens*, 758 S.E.2d at 801.

actually used to carry out the execution or the dosage of the drug to be used on an individual in carrying out the execution. Since *Furman v. Georgia* was decided, twenty-four jurisdictions that practice or have practiced capital punishment, including South Carolina, operated under some shield law. Fourteen other jurisdictions define the execution team members and identifying information that is protected from disclosure in similar or identical terms to S.C. Code § 24-3-580. Eight other jurisdictions provide weaker or vaguer protection than the language in S.C. Code § 24-3-580. *See* Attachment A, Status of Shield Laws in Jurisdictions Practicing Capital Punishment Post-*Furman*.

None of these jurisdictions have gone as far as to hide information related to drug quality and reliability from either death row inmates or the public as Respondents argue § 24-3-580 should.[35] In fact, other states have recognized the concerns that total non-disclosure creates and provided that certain information should always be available to the public, could be provided to an individual in court under seal, or could be provided to the public with the identifying information redacted. *See, e.g.*, Ark. Rev. Stat. 5-4-617(j); Idaho Admin. Code 06.01.01.135.05; Idaho Code § 19-2716A(4)(b); Mo. Rev. Stat. § 546.720(2); Miss. Code Ann. § 99-19-51(4); Neb. Rev. Stat. § 83-967(2); Tenn. Code Ann. § 10-7-504(h)(2); Wyo. Code § 7-13-916.

B. If Appellants' Interpretation of the Shield Law Is Correct, the Statute Is Unconstitutional

i. Appellants' Interpretation of the Shield Law Violates Separation of Powers and Non-Delegation Principles

If Respondents' interpretation of the Shield Law is correct, and everything about the execution process must be shielded from judicial review, the Legislature has unconstitutionally infringed on the power of the judiciary to oversee executive action by delegating that power to the

[35] For a summary of state shield laws nationwide, *see* Attachment A.

executive branch itself.[36] The South Carolina Constitution establishes three branches of government that must remain "forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8; *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). Thus, a statute that grants 'an absolute, unregulated, and undefined discretion" to an executive agency is an unlawful delegation of legislative power. *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 595, 86 S.E.2d 466, 471 (1955) (quoting 42 Am. Jur. at 343).

Executive action must be reviewable by the judiciary, *Marbury v. Madison*, 5 U.S. 137 (1803), and separation of powers requires that the Legislature provide a review process where matters of public interest are at issue. *Harbin* at 594, 86 S.E.2d at 470 (requiring that the Legislature build into its laws "a proper regard for the protection of the public interests . . . and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration" (quoting *State v. Stoddard*, 3 A.2d 586, 588 (Conn. 1940))). The public interest requires more than blind trust in the good faith of executive actors—it requires judicial and/or legislative oversight. *Harbin* at 596, 86 S.E.2d at 471. This Court has been clear

---

[36] It is not clear that the legislature intended to impose a complete veil of secrecy from the judicial branch, as Appellants suggest. During the legislative debates about the Shield Law, Senator Hembree (the bill's sponsor) repeatedly stated that the General Assembly could simply "trust the judicial system" to assert its authority even without a "good cause" provision expressly permitting disclosure:

> So I think **you're going to have to kind of trust the judicial system to, to deal with that exceptional circumstance, if you had a botched execution,** that a lawyer is going to come in and say, "Hey, I know what the statute says. But this is truly exceptional. And because of this, we need to . . . be able to pierce the shield." And, you know, I think . . . **that's what judges do.**

Hearing Before the Senate Comm. on Corrections and Penology, 125th S.C. Legis. Sess. at 20:11 (Feb. 2, 2023) (Statement of Sen. Greg Hembree).

that "the judicial branch retains the ultimate authority in deciding when agency decisions comport with established law." *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 277, 802 S.E.2d 794, 800 (2017) (quoting *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 53, 766 S.E.2d 707, 728 (2014) (Toal, C.J., dissenting).

ii. Appellants' Interpretation of the Shield Law Creates a Heightened Risk of Botched Executions, with No Way for This Court to Determine Whether Respondents' Constitutional Rights Have Been or Will Be Violated

If Appellants' interpretation is correct, the Shield Law removes all precautions that courts might take to prevent a botched execution, and further eliminates any recourse that *any* state actor other than SCDC might have in the event that an execution is botched. This interpretation would prevent either the judiciary or the Legislature from learning anything about how the drug was created, when it was made, how it will be stored or prepared for an execution, the potency of the drug, or even whether the drug is pentobarbital at all—instead, Appellants insists that this Court must rely on nothing but an affidavit from Bryan Stirling asserting that lethal injection is an available method of execution to serve as a satisfactory answer to all of those questions. "The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion." *Harbin* at 596, 86 S.E.2d at 471 (quoting 42 Am. Jur., Public Administrative Law, Section 45)).

An execution with improperly compounded or improperly stored pentobarbital will cause extreme pain and suffering along with violent reactions, including choking, spasms, groaning, and gasping for air as the drug takes effect. Dr. Michaela Almgren Aff. ¶ 21 (Dec. 27, 2023).[37] If the drug is not potent enough, the inmate is likely to remain conscious or regain consciousness after injection, likely with organ or brain damage from oxygen deprivation. *Id.* Further, the Shield Law

[37] Attachment A to Respondents-Appellants' Motion to Supplement the Record.

allows SCDC to obtain pentobarbital from unlicensed pharmacists, which, due to the nature of the drug and the difficulty of compounding it, increases the chance that it will not be compounded correctly, which in turn increases the likelihood that an execution will be excruciatingly painful. *Id.* ¶¶ 8–12. In other words, under the Shield Law, there is no way for this Court to ascertain whether South Carolina's execution process violates the Eighth Amendment or article I, section 15 of the South Carolina Constitution.

Depriving a death-sentenced inmate of basic information about lethal injection drugs also violates his due process rights. U.S. Const. amend. XIV; S.C. Const. art. I § 3. Although "due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances,'" the phrase itself "expresses the requirement of 'fundamental fairness.'" *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 24-25 (1981) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)). Thus, when the government seeks to deprive a citizen of the most fundamental of all rights—the right to life—procedural due process requires that the state provide sufficient process to fully protect the interests at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 323 (1976). This inquiry requires balancing three factors: (1) the weight of the individual interest at stake; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the government's interest in maintaining the existing procedures. *See id.* at 335. Respondents' right not to suffer a torturous death is weighty; the risk of a botched execution without any oversight is high; and the information Respondents request is reasonable and narrowly tailored to protect their fundamental rights.[38]

[38] Similarly, Appellants' interpretation of the Shield Law renders the statutory right of election meaningless. Without further information, Respondents face selecting blindly between a method

VII. ADDITIONAL INFORMATION IS NEEDED TO PROPERLY ANALYZE THE EX POST FACTO ISSUE

A law is unconstitutionally ex post facto when it "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes," *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or "alters the situation of the party to his disadvantage," *State v. Malloy*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913) (*Malloy I*). Put another way, a change that makes a criminal law "more onerous" violates the federal Ex Post Facto Clause. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). Moreover, this Court's ex post facto jurisprudence goes beyond the federal standard.[39] *Jernigan v. State*, 340 S.C. 256, 561 S.E.2d 507 (2000).

A change to the method of execution violates the state and federal Ex Post Facto Clauses if the new method "inflicts a greater punishment[] than the law annexed to the crime, when committed." *Malloy v. South Carolina*, 237 U.S. 180, 184 (1915) (*Malloy II*); *see also Malloy I*, 95 S.C. at 441, 78 S.E. at 997 ("[T]he punishment prescribed by law for an offense, at the time it was committed, can not be changed by subsequent legislation, unless the change is advantageous to the prisoner."). If it turns out that the drug SCDC has obtained is in fact pentobarbital from a legitimate source and of adequate quality, then Respondents concede that this claim would fail as they have conceded (and the Supreme Court has found) that a single dose of pentobarbital is

---

of execution of uncertain efficacy (lethal injection) and two antiquated methods that the circuit court has deemed unconstitutional due to the pain and damage each method is certain to cause.

[39] *Jernigan* involved a challenge to a change in South Carolina's parole statute that had already been litigated at the Fourth Circuit. Specifically, the Fourth Circuit held that the parole statute was not ex post facto as a matter of federal law when it changed parole review from annual to biannual for offenders convicted of violent crimes. *Roller v. Gunn*, 107 F.3d 227, 235-36 (4th Cir. 1997). Three years later, this Court struck down the same statute as an ex post facto law and explicitly rejected the analysis in *Roller*: "We find the analysis of the dissent in *Roller II* more compelling than that of the *Roller II* majority." *Jernigan*, 340 S.C. at 263-65, 561 S.E.2d at 511.

currently the most humane method of execution. However, whether SCDC's new lethal injection protocol would produce a "more onerous" method of execution than one permitted by law prior to the passage of Act 43 is, in Respondent's view, currently unknown and unknowable without the essential details discussed above.

CONCLUSION

The circuit court correctly applied the law to the facts that the evidence at trial supported. The judgment below should be affirmed.

Respectfully submitted,

s/ Lindsey S. Vann

Lindsey S. Vann (No. 101408)
Emily Paavola (No. 77855)
Allison Franz (No. 105189)
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

John H. Blume (No. 743)
CORNELL LAW SCHOOL
112 Myron Taylor Hall
Ithaca, NY 14853

Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
506 Pettigru (29601)
P.O. Box 6938
Greenville, SC 29606

John Christopher Mills (No. 9067)
J. CHRISTOPHER MILLS, LLC
2118 Lincoln Street
Columbia, SC 29202

Counsel for Respondents-Appellants

December 27, 2023.

Attachment A: Status of Shield Laws in Jurisdictions Practicing Capital Punishment post-*Furman*

State	Status of Capital Punishment	Shield Law	What is protected under the shield law?
Alabama	Legal Last execution by lethal injection in 2023 Protocol with redactions available publicly	No shield law but asserts they are not required to disclose information as a matter of policy	N/a Courts have ordered the production of redacted protocols. *See, e.g.*, *Comm'r Ala. Dep't Corr. v. Advance Local Media, LLC*, 918 F.3d 1161 (11th Cir. 2019).
Arizona	Legal Last execution by lethal injection in 2022 Protocol available publicly	Ariz. Rev. Stat. § 13-757(c)	The identity of executioners and other persons who participate or perform ancillary functions in an execution. Courts have recognized that drug packaging might be public records and required for redacted production of records about drug expiration dates, procurement processes, and the like to third parties. *ACLU of Ariz. v. Ariz. Dep't of Corr.*, 2017 Ariz. App. Unpub. LEXIS 725 (Ariz. Ct. App. June 8, 2017).
Arkansas	Legal Last execution by lethal	Ark. Code Ann. § 5-4-617 (d), (i)	Documents, records, or information that may identify or reasonably lead directly or indirectly to the identification of an entity or person who compounds, synthesizes, tests, sells, supplies, manufactures, transports, procures, dispenses, or prescribes the drug or drugs.

	injection in 2017 Protocol available publicly		Courts have ordered production to third parties of redacted labels and packaging inserts under a former version of the shield law. *E.g.*, *Ark. Dep't of Corr. v. Shults*, 541 S.W.3d 410 (Ark. 2018). The current version of this shield law has not been considered by the courts.
California	Legal but Governor imposed moratorium Last execution by lethal injection in 2006 No current protocol in place	No shield law	N/a
Colorado	Abolished in 2020 Last execution by lethal injection in 1997	No shield law	N/a
Connecticut	Abolished in 2012 Last execution by	No shield law	N/a

	lethal injection in 2005		
Delaware	Abolished in 2016 Last execution by lethal injection in 2012	No shield law	N/a
Florida	Legal Last execution by lethal injection in 2023 Protocol available publicly	Fla. Stat. Ann. § 945.10(2)(g)	Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection. Courts have required the production of documents related to safety and efficacy issues including those received from the manufacturers of lethal injection drugs while not requiring disclosure of information about who the execution team members were. *Muhammad v. State*, 132 So.3d 176 (Fla. 2013).
Georgia	Legal Last execution by lethal injection in 2020 Protocol available publicly	Ga. Code § 42-5-36	The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence. Courts have recognized that total nondisclosure of documents containing information protected by the shield law is improper and redacted documents should be produced instead. *Blau v. Dep't of Corr*, 873 S.E.2d 464, 469–70 (Ga. Ct. App. 2022). Courts have also recognized that, even with the shield law in place, other "available and feasible means of discovery. . . [like] production of a

			sample of the drug for independent testing," might be required. *Owens v. Hill*, 758 S.E.2d 794, 800 (Ga. 2014).
Idaho	Legal Last execution by lethal injection in 2012 Protocol available publicly	Idaho Admin. Code 06.01.01.135; Idaho Code § 19-2716A(4)(b)	Designates as confidential information about the identity of any person or entity who compounds, synthesizes, tests, sells, supplies, manufactures, stores, transports, procures, dispenses, or prescribes the chemicals or substances for use in an execution or that provides the medical supplies or medical equipment for the execution process. Courts have recognized under both Idaho Admin Code 06.01.01.135 and Idaho Code § 19-2716A(4)(b) that individuals are entitled to protocol information, including the drugs to be used and the procedures to be undertaken to carry out an execution by lethal injection, but not information about the individuals involved in making the drugs. *Cover v. Idaho Bd. Of Corr.*, 476 P.3d 388 (Idaho 2020); *Creech v. Tewalt*, 84 F.4th 777 (9th Cir. 2023).
Illinois	Abolished in 2011 Last execution by lethal injection in 1999	No shield law	N/a
Indiana	Legal Last execution by lethal injection in 2009 Confidential Protocol	Ind. Code § 35-38-6-1	The identity of an outsourcing facility, a wholesale drug distributor (as defined in IC 25-26-14-12), a pharmacy (as defined in IC 25-26-13-2), or a pharmacist (as defined in IC 25-26-13-2) for the issuance or compounding of a lethal substance necessary to carry out an execution by lethal injection. Courts have not considered this statute as it pertains to information access.

	available to inmate		
Kansas	Legal Never carried out an execution by lethal injection No current protocol in place	Kan. Stat. Ann. § 22-4001(b)	The identity of executioners and other persons designated to assist in carrying out the sentence of death. Courts have not considered this statute as it pertains to information access.
Kentucky	Legal Last execution by lethal injection in 2008 Protocol available publicly	Ky. Rev. Stat. § 45A.720	The identity of an individual performing the services of executioner. Courts have not considered this statute as it pertains to information access.
Louisiana	Legal Last execution by lethal injection in 2010	La. Rev. Stat. § 15:570	The identity of any persons other than the persons specified in Subsection F of this Section who participate or perform ancillary functions in an execution of the death sentence, either directly or indirectly. The persons specified to be not confidential include the Warden, the coroner, the condemned's minister or priest, 5-7 witnesses, and the victim's witnesses if present. While courts have recognized the nondisclosure of identity information and have not ordered specific production of protocols, the protocols have been provided to

			inmates in discovery related to execution protocol challenges. *E.g.*, *Hoffman v. Jindal*, 2022 U.S. Dist. LEXIS 58565 (M.D. La. March 30, 2022).
Maryland	Abolished in 2013 Last execution by lethal injection in 2005	No shield law	N/a
Massachusetts	Abolished in 1984 Never carried out an execution by lethal injection	No shield law	N/a
Mississippi	Legal Last execution by lethal injection in 2022 Confidential Protocol available to inmate	Miss. Code Ann. § 99-19-51 (3)–(5)	The identities of the State Executioner and his deputies, all members of the execution team, a supplier of lethal injection chemicals, and witnesses who attend as members of the victim's family or designated by the condemned person. Courts have required confidential disclosure of the protocols to be used to the inmate to be executed with redaction to prevent identifying information about drug manufacturers from being disclosed. *E.g.*, *Chase v. Hall*, 2018 U.S. Dist. LEXIS 53471 (S.D. Miss. March 29, 2018).
Missouri	Legal	Mo. Rev. Stat. § 546.720	The identities of members of the execution team, as defined in the execution protocol.

	Last execution by lethal injection in 2023 Protocol available publicly		Courts have recognized that the specific supplier or testing laboratory identity does not need to be disclosed when inmates have information about the execution protocol to be used and whether the drug came from a manufacturer or compounder. *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014). *See also In re Mo. Dep't of Corr.*, 839 F.3d 732 (8th Cir. 2016); *Bray v. Lombardi*, 516 S.W. 3d 839, 845 (Mo. Ct. App. 2017).
Montana	Legal Last execution by lethal injection in 2006 Protocol available publicly	Mont. Code Ann. § 46-19-103(5)	The identity of the executioner. Courts have not considered this statute as it pertains to information access.
Nebraska	Legal Last execution by lethal injection in 2018 Protocol available publicly	Neb. Rev. Stat. § 83-967	The identity of all members of the execution team. Courts have recognized that drug manufacturers are considered a part of the execution team protected by the state's shield law but protocols, but documents that do not identify execution team members are not exempt from disclosure and other documents can be provided to the public in redacted form to protect this identity information. *State ex rel. BH Media Group v. Frakes*, 943 N.W.2d 231 (Neb. 2020).
Nevada	Legal	No shield law but the DOC	N/a

	Last execution by lethal injection in 2006 Protocol with redactions available publicly	has asserted they are not required to disclose information as a matter of policy	Courts have recognized that it is proper for the inmate to be executed to have access to the protocol to be used to challenge his/her execution. *Nev. Dep't of Corr. v. Eighth Judicial Dist. Court*, 2018 Nev. Unpub. LEXIS 396 (Nev. 2018). Courts have also recognized that identity information about drug manufacturers/compounders that has been publicly disclosed by the state cannot later be withheld. *See, e.g., Alvogen, Inc. v. State*, 2018 Nev. Dist. LEXIS 966 (Nev. 8th Judicial District Sept. 28, 2018).
New Hampshire	Abolished in 2019 Never carried out an execution by lethal injection	No shield law	N/a
New Jersey	Abolished in 2007 Never carried out an execution by lethal injection	No shield law	N/a
New Mexico	Abolished in 2009 Last execution by lethal	No shield law	N/a

	injection in 2001		
North Carolina	Legal Last execution by lethal injection in 2006 Protocol available publicly	N.C. Gen. Stat. § 132-1.2	The name, address, qualifications, and other identifying information of any person or entity that manufactures, compounds, prepares, prescribes, dispenses, supplies, or administers the drugs or supplies obtained. Courts have not considered this statute as it pertains to drug manufacturer identity information access.
Ohio	Legal Last execution by lethal injection in 2018 Protocol available publicly	Ohio Rev. Code Ann. § 2949.211	The identity of a person who manufactures, compounds, imports, transports, distributes, supplies, prescribes, prepares, administers, uses, or tests any of the compounding equipment or components, the active pharmaceutical ingredients, the drugs or combination of drugs, the medical supplies, or the medical equipment used in the application of a lethal injection of a drug or combination of drugs in the administration of a death sentence by lethal injection. Courts have recognized that the inmate to be executed is provided the protocol to be used while the identity information remains confidential. *In re Ohio Execution Protocol Litigation*, 2017 U.S. Dist. LEXIS 107468 (S.D. Ohio July 12, 2017). Courts have ordered photographing of the medication vials, the boxes in which they were packaged, and the syringes used in the administration of a lethal injection execution and have recognized that redacted versions of these photos could be disclosed while also providing for preservation and testing of the materials. *In re Ohio Execution Protocol Litigation*, 2017 U.S. Dist. LEXIS 111003 (S.D. Ohio July 18. 2017).
Oklahoma	Legal Last execution by	22 Okla. Stat. Ann. § 1015(B)	The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution.

	lethal injection in 2023 Protocol available publicly		Courts have recognized that the protocol and other information can be provided to inmates without necessitating disclosure of identity information. *Glossip v. Chandler*, 554 F.Supp.3d 1176 (W.D. Okla. 2021), *vacated on other grounds by Glossip v. Chandler*, 2021 U.S. Dist. LEXIS 196084 (W.D. Okla. Oct. 12, 2021). *See also Lockett v. Evans*, 330 P.3d 488, 491 (Okla. 2014).
Oregon	Legal but Governor imposed moratorium Last execution by lethal injection in 1997 Protocol available publicly	Or. Admin. Rule 291-024-0016	The identity of the executioner(s). Courts have not considered this statute as it pertains to information access.
Pennsylvania	Legal but Governor imposed moratorium Last execution by lethal injection in 1999	61 Pa. C. S. § 4305	The identity of department employees, department contractors or victims who participate in the administration of an execution. Courts have provided for disclosure of the protocol and information about the sources of the lethal injection drugs under a strict confidentiality order to counsel for the inmate to be executed pursuant to the lethal injection protocol. *Chester v. Beard*, 2012 U.S. Dist. LEXIS 157316 (M. D. Pa. Nov. 2, 2012).

	Protocol available publicly Protocol available confidentially		
Rhode Island	Abolished in 1984 Never carried out an execution by lethal injection.	No shield law	N/a
South Carolina	Legal Last execution by lethal injection in 2011 Protocol not available publicly	S.C. Code § 24-3-580	Identifying information about any person or entity that participates in the planning or administration of the execution of a death sentence, including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence.
South Dakota	Legal Last execution by lethal	S.D. Code §23A-27A-31.2	The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering lethal injection are confidential. Courts have recognized that documents containing information about lethal injection, drug procurement, and the protocols are of strong public interest and

	injection in 2019 Protocol available publicly		should be provided in redacted form upon request because the shield provision does not provide blanket nondisclosure, but rather only protects identity information. *See Moeller v. Weber*, 2013 U.S. Dist. LEXIS 140558 (S.D. Sept. 30, 2013); *Moeller v. Weber*, 2014 U.S. Dist. LEXIS 138361 (S.D. Sept. 30, 2014).
Tennessee	Legal Last execution by lethal injection in 2019 Protocol available publicly	Tenn. Code Ann. § 10-7-504	The part of a record identifying a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection. For the purposes of this section "person or entity" includes, but is not limited to, an employee of the state who has training related to direct involvement in the process of executing a sentence of death, a contractor or employee of a contractor, a volunteer who has direct involvement in the process of executing a sentence of death, or a person or entity involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death. Courts have recognized that the supplier or manufacturer identity information could remain confidential under the shield law in litigation where the inmates had access to the protocol to be used which also included information about whether the drugs to be used were obtained from a compounding pharmacy. *West v. Schofield*, 460 S.W.3d 113 (Tenn. 2015). Courts have also required production of records/testimony about drug availability and procurement efforts with identity information redacted. *See Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018).
Texas	Legal Last execution by lethal	Tex. Crim. Proc. Code Ann. Art. 43.14(b); Tex. Gov't	The name, address, and other identifying information of 1any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.

	injection in 2023 Protocol available publicly	Code § 552.1081	Courts have recognized that the drug's specific source did not have to be disclosed when Texas provided the protocol to be used, information about the drugs and back up drugs to be used in an execution, whether the drugs were manufactured or from a compounding pharmacy, information about the dates the drugs were ordered and received, and information about testing conducted to ensure potency, purity, and integrity. *Tex. Dep't of Crim. J. v. Levin*, 572 S.W.3d 671 (Tex. 2019).
Utah	Legal Last execution by lethal injection in 1991 Protocol available publicly	No shield law but asserts they are not required to disclose information as a matter of policy	N/a Courts have not explicitly considered whether this information must remain confidential as a matter of policy.
Virginia	Abolished in 2021 Last execution by lethal injection in 2017	Va. Code § 53.1-234	The identities of any pharmacy or outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection, any officer or employee of such pharmacy or outsourcing facility, and any person or entity used by such pharmacy or outsourcing facility to obtain equipment or substances to facilitate the compounding of such drugs and any information reasonably calculated to lead to the identities of such persons or entities, including their names, residential and office addresses, residential and office telephone numbers, social security numbers, and tax identification numbers. Courts have recognized that the identity of the manufacturers or compounders do not need to be disclosed, particularly since Virginia provided the inmate with information about the protocol to be carried out, the drug dosages, information about whether specific substances were obtained from manufacturers or

			compounding pharmacies, and about the efficacy testing that the DOC conducted themselves. *Gray v. McAuliffe*, 2017 WL 102970 (E.D. Va. Jan. 10, 2017).
Washington	Abolished in 2018 Last execution by lethal injection in 2010	No shield law	N/a
Wyoming	Legal Last execution by lethal injection in 1992 No current protocol	Wyo. Code § 7-13-916	The identities of all persons who participate in the execution of a death sentence as a member of the execution team or by supplying or manufacturing the equipment and substances used for the execution. Courts have not considered this statute as it pertains to information access.
Federal Government	Legal Last execution by lethal injection in 2021 Protocol available publicly	No shield law but asserts they are not required to disclose information under Freedom of Information Act exceptions	N/a Courts have held that while the specific identifying information or a manufacturer or compounder might be withheld pursuant to FOIA, information related to drug price, quantity, expiration date, container units, lot numbers, purchase order/reference numbers, substance descriptions, drug concentration, and dates of purchase, service, and/or delivery were not necessarily commercial for the purposes of exemption under FOIA, and that information could be redacted to still allow for public record access. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't. of J.*, 58 F.4th 1255 (D.C. Cir. 2023); *Buzzfeed, Inc. v. United States DOJ*, 2023 U.S. Dist. LEXIS 153530 (D.D.C. Aug. 30, 2023).