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S.C. SUPREME COURT

THE 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 REPLY BRIEF OF APPELLANTS-RESPONDENTS

Daniel C. Plyler
Austin T. Reed
SMITH | ROBINSON
2530 Devine Street
Columbia, SC 29205

Counsel for Director Stirling and SCDC

Thomas A. Limehouse, Jr.
Chief Legal Counsel
Wm. Grayson Lambert
Senior Litigation Counsel
Erica Wells Shedd
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, SC 29201

Counsel for Governor McMaster

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REPLY BRIEF

Respondents' brief confirms that there are two, independent bases on which to reverse the circuit court's order. First, the Court can maintain its centuries' old approach to constitutional interpretation, give article I, section 15 the meaning that "its framers and the people who adopted it" intended, *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014), and hold that because neither electrocution nor the firing squad is intended to "superadd terror, pain, or disgrace" to an execution, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019), these methods are constitutional. This constitutional test stands in stark contrast with the circuit court's novel standard that a method must cause "instantaneous or painless death" to be constitutional—a standard that the circuit court wrongly forced Appellants, rather than Respondents, to prove. R. p. 26.

Second, the Court can hold that Respondents failed to carry their "heavy burden," *Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013), to prove Act 43's "repugnance to the Constitution is clear and beyond a reasonable doubt," *Curtis v. State*, 345 S.C. 557, 570, 549 S.E.2d 591, 597 (2001). Look no further than their own experts' testimony on direct examination (not even on cross) about electrocution. Wikswo recognized that the "fundamental question is what fraction of the current is going through the skull" but admitted that he had "no evidence" of how much of the brain was rendered immediately insensate. R. pp. 1188, 1202. Along the same lines, Arden acknowledged that he did not "think it's possible to determine with any kind of medical certainty whether" an inmate was "sensate during the application of current." R. pp. 1329–30. He summed up his thoughts succinctly: "we simply don't know" when a person becomes insensate during electrocution. R. p. 1330. For parties required to prove a law is unconstitutional beyond a reasonable doubt, these admissions doom their case.

In fact, the only time that Respondents ever get close to citing something from their experts

that is definitive on whether electrocution is painful is when they misleadingly quote a portion of Arden's testimony. They claim, based on that testimony, "that death in the electric chair is 'painful and excruciating.'" Resps.' Br. 26 (quoting R. p. 1352). Arden, however, conditioned that claim on "*as long as the person is still conscious*." R. p. 1352 (emphasis added). In other words, Respondents have taken a qualified statement and transmogrified it into an unequivocal declaration on the case's ultimate question.

Either basis leads to the same result: reversal. The circuit court's order is riddled with errors, from applying an unprecedented legal framework to ignoring damning testimony from Respondents' own experts while flipping the burden of proof. That order therefore cannot stand.

The Shield Statute does not change any of this substantive analysis. At most, it gives this Court a jurisdictional offramp before reaching the constitutional questions this case raises. *See Sanders v. Anderson Cnty.*, 195 S.C. 171, ___, 10 S.E.2d 364, 364 (1940) ("The Court will avoid, when possible, passing upon the constitutionality of an Act of the Legislature"); *cf. Planned Parenthood S. Atl. v. State* ("*Planned Parenthood II*"), 440 S.C. 465, 476, 892 S.E.2d 121, 127 (2023) ("when issuing constitutional rulings, a court should endeavor to ground its decision on the narrowest possible basis"). The Shield Statute is nothing more than the General Assembly's exercise of its plenary power to legislate. No matter what "unease" the Court (or Respondents) might have with that policy, the policy must be enforced because it is constitutional and because Respondents do not actually have a claim in this case challenging the Shield Statute. *Connelly v. Main St. Am. Grp.*, 439 S.C. 81, 97, 886 S.E.2d 196, 204 (2023). Respondents' speculation about what might happen in a future lethal injection is no basis to disregard the statute's plain language.

I. Electrocution and the firing squad are constitutional.

A. Both methods are constitutional under article I, section 15's original meaning.

The Court should decline Respondents' invitation to throw out it its centuries' old approach to interpreting our Constitution. Appellants cited cases going back two centuries, all of which stand for the proposition that the Constitution is interpreted based on the intent and understanding of those who enacted it. *See* Apps.' Br. 13 (collecting cases).

Respondents insist that the method of constitutional interpretation is set by a single case—*State v. Forrester*, 343 S.C. 637, 541 S.E.2d 836 (2001)—and requires comparing the state and federal Constitutions, then comparing the state Constitution to other States' social compacts, and finally asking whether a proposed interpretation of the South Carolina Constitution is consistent with precedent. *See* Resps.' Br. 10. To be sure, those secondary analytical steps may be necessary in some isntances, but the initial inquiry and ultimate question are always "what does the text of the South Carolina Constitution mean?".

No one here disputes that there are some differences in the structure of article I, section 15 and the Eighth Amendment or that a state constitution may sometimes provide greater protection than the federal constitution. But the essential question remains: What do *cruel*, *unusual*, and *corporal* mean?

Appellants' opening brief offered a detailed study of the historical record. *See* Apps.' Br. 15–23. Unsurprisingly, Respondents take issue with that study, but their objections fall flat. Respondents claim that Appellants' "sole source" for determining the meaning of constitutional terms is Samuel Johnson's dictionary. Resps.' Br. 9. Not at all. Indeed, far from it. In addition to this dictionary (which the U.S. Supreme Court has repeatedly cited when analyzing constitutional terms, *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)), Appellants also cited

old South Carolina statutes; South Carolina Supreme Court decisions; U.S. Supreme Court decisions; judicial decisions from the 1800s; primary sources from the Founding era; and books and law review articles by modern academics. *See* Apps.' Br. 16–23. All of these sources shed more light on the meaning of constitutional terms than the 2023 dictionary the circuit court cited.

Additionally, Respondents complain about how far back Appellants' historical analysis of *cruel*, *unusual*, and *corporal* goes, insisting that the terms' meaning in 1970, not in colonial times, controls. *See* Resps.' Br. 19 n.16. Appellants never claimed that anything other than those terms' meaning in 1970 controls, but the history of those terms matters for at least two reasons. First, at no point do Respondents actually argue that the framers and people in 1970 thought these terms meant something other than how Appellants have defined them based on the historical record. Second, Respondents overlook the fact that the West Committee merely "modernized the language," *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895* 19 (1969), so the historical meaning of these terms that were still included in article I, section 15 is relevant to determine the proper understanding of those terms. Put another way, Respondents are correct that article I, section 15 means what it was understood to mean in 1970, but Respondents are incorrect that *cruel*, *unusual*, and *corporal* had different meanings in 1970 than they had in the previous centuries.

Ultimately, Appellants' study provided a clear definition of all three constitutional terms. A *cruel* punishment is one that superadds terror, pain, or disgrace. *See* Apps.' Br. 16–19. An *unusual* punishment is one that is contrary to long or immemorial usage. *See* Apps.' Br. 19–21. And a *corporal* punishment is a distinct category of punishment from capital punishment that causes physical harm but leaves an inmate alive (a fact implicitly confirmed by the text of article I, section 15, which discusses "capital offenses"). *See* Apps.' Br. 21–23.

None of these terms requires "an instantaneous or painless death," as the circuit court claimed. R. p. 26. Consider just two examples of why. *One*, our Constitution since 1790 has prohibited "cruel" punishments, *compare* S.C. Const. art. IX, § 4 (1790), *with* S.C. Const. art. I, § 15, yet hanging was the State's method of execution for more than a century. Hanging "could be fast or slow, apparently painless or obviously excruciating, depending on the actual case of death," whether a severed spinal cord or asphyxiation. Stuart Banner, *The Death Penalty: An American History* 46–47 (2002). Respondents concede as much about hanging. *See* Resps.' Br. 4. No court, however, ever concluded that hanging was unconstitutionally cruel between 1790 and 1912.

Two, for all the pre-1970 news reports that Respondents claim showed electrocution could be painful, *cf.* R. pp. 1287–88 (cross-examination of Wikswo about these articles), the State continued using electrocution as the sole method of execution for another 25 years after article I, section 15 was adopted. If electrocution had been understood to be unconstitutional in 1970, it's inconceivable the State would have continued to use it for so long after adopting article I, section 15. Both of these examples demonstrate that South Carolina's constitutional language has always prohibited attempts to intensify a death sentence, not to mandate eliminating any "risk[]" of a "painful" death (as Respondents put it). Resps.' Br. 10.

Respondents alternatively try to criticize Appellants' approach to constitutional analysis by claiming it obstructs society's progress. *See* Resps.' Br. 9, 18. Hardly. Even in the case that Respondents cite on this front, this Court explained that when "seeking to ascertain [the Constitution's] meaning," the Court must "look to [the Constitution's] historical background," so "consideration of the history of the times in which it was framed and adopted, and of the object sought to be accomplished by it, is an appropriate inquiry in the judicial effort to determine the intent of its framers and of the people who adopted it." *Knight v. Hollings*, 242 S.C. 1, 4, 129

S.E.2d 746, 747 (1963). In other words, the Constitution can apply to changing circumstances (which means that the First Amendment applies to the Internet, *see Packingham v. North Carolina*, 582 U.S. 98 (2017), and the Fourth Amendment to cars, *see Kansas v. Glover*, 140 S. Ct. 1183 (2020)), but the meaning of the Constitution is fixed. The People have the sole power to amend it. *See* S.C. Const. art. I, § 1; *id.* art. XVI, § 1.

Nothing else that Respondents argue changes this analysis. Their recounting of South Carolina's various constitutional amendments, *see* Resps.' Br. 12–13, never puts forward anything instructive about what the framers or the People understood *cruel*, *unusual*, and *corporal* to mean. All they say is that South Carolina wanted to provide greater protection than the federal Constitution. Even assuming that is true, article I, section 15 did just that: A punishment that is cruel *or* unusual *or* corporal violates state law. A punishment violates the Eighth Amendment only if it is both cruel *and* unusual. Thus, *cruel* and *unusual* may mean the same thing under both Constitutions, and the South Carolina Constitution is still more protective of individual rights than its federal counterpart.

Respondents' contention that, essentially, "we know more now than they knew then" falls flat for at least three reasons. *See* Resps. Br. 14. In the first place, this argument actually confirms that the original understanding of article I, section 15 permits electrocution. In the second, this argument wrongly invites the Court to take the right to amend the Constitution away from the People and arrogate that power to itself. And in the third, this argument assumes there is some scientific consensus against electrocution, which is not the case, based both on the testimony at trial in this case and the fact that multiple States still have electrocution as an authorized method of execution. *See, e.g.*, Ala. Code § 15-18-82.1.

Respondents' remaining attempts to apply their *Forrester* test similarly fail. *See* Resps.'

Br. 15–18. Neither *State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985), nor *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), has anything to say about how article I, section 15's terms apply to methods of execution. And nothing they point to from other States sheds any light on the meaning of the terms in article I, section 15 or how South Carolinians understood them.

In fact, when Respondents attempt to define the constitutional terms, it's clear that those terms mean what Appellants said they mean and that both electrocution and the firing squad are constitutional under those standards. Starting with *cruel*, Respondents quote *In re Kemmler* for the meaning of the term: "torture or a lingering death . . . something more than the mere extinguishment of life." Resps.' Br. 18 (quoting 136 U.S. 436, 447 (1890)) (alteration in original). But they overlook two things here. First, by looking to federal caselaw, they implicitly admit that *cruel* means the same thing in article I, section 15 as it does in the Eighth Amendment—a point they seem to resist elsewhere. Second, they ignore that the U.S. Supreme Court, in discussing *Kemmler* and other cases, has recognized that this term "does not guarantee a prisoner a painless death." *Bucklew*, 139 S. Ct. at 1124. In other words, *cruel* doesn't mean *painless*. Electrocution and the firing squad are not intended to superadd pain but to cause a swift death.

Turning to *unusual*, Respondents don't actually disagree with Appellants' definition that the term means punishments that have fallen out of use.[1] *See* Resps.' Br. 18. They merely disagree with how out of use is out of use enough. Electrocution has been an authorized method of execution in South Carolina for 112 years, *see* 1912 S.C. Acts No. 402, § 1, and it has been used in this State as recently as 2008. The firing squad, while new to South Carolina, has been an authorized method

[1] To their credit, Respondents at least do not repeat the circuit court's error. The circuit court held that because the firing squad "has never before been employed" in this State, it is unusual. R. p. 22. But by that logic, lethal injection would have been unconstitutional when it was enacted in 1995, given the disjunctive structure of article I, section 15.

in multiple States and used as recently as 2010. Neither is contrary to immemorial usage, *see* Apps.' Br. 19–21, and applying Respondents' standard would, with a sufficient delay in executions, even result in lethal injection becoming unusual.

Finishing with *corporal*, Respondents say that means "'mutilation' or damage to the human body beyond what is essential to effectuate a punishment." Resps.' Br. 18. They try to push back on Appellants' definition by claiming Appellants look to old sources. Appellants did so because *corporal* is a long-used legal term. But even modern sources draw the distinction between corporal and capital punishment that Appellants did. Look no further than Merriam-Webster's—the very dictionary on which the circuit court relied: "execution comes under the separate heading of 'capital punishment', which originally involved losing your head (*capit-* meaning 'head')." Merriam-Webster (2023), https://tinyurl.com/yc4bcth4. Corporal punishment is therefore the easiest of article I, section 15's terms to analyze here because it doesn't apply to capital punishment.

B. Respondents failed to carry their heavy burden to prove either method is unconstitutional.

The circuit court must be reversed for a second, independent reason: Respondents did not prove that electrocution and the firing squad violate article I, section 15. It was, after all, their "heavy burden," *Bodman*, 403 S.C. at 66, 742 S.E.2d at 36, to prove those methods were "clear[ly]" unconstitutional "beyond a reasonable doubt," *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597. Yet their own experts' testimony dooms their claims.

1. Electrocution.

Nothing Respondents argue can change the fact that both of their experts repeatedly and unequivocally testified that they do not know when an inmate becomes insensate. At most, they tried to shift the burden to say that there's no proof electrocution is instantaneous or painless—a

burden shifting that the circuit court wrongly embraced. *See* R. p. 26 ("there is no evidence to support the idea that electrocution produces an instantaneous or painless death"); *see also* Resps.' Br. 26 (continuing to push this burden shifting). For example, Wikswo testified:

- "There are no measurements to prove that the brain is rendered insensate from the early shocks." R. p. 1169.
- "[T]here is no scientific basis for [electrocution] being instantaneous and painless." R. pp. 1184–85.
- "[T]he initial shock . . . may or may not be rendering the brain insensate." R. pp. 1186–87.
- "[A] fundamental question is what fraction of the current is going through the skull." R. p. 1188.
- "Some [current] will, of course, go into the brain. The great question is what fraction of the current goes into the brain and it is by no means all of the current." R. p. 1196.
- "[T]here's no evidence . . . on what that fraction is" of current that enters the brain. R. p. 1201; *see also* R. p. 1264.
- "I am not able to determine whether a burn occurred before or after death." R. p. 1215.
- "I don't believe that anyone today knows how long some period of time is" before an inmate dies from judicial electrocution and that it may be "less than ten [seconds]," "less than five [seconds]," or even "less than two [seconds]," but all Wikswo could say is "I don't know." R. pp. 1229–31.
- "I'm not arguing for . . . or against" the claim that death by judicial electrocution is "instantaneous," but "I'm simply saying there is no scientific proof" that it is instantaneous. R. p. 1240; *see also* R. p. 1282.
- "My position is no one can" prove how long it takes someone to lose consciousness in a judicial electrocution. R. p. 1260.

Arden testified similarly:

- "I don't think there's any way to determine with any kind of scientific certainty this [mechanism of death in judicial electrocution] is happening or this one happens first." R. p. 1326.

- "I don't think there's any way to predict does the current immediately render you unconscious or not." R. p. 1327.

- "We don't know for sure that the current is first going this place or that place." R. p. 1328.

- "I don't think it's possible to determine with any kind of medical certainty whether those people were sensate during the application of the current or not." R. pp. 1329–30.

- "[W]e really don't know how this effects people and whether it does—could render them unconscious or insensate rapidly or immediately or not." R. p. 1330.

- "[W]e simply don't know." R. p. 1330.

- "I do not have an opinion—I do not have a way to determine specifically how rapidly or not [becoming insensate] occurs." R. p. 1370.

- I do not "know how long it might take to depolarize the neurons in the brain." R. p. 1371.

- "I cannot look at the individual burn and say this one is antemortem, this one is postmortem. That's not possible." R. p. 1372.

These repeated admissions of their experts' lack of knowledge doom their claim, given that they bore the heavy burden of proving electrocution is unconstitutional. Even accepting the faulty premise that any pain is constitutionally prohibited, the absence of evidence that electrocution is painless is not itself evidence of pain. Thus, the Court need not even consider any of the testimony from Appellants' experts (much less determine that the circuit court was wrong not to credit it) in finding that Respondents failed to prove their case. These concessions from Respondents' experts are, standing alone, sufficient to reverse the circuit court.

Respondents offer various arguments about the testimony from trial, but none of these five arguments salvages the fatal defects in their experts' testimony. *First*, they seek to change the question from "how long is an inmate sensate?" to "what does an inmate experience if he remains sensate after the first high-voltage shocks?". *See* Resps.' Br. 22. No one disagrees about that

second question: that would be painful. *See* R. p. 1470 (Wright). But the experts vehemently disagreed about whether an inmate would be sensate after the initial shock. And as the long list of bullet-pointed quotes demonstrates, Respondents' experts admittedly could not answer that question.

Second, Respondents insist that because experimentation on people isn't possible, this case is "precisely the situation in which expert testimony is necessary." Resps. Br. 21 n.19. That's fair enough. But Respondents still had to prove their case that these methods are unconstitutional. They didn't do that because their experts repeatedly said things like "I don't think it's possible to determine with any kind of medical certainty whether those people were sensate during the application of current or not." R. pp. 1329–30 (Arden). Respondents cannot escape this fact by claiming Appellants' expert did not "offer any affirmative proof to support" his theories. Resps.' Br. 27. It wasn't Appellants' burden to prove anything.

Third, Respondents point to the autopsy reviews. *See* Resps.' Br. 24–25. Yet both Wikswo and Arden candidly admitted they could not determine if any particular burn occurred pre- or post-mortem. R. pp. 1215, 1372. And the only pre-mortem injury they could identify was bruising of the wrists. R. p. 1351 (Arden). That does not, however, answer whether the inmate was sensate at that point. Nor does it apply the correct constitutional test. After all, inserting an IV can cause bruising too. Does that mean lethal injection is also unconstitutional?

Fourth, Respondents lean on what they claim are botched executions. *See* Resps.' Br. 25. Yet they fail to grapple with the fact that, based on Austin Sarat's exhaustive study, only 1.92% of electrocutions are botched or that the sole account of an inmate who purportedly "scream[ed]" was a single news report from a Florida execution. *See* Apps.' Br. 31. (Respondents did not offer the newspaper article on which the testimony about that scream was based as evidence, so we

know little about what actually happened in that execution.) Nor do they respond to the fact that in Florida, all four forensic pathologists who studied Pedro Medina's body concluded he died instantaneously upon the first application of the electric current. *See* Apps.' Br. 31. The report from those pathologists, *see* R. p. 1648, also shows that the circuit court was incorrect when it said that "there is no evidence to support the idea that electrocution produces an instantaneous or painless death," (as if that were actually the correct legal framework), R. p. 26.

Fifth, Respondents make much of the fact that Wikswo testified that the animal-husbandry industry does not use this method of electrocution. *See* Resps.' Br. 25–26. The Court need not engage with this red herring. Respondents omit the fact that the U.S. Supreme Court (like other courts presented with similar arguments) has repudiated the notion of comparing judicial executions with veterinary practices, as "veterinary practice for animals is not an appropriate guide to humane practices for humans." *Baze v. Rees*, 553 U.S. 35, 58 (2008) (plurality) (rejecting "[w]hatever rhetorical force the argument carries" and emphasizing that "it overlooks the States' legitimate interest in providing for a quick, certain death").

Moving beyond the testimony from trial, Respondents gain no more traction by looking to cases from Georgia and Nebraska. *See* Resps.' Br. 29–31 (discussing *Dawson v. Georgia*, 554 S.E.2d 137 (Ga. 2001), and *Nebraska v. Mata*, 745 N.W.2d 229 (Neb. 2008)). None of their arguments accounts for the facts that those courts (1) applied an evolving standards of decency test, which is not the law in South Carolina, and (2) analyzed the question with the assumption that lethal injection is less painful, which is now a frequently litigated question. *See* Apps.' Br. 39–40. Meanwhile, Respondents try to discount the fact that Florida upheld electrocution in *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999), but the U.S. Supreme Court actually denied cert there, *see* 528 U.S. 1182 (2000). A denial of certiorari has no precedential value, so there is nothing that can

be read into a denial. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 n.56 (2020). *Provenzano* is still good law in Florida, and it demonstrates that there is not the uniform consensus against electrocution that Respondents suggest there is.

Finally, the single paragraph in which Respondents defend the circuit court's ultimate conclusion that electrocution violates article I, section 15 cannot withstand scrutiny. *See* Resps.' Br. 28. For *cruel*, they claim there is "an inherent and unacceptable risk of 'intolerable pain,'" Resps.' Br. 28 (quoting R. p. 26), but they neither account for Austin Sarat's detailed study that electrocution is botched less than lethal injection nor recognize that their own experts couldn't say how long an inmate remains sensate. For *unusual*, they ignore the fact that electrocution has been continuously authorized in South Carolina for more than a century and that it's been used, on average, more than once a decade for the past half century. And for *corporal*, they continue to apply the wrong definition, without ever explaining how much bodily damage is too much before a method is unconstitutional.

2. The firing squad.

As Respondents admit, there was less dispute at trial over the firing squad. The experts generally agreed that the three frangible rounds would break the ribs and destroy the heart, resulting in death by exsanguination. R. pp. 1352–57 (Arden); R. pp. 1418–26 (Alvarez). Even so, the circuit court still missed a critical part of the testimony in concluding that the firing squad is unconstitutional.

According to the circuit court, a condemned inmate "is likely to be conscious for a *minimum* of ten seconds after impact." R. p. 22 (emphasis added). This was based on Arden's testimony, who claimed that an inmate would be conscious for about 15 seconds "following the cessation of circulation" because of the oxygenated blood "that remains in the blood vessels in the

brain." R. pp. 1353, 1323 (Arden).

What the circuit court disregarded in its analysis was the fact that, with the firing squad, blood will not remain in the brain this long. The ruptured heart will result in blood leaving the body, and gravity will pull any blood quickly out of the brain. R. pp. 1422–23, 1435–36 (Alvarez). Thus, the condemned inmate will lose consciousness much more quickly than Arden suggested, in *less than* ten seconds.[2] R. p. 1420 (Alvarez).

This is the crux of the circuit court's *cruel* analysis: For a few seconds, an inmate may remain conscious after being struck by the bullets and feel the pain of the broken bones. *See* R. p. 22. But no court has ever required an instant death (or a painless one) for a method to be constitutional. The method must only not be intended to superadd pain to the death sentence.

On that issue, Respondents' claim that "SCDC did not adopt the protocol it did in any effort to minimize pain and suffering" is directly contradicted by the testimony at trial. Resps.' Br. 38. a senior SCDC official explained that SCDC chose the fragmentation ammunition so that the bullets "would create cavitation at the heart" and "cause a more instantaneous death versus if you had a clean shot through that would facilitate a more long-term bleed out." R. p. 1112.

In another attempt to defend the circuit court's flawed order, Respondents followed the circuit court into the same trap on *unusual*. *See* Resps.' Br. 37–38. *Unusual* isn't strictly a numbers game. As Justice Scalia once put it, treating "unusual" to mean "decline in use" amounts to "a

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[2] The circuit court's passing comment that a condemned inmate might be conscious for more than 15 seconds if the heart is not fully incapacitated, R. p. 22, can be quickly rejected here. This is a facial challenge, so Respondents must show "that no set of circumstances exists under which the statute would be valid." *Doe v. State*, 421 S.C. 490, 502–03, 808 S.E.2d 807, 813 (2017) (cleaned up). The Court must therefore assume in this case that an execution by firing squad will be carried out as it is intended under the protocol.

For that same reason, Respondents' criticisms about the development of the protocol are irrelevant, as are their suggestions that the protocol won't be carried out properly. *See* Resps.' Br. 31–32, 35–36. What matters is what the protocol is and how it results in death.

white paper devoid of any meaningful legal argument." *Glossip v. Gross*, 576 U.S. 863, 895 (2015) (Scalia, J., concurring). The firing squad may not be used as often as other methods, but it has been a consistently authorized method in various American jurisdictions, so it is not contrary to immemorial usage. Moreover, this argument assumes "more humane methods" exist, Resps.' Br. 38, despite the fact that Respondents did not offer any evidence at trial about how lethal injection works, *see* Apps.' Br. 39–40.

Finally, on *corporal*, it's the same error once again: Respondents, like the circuit court, do not recognize that corporal punishment is a different category. *See* Resps.' Br. 38–39. Plus, if SCDC had chosen a single shot with a non-fragmentation round, Respondents would be claiming the firing squad protocol took too long to cause death.

II. Respondents' remaining claims fail.

A. Act 43 does not violate the Ex Post Facto Clauses.

Rather than engage with Appellants' arguments on the ex post facto claim, Respondents insist that they need more discovery related to SCDC's pentobarbital protocol. *See* Resps.' Br. 54–55. This request for a remand and further delay should be rejected for at least two reasons.

First, Respondents offer no response to Appellants' explanation that the Ex Post Facto Clauses are not implicated by a change from one constitutional method of execution to another constitutional method. *See* Apps.' Br. 42 (collecting cases). In fact, Respondents cite no case holding to the contrary. Their sentences were—and remain—death. *See Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) ("[T]he sentence was death, and that sentence remains in place. The change in method does not make the sentence more burdensome and so does not violate the Ex Post Facto Clause.").

Second, and assuming a change from one constitutional method of execution to another

constitutional method could trigger an ex post facto claim, that claim is necessarily backward looking. It compares the new method to the old method. The pre-Act 43 default method was lethal injection. Respondents were free at trial to offer evidence about how lethal injection causes death.[3] They failed to offer any evidence about the old method. Therefore, a comparison is now impossible, and their claim fails. *See State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("given that Jones has offered no evidence in support of his claim, he has utterly failed in his burden").

B. *Available* has a discernable meaning that gives sufficient direction to SCDC.

Available has a discernable meaning in Act 43, and nothing Respondents argue to the contrary is compelling. *See* Resps.' Br. 40–42.

As an initial matter, Respondents appear to confuse vagueness and ambiguity. Ambiguity is when a statute has two potential meanings, while vagueness is when a statute is simply unclear. *See* Antonin Scalia & Bryan Garner, *Reading Law* 31–33 (2012). Respondents want to proffer two conflicting readings of Act 43 and have the Court conclude that Act 43 must therefore be unconstitutional. *See* Resps.' Br. 40. But that is not the law. At most here, Respondents have put forward an ambiguity argument. When a statute is ambiguous, a court may—indeed, must—analyze the competing readings and give the statute a constitutional construction "if possible." *Curtis*, 345 S.C. at 569, 549 S.E.2d at 597.

Even if Act 43 were somehow not clear on its face, the General Assembly's intent is

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[3] To be sure, nothing about the circuit court's rulings limiting discovery into SCDC's efforts to obtain lethal injection drugs prohibited Respondents from having an expert testify about how lethal injection works. They could have offered expert testimony about the three-drug protocol that SCDC had previously used, R. p. 1746, and they could have introduced expert testimony about a one-drug pentobarbital protocol that they have insisted was the most humane method since the beginning of the litigation, R. p. 113.

evident. *Cf. Powell v. Keel*, 433 S.C. 457, 470, 860 S.E.2d 344, 351 (2021) (a court may consider legislative history). Floor statements from both the House and Senate leave no doubt that the goal of Act 43 was to ensure the State could carry out a death sentence. *See, e.g.*, S.C. Senate, Video of Floor Proceedings, 1:09:28 (Mar. 2, 2021), https://tinyurl.com/4czcc4yc; S.C. House, Video of Floor Proceedings, 1:08:40 (May 5, 2021), https://tinyurl.com/4czcc4yc.

The fact that the General Assembly left a condemned inmate a choice of methods if multiple methods could be used changes none of this. That choice is a legislatively granted option. But that choice is still contingent and not mandated for every execution because Act 43 uses "if." *If* is a conditional word. *See, e.g.*, Merriam-Webster (2023), https://tinyurl.com/4tb2e5nx. If a certain method isn't available at the time an execution is noticed, then a condemned inmate cannot choose that method.

Respondents strain to read this Court's June 2021 orders staying the executions of Sigmon and Owens as helping their case because the firing squad was "currently unavailable," as SCDC had not yet "complete[d] its development and implementation of necessary protocols and policies." Order, *State v. Sigmon*, No. 2002-024388 (June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). This misses two critical things about the orders. First, it ignores the fact that SCDC could not possibly have implemented the firing squad in the month since Act 43 became law. And second, if *available* was unconstitutionally vague in Act 43, this Court would not have used *availability* in its June 2021 orders discussing the same subject matter.

Respondents likewise put forward nothing that justifies the circuit court's conclusion on their nondelegation claim. *See* Resps.' Br. 42–44. To begin, it's important to note what Respondents never address on this front: The circuit court's holding would mandate that the General Assembly give condemned inmates the right to challenge the director's certification, no

matter the definition of *available*. As explained in Appellants' opening brief, there is no way the General Assembly intended Act 43 to create additional rounds of capital litigation at that late stage.

Even assuming that some judicial review of the director's determination is required, Respondents discount the fact that this Court can serve that function. This Court's clerk issues a notice of execution, *see* S.C. Code Ann. § 17-25-370, and the director's certification is submitted to this Court, *see id.* § 24-3-530(B). This Court has already demonstrated its willingness to act based on the director's certification, and this Court could inquire why a method was unavailable, thereby ensuring that a director did "make a bona fide effort" to make a method available. Resps.' Br. 43. Thus, there is already judicial oversight of the director's certification. Similarly, once this Court declares what *available* means, no one can credibly claim that Act 43 "gives the Director a judicially unreviewable power" to define that term. Resps.' Br. 43.

C. Respondents' statutory claim fails.

Respondents only argue one of their statutory claims on appeal: that they have a "right" to elect between two constitutional methods. *See* Resps.' Br. 44–45. Their argument, however, is unpersuasive, given the plain language of the statute.

Instead of analyzing the text of Act 43, Respondents overread this Court's June 2021 orders and its January 2023 decision remanding part of this case. In neither instance did this Court apply the usual tools of statutory construction (or analyze the statute at all), and treating those documents as the Court's holding on the meaning of Act 43 improperly short-circuits the judicial process.

What's clear from Act 43 is that any choice an inmate has is conditioned on the availability of a method. "If" a method is available, an inmate may elect it. S.C. Code Ann. § 24-3-530(A) (an inmate "shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election"). On the other hand, if a

method is unavailable, an inmate may not elect it. There is, in other words, no absolute right to elect between multiple methods in every execution. That there is no absolute right to choose is confirmed by the fact that the previous version of section 24-3-530 did not include "if . . . available," *see* 1995 S.C. Acts No. 108, § 1, so the General Assembly "intended to change the existing law" by adding this language rather than undertaking "a futile act," *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 46, 659 S.E.2d 125, 128, 130 (2008).

This conclusion is bolstered by the fact that "if available" appears more than 50 times in the South Carolina Code, which strongly suggests this language is used to "fill up the details," to include providing for future contingencies, rather than improperly delegate legislative power. *Hampton v. Haley*, 403 S.C. 395, 407, 743 S.E.2d 258, 264 (2013); *see, e.g.*, S.C. Code Ann. §§ 2-15-64; 11-46-50; 44-13-05(A); 44-93-50(4); 56-5-1250.

III. The Shield Statute is constitutional and precludes the discovery Respondents seek.

At the outset, it's worth noting two things. First, Respondents do not engage at all with Appellants' jurisdictional arguments. *See* Apps.' Br. 50. Lethal injection is now available, so there's no reason that Respondents need to choose electrocution or the firing squad, and all three methods authorized by Act 43 are available (whatever that term means)—which means there's no reason the Court needs to reach those claims. Second, look how far Respondents' arguments on the Shield Statute have strayed from what this case has been about. What started as a challenge to electrocution, the firing squad, and Act 43 has morphed into an assault on the Shield Statute and suggestions that SCDC cannot actually carry out lethal injection properly.

If the Court is inclined to consider Respondents' arguments on the Shield Statute, two fundamental principles must be kept in mind. One, the General Assembly "is the author of our state's public policy." *ArrowPointe Fed. Credit Union v. Bailey*, 438 S.C. 573, 580, 884 S.E.2d

506, 509 (2023). And two, this Court is just that: "a court, not a legislative body." *Connelly*, 439 S.C. at 97, 886 S.E.2d at 204. It is "thus constrained by [its] judicial role to interpret the law as written and not to create exceptions to plainly-worded statutes." *Id.* This is a "boundary [the Court] do[es] not cross, even in sympathetic situations," and despite "[a]ny unease" with the outcome. *Id.*

The text of the Shield Statute makes at least four things indisputable. *Cf. Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question."). First, any entity that "manufactures" or "compounds" the "drugs . . . utilized in the execution of a death sentence" is covered by the statute. S.C. Code Ann. § 24-3-580(A)(1). Second, "any identifying information" about that entity "shall be confidential." *Id.* § 24-3-580(B). Third, "identifying information" is a "broad[]" term that includes "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." *Id.* § 24-3-580(A)(2). Fourth, the Shield Statute "shall be broadly construed by the courts of this State so as to give effect to the General Assembly's intent to ensure the absolute confidentiality of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence within this State." *Id.* § 24-3-580(I).

In the face of the unambiguous statutory language, Respondents lodge two basic objections. The first is that the Shield Statute does not protect the information they now seek. In some ways, Respondents' claims are in direct conflict with the Shield Statute. An entity's "licensure status," Resps.' Br. 47, is a "professional qualification," which is explicitly protected by the Shield Statute, S.C. Code Ann. § 24-3-580(A)(2); *see also id.* § 24-3-580(F).

In other ways, Respondents' arguments amount to a backdoor effort to learn what the Shield Statute protects. For instance, they demand to know whether the drugs are manufactured or

compounded. *See* Resps.' Br. 47. Yet there is a limited number of manufacturers, so if SCDC did obtain manufactured pentobarbital and had to tell Respondents as much, that would leave Respondents with a limited universe to determine who provided the drug to SCDC. Plus, as Respondent's newly proffered expert notes, these manufacturers refuse to sell pentobarbital for use in executions. Almgren Aff. ¶ 7. It doesn't seem a stretch to think that, if SCDC did have manufactured pentobarbital and told Respondents as much, Respondents would rush to all pentobarbital manufacturers to have them threaten to stop selling all drugs (including those for regular medical use) to SCDC unless the pentobarbital was returned. Even if the exact manufacturer is not identified, this entire scenario would make it harder for SCDC to carry out its daily operations and a duly imposed death sentence—which is presumably exactly what Respondents want. *Cf.* John H. Blume & Brendan Van Winkle, *Death Penalty: Determine if Capital Punishment Has Outlived its Use* 3, American Constitution Society (2020), https://tinyurl.com/ym2vcbdr (calling on the incoming Biden Administration to "heavily regulate lethal injection drugs and seek to prevent their importation and travel through interstate commerce").[4] The same concerns arise if SCDC obtained compounded pentobarbital, as Respondents could start contacting the compounding pharmacies capable of providing that drug.

The same issue arises with information such as dates when drugs were manufactured,

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[4] Because of anti-death penalty advocacy, lethal injection drugs became hard to come by, *see Glossip*, 576 U.S. at 870 (majority op.), and other States began enacting shield laws. States that have carried out executions by lethal injection in the past decade have protected information about the sources of those drugs, but when South Carolina first started debating a shield statute, anti-death penalty advocates opposed that legislation. *See, e.g.*, John Monk, *Controversial Bill Proposed to Get Stalled Executions Back on Track*, The State (Mar. 6, 2016) (quoting Respondents' counsel as saying, "We oppose this bill," and denouncing it as "special-interest legislation"). These advocates have, in effect, tried to create a "heads I win, tails you lose" situation. It's all part of "a guerilla war against the death penalty." Oral Argument Tr. 14:21–25, *Glossip v. Gross*, No. 14-7955 (U.S.) (Alito, J.).

compounded, or expire. *See* Resps.' Br. 47. Each additional piece of information is a puzzle piece, and with enough of them, Respondents (or anyone else) may put them together to identify an individual or entity protected by the Shield Statute.

In still other ways, Respondents are demanding information they already have (or that SCDC is not trying to protect). *See* Resps.' Br. 47. Director Stirling's affidavit that accompanied the motion to lift, dismiss, and vacate explained that SCDC had adopted a one-drug pentobarbital protocol that "is essentially identical to the protocol used by the Federal Bureau of Prisons and at least six other States." Stirling Aff. ¶ 8. Just as SCDC provided Respondents the specific drug quantities for the three-drug protocol, R. p. 1746, SCDC will provide the same information to Respondents about the one-drug protocol.

Respondents' second basic objection is that interpreting the Shield Statute as Appellants suggest renders that statute unconstitutional. *See* Resps.' Br. 50–52. Respondents mount a separation-of-powers argument, but that argument is misguided. This isn't a situation like *S.C. State Highway Dep't v. Harbin*, in which executive officials are adjudicating some right or privilege, as they were there with driver's licenses. 226 S.C. 585, 86 S.E.2d 466 (1955). Rather, this is SCDC carrying out the General Assembly's intent to make lethal injection available if possible—and doing so while protecting the information that the General Assembly directed not to be disclosed. At bottom, Respondents seek "to transform courts into boards of inquiry charged with determining 'best practices' for executions" and to "embroil the courts in ongoing scientific controversies beyond their expertise." *Baze*, 553 U.S. at 51. If Respondents were given all the information they demand, every time a notice of execution were issued, there would almost certainly be demands for testing and dueling experts about whether the drugs were sufficient for the execution.

On this issue, the federal Constitution provides no more help to Respondents than the South Carolina Constitution. They make a passing procedural due process argument, *see* Resps.' Br. 53, but their one sentence of analysis completely ignores the voluminous case law that rejects such claims. As one example, the Eleventh Circuit has held that an inmate was not entitled to an injunction stopping his execution because "speculation that a drug that has not been approved will lead to severe pain or suffering cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering." *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir. 2014) (cleaned up). As another, the Fifth Circuit took a similar position when it observed that the "[p]laintiff argues that because the State has transitioned to a new source for the compounded pentobarbital, there are unknowns because of the possibility of improper compounding or contamination." *Sells v. Livingston*, 561 F. App'x 342, 344 (5th Cir. 2014). "But," the court went on, the "plaintiff cannot rely on speculation alone." *Id.* at 344–45.

That's all Respondents offer, whether in their brief or in Almgren's affidavit (if the Court is even willing to consider this affidavit that violates Rule 210(c)). She says manufactured pentobarbital "is not itself necessarily a guarantee of efficacy." Almgren Aff. ¶ 7. She suggests that pentobarbital might not be compounded correctly. Almgren Aff. ¶¶ 8–12. Improperly stored or compounded pentobarbital "*can* lead to extreme pain." Almgren Aff. ¶ 11 (emphasis added). "[O]ne overseas facility" had problems with birds and insects. Almgren Aff. ¶ 13. Chemicals "may" be contaminated. Almgren Aff. ¶ 15. Older drugs "*may* no longer maintain" the same efficacy. Almgren Aff. ¶ 18 (emphasis added). There is, she claims, a "substantial risk that the drugs that are intended to be use[d] in execution will not be of the appropriate quality or potency to cause death without significant suffering," without any attempt to quantify that risk. Almgren Aff. ¶ 21. Could, may, might—such speculation cannot be the basis of a plausible claim that adds

to the "seemingly endless proceedings that have characterized capital litigation" in recent decades. *Baze*, 553 U.S. at 69 (Alito, J., concurring).

Such speculation undergirds much of Respondents' questioning of the fact that SCDC can now use pentobarbital to carry out an execution by lethal injection. Take, for example, their claim that SCDC couldn't obtain pentobarbital until contacting its "1301st choice." Resps.' Br. 47. That's a mischaracterization of Director Stirling's affidavit. Director Stirling never said that the first 1,300 contacts said "no." SCDC simply kept contacting potential sources until SCDC was able to inform this Court that lethal injection was available with a one-drug pentobarbital protocol. Surely if SCDC had waited until each lead fizzled to contact another one, Respondents would have criticized that approach as lacking sufficient hustle.

Respondents even speculate "whether the drug is pentobarbital at all." Resps.' Br. 52. That suggestion is telling. Either they are claiming that SCDC is incompetent that it doesn't know what drug it has; they are seeking additional information in an effort to pierce, indirectly, the veil established by the General Assembly's enactment of the Shield Statute; or they are demanding such stringent testing and inspections that, in reality, nothing will ever satisfy them and there will always be something else they want to confirm (or remote risk they want to eliminate) before they are willing to concede that an execution may proceed.

Finally, nothing Respondents cite from other States helps their case here. As an initial matter, what other States may have decided to do about shielding information related to executions is irrelevant. Our General Assembly sets the policy for South Carolina—no one else. *See ArrowPointe*, 438 S.C. at 580, 884 S.E.2d at 509. Moreover, Respondents put more weight on those out-of-state cases than they can bear. For example, the Georgia Supreme Court, while noting the option of independent testing, quickly explained that the court did "not mean to suggest that

such discovery should be routinely available," which is contrary to what Respondents seem to envision. *Owens v. Hill*, 758 S.E.2d 794, 800 (Ga. 2014). The statute at issue in the Nebraska case included an exception that South Carolina's Shield Statute does not. *See Nebraska ex rel. BH Media Grp., Inc. v. Frakes*, 943 N.W.2d 231 (Neb. 2020) (discussing Neb. Rev. Stat. Ann. § 83-967(2)). And the Oklahoma Supreme Court declared its shield law did not protect the "identity of the drug or drugs and the dosage of the drugs," *Lockett v. Evans*, 330 P.3d 488, 491 (Okla. 2014), but neither of those are things SCDC has claimed are covered by our Shield Statute.

Ultimately, Respondents do not like the Shield Statute. Perhaps that's because they do not want their death sentences carried out. Perhaps that's because they disagree with the policy underlying it. Perhaps that's because it enabled SCDC to be able to obtain pentobarbital. Perhaps it's all of these reasons. But the decision to enact the Shield Statute belonged to the General Assembly. Nothing in the South Carolina Constitution or the United States Constitution precludes the General Assembly from enacting this policy. *See Planned Parenthood II*, 440 S.C. at 475, 892 S.E.2d at 127 (the General Assembly's authority to legislate is "plenary" as long as "legislation is not expressly prohibited by the Constitution of this state, or the Constitution of the United States"). This Court must therefore apply it as the General Assembly has written it. *See Connelly*, 439 S.C. at 97, 886 S.E.2d at 204.

CONCLUSION

For the foregoing reasons, the circuit court's order should be reversed, and the case remanded with instructions to enter judgment for Appellants.

Respectfully submitted,

s/Wm. Grayson Lambert
Thomas A. Limehouse, Jr. (S.C. Bar No. 101289)
Chief Legal Counsel
Wm. Grayson Lambert (S.C. Bar No. 101282)
Senior Litigation Counsel
Erica W. Shedd (S.C. Bar No. 104287)
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
tlimehouse@governor.sc.gov
glambert@governor.sc.gov
eshedd@governor.sc.gov

Counsel for Governor McMaster

s/ Daniel C. Plyler
Daniel C. Plyler (S.C. Bar No. 72671)
Austin T. Reed (S.C. Bar No. 102808)
SMITH | ROBINSON
2530 Devine Street
Columbia, SC 29205
(803) 254-5445
Daniel.Plyler@SmithRobinsonLaw.com
Austin.Reed@SmithRobinsonLaw.com

Counsel for Director Stirling and SCDC

January 8, 2024
Columbia, South Carolina

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Jan 08 2024

S.C. SUPREME COURT

THE 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.

CERTIFICATE OF COMPLIANCE

I certify that this *Amended Final Reply Brief of Appellants-Respondents* complies with Rule 211(b), SCACR, and the Court's October 31, 2023 Order.

s/Wm. Grayson Lambert
Wm. Grayson Lambert
Counsel for Governor McMaster