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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*.

FINAL BRIEF OF RESPONDENTS-APPELLANTS

Lindsey S. Vann (No. 101408)
Emily Paavola (No. 77855)
Hannah L. Freedman (No. 103373)
Brendan Van Winkle (No. 104768)
Allison Franz (No. 105189)
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

John H. Blume (No. 743)
CORNELL LAW SCHOOL
158 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

Elizabeth Franklin-Best (No. 72555)
ELIZABETH FRANKLIN-BEST, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204

Counsel for Respondents-Appellants

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

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

V. 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 and whether the Department violates the statute when it fails to take those affirmative steps to make any of those methods available.

VI. Whether the circuit court erred in limiting the scope of discovery to prevent Respondents from inquiring into information related to lethal injection, including the Department's efforts—if any—to acquire drugs to make lethal injection available as a method of execution.

VII. 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.

INTRODUCTION

After hearing four days of testimony and assessing the credibility of the witnesses, the Honorable Jocelyn Newman made the following findings of fact, among others, in declaring electrocution violates the South Carolina Constitution:

- "[T]here is no evidence to support the idea that electrocution produces an instantaneous or painless death." R. p. 26.
- "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." (R. p. 26)
- "[T]here is no scientific or medical justification for the way South Carolina carries out judicial electrocutions." R. p. 26.
- "[A]n intolerably high percentage of judicial electrocutions do not go according to plan and cause extreme pain and suffering." R. p. 27.
- "[T]he underlying assumptions upon which the electric chair is based, dating back to the 1800s, have since been disproven." R. p. 27.

Declaring the firing squad unconstitutional, Judge Newman found:

- "A review of executions nationally and in South Carolina demonstrates that the firing squad is unusual." R. p. 21.
- During an execution by firing squad, "the inmate is likely to be conscious for a minimum of ten seconds after impact," which "could even be extended if the ammunition does not fully incapacitate the heart. During this time, he will feel excruciating pain resulting from gunshot wounds and broken bones. This pain will be exacerbated by any movement he makes, such as flinching or breathing." R. p. 22.
- "The firing squad clearly causes destruction to the human body." The ammunition proposed for use in South Carolina was selected because it will "inflict maximal damage to the inmate's body." R. p. 23.
- "The expected damage is confirmed by the Court's review of autopsy photos of the last person executed by firing squad in Utah." These demonstrate that "[t]he inmate's body has been, by any objective measure, mutilated." R. p. 23.
- "SCDC clearly anticipates similar carnage, as it created a firing squad chamber that includes a slanted trough below the firing squad chair 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. 23-24.

As is discussed in more detail below, the trial court's conclusions are supported by the evidence presented. Rather than engage with that evidence, Appellants offer the same story they have long been telling. They claim that despite their diligent efforts for nearly a decade, they have been unable to procure the drugs necessary to carry out an execution by lethal injection. They blame this failure on the purported efforts of anti-death penalty advocates, who have allegedly harassed and intimidated drug manufacturers nation-wide, causing a years-long inmate-imposed moratorium on executions in South Carolina. In 2021, the General Assembly finally intervened, Appellants say, to resolve this conundrum by passing Act 43, which now requires that executions be carried out by electrocution, unless the inmate elects either firing squad or lethal injection, but only if the Director of the South Carolina Department of Corrections (SCDC) deems those methods "available," in his sole discretion, upon the issuance of a particular inmate's execution notice. *See* 2021 S.C. Acts No. 43, *codified at* S.C. Code Ann. § 24-3-530 (2021) ("Act 43"). The current problem, according to Appellants, is that Respondents have stymied the will of the people by filing endless, last-minute litigation, which they will continue to do if this Court does not stop them.

None of that story is true. In 2013, Bryan Stirling became the interim Director of SCDC, and he was told that SCDC's supply of lethal injection drugs was due to expire. He passed that information on to the Legislature. Then—as far as all available evidence indicates—he did little else. Perhaps that was because there was no urgent need for lethal injection drugs given that South Carolina has not had an execution since 2011, when Jeffrey Motts waived his appeals and volunteered for execution. Until 2020, there were no executions on the horizon because no death sentenced inmate had completed the appeals process, not because of anything having to do with a lack of execution drugs.

In November of 2020, Respondent Richard Moore became the first non-volunteer in South Carolina since 2008 to exhaust his appeals and receive an execution notice from this Court. Moore's execution was briefly stayed following Director Stirling's assertion that he was unable to obtain lethal injection drugs for Moore's execution. Shortly thereafter, this Court agreed to hear Moore's proportionality challenge in the Court's original jurisdiction. Respondents Brad Sigmon and Freddie Owens received execution notices in early 2021. Their executions were briefly stayed while the legislature discussed and ultimately passed Act 43.

Those legislative discussions were premised on Stirling's unsubstantiated claims that lethal injection drugs were impossible to obtain. There was no serious inquiry during the legislative debates into how it could possibly be true that South Carolina was unable to obtain lethal injection drugs while simultaneously thirteen states and the federal government had carried out 223 executions by lethal injection during Stirling's leadership of SCDC. Indeed, today that number is even greater; since Act 43 was passed 19 additional people have been executed by lethal injection by Alabama, Arizona, Mississippi, Missouri, Oklahoma, and Texas. *See* DEATH PENALTY INFORMATION CENTER, *Execution Database*, https://deathpenaltyinfo.org/executions/execution-database (last visited Oct. 8, 2022).

On May 14, 2021, Governor McMaster signed Act 43 into law, making South Carolina the first (and only) jurisdiction to revert to antiquated and generally abandoned methods of execution—electrocution as its default method and firing squad as an alternative—instead of obtaining lethal injection drugs. Respondents filed suit on the next business day—*at the earliest possible juncture*—not to engender delay as Appellants suggest, but to seek resolution of the multiple unanswered and weighty questions of South Carolina law that Act 43 precipitated. Appellants vigorously resisted discovery on any issues related to lethal injection, asserting that

essentially all of Respondents' requests on this and other topics were "irrelevant," and persuaded the trial court to issue a protective order. They now fault Respondents for "failing" to offer evidence regarding lethal injection, and they ask this Court to sanction torturous methods of execution based on their untested assurances that lethal injection is "unavailable" and against the considerable weight of the trial evidence demonstrating that electrocution and the firing squad are cruel, unusual, and corporal punishments. This Court should decline that invitation and uphold Judge Newman's well-reasoned decision.

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 and the individual counties—not the state government—were responsible for overseeing the executions. *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 condemned people executed by this method choked to death slowly when their necks did not break on the fall. 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).[1] 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. And less than six months later, William Reed—a Black man convicted in Anderson County of attempted assault on a white woman—was executed in the electric chair. *Id.* Since then, 247 additional people have been put to death in South Carolina's electric chair. Today, SCDC uses the same electric chair that it purchased in 1912, although some of the components have been replaced. R. p. 7.

[1] The decision to use electrocution as a method of execution was, from its inception, clouded by non-scientific bias. At the same time New York was debating whether to adopt it as a method of execution, the "battle of the currents" was raging between Thomas Edison on the one hand and George Westinghouse and Nikola Tesla on the other hand. *See* Carl L. Sulzberger, *Triumph of AC, Part 2*, IEEE POWER & ENERGY MAGAZINE 70-71 (2003). Edison, who had worked to bring direct current (DC) electricity to New York City, actively promoted the use of DC, while Westinghouse was invested in the development of alternating current (AC). *Id.* at 70. When the New York commission began to investigate the possibility of executions by electrocution, Edison saw a chance to profit. With the help of a man named Harold P. Brown, a "self-taught engineer assuming the title 'professor,'" who "appeared as a supposed advocate for public safety," Edison sought to scare the public away from AC by publicly killing animals with it—including "electrocuting dogs and old horses right on stage," *id.* at 71, and one particularly gruesome incident, carrying out "a very public demonstration of the electrocution of an elephant," R. p. 1182, lines 14-15. Thus, although there was not and is not any scientific basis behind the idea that AC is more or less dangerous than DC, Edison's campaign was successful, and the first judicial electrocution in the United States "utilized a Westinghouse generator clandestinely acquired by Brown with the financial backing of the Edison interests." Sulzberger, *Triumph of AC* at 71.

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).[2] As it became increasingly clear that the electric chair was, at a minimum, an unreliable way to carry out executions and, at worst, torture, states one after another abandoned the electric chair and amended their laws to make lethal injection the preferred method.

By the mid-1990s, a majority of states had formally abandoned electrocution in favor of lethal injection. *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

[2] 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 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).

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.[3]

Between 1996 and 2011, South Carolina executed 39 people; three chose to die in the electric chair, while the remainder were killed by lethal injection. In 2013, Appellants began publicly asserting they could not obtain drugs to carry out lethal injection executions. Since then, however, multiple states and the federal government have executed hundreds of people by lethal injection.[4] 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.

II. RESPONDENTS FILE SUIT

On May 17, 2021, Respondents Sigmon and Owens filed suit, asserting that Act 43 constitutes *ex post facto* legislation, that it is unconstitutionally vague, and that it violates the non-delegation doctrine.[5] R. pp. 60-61. Respondents moved for a preliminary injunction and requested expedited discovery and a hearing. After counsel for SCDC notified this Court that "due to the recent amendment . . . the Department is now able to carry out executions by electrocution," Letter,

[3] 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.

[4] In this calendar year alone, eleven people have been executed by lethal injection in Alabama, Arizona, Missouri, Oklahoma and Texas. *See* DEATH PENALTY INFORMATION CENTER, *Execution Database*, https://deathpenaltyinfo.org/executions/execution-database (last visited Oct. 6, 2022).

[5] Respondents also raised a due process claim but they later withdrew it.

Plyler to Shearouse (May 19, 2021), this Court issued execution notices for both men, but 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).

At a hearing on Respondents' request for a preliminary injunction, Appellants repeatedly argued that Judge Newman had no authority to issue an injunction because it would override this Court's execution orders. R. p. 256, lines 15-25; R. p. 264, lines 8-16; R. p. 51, line 22-p. 52, line 8. Judge Newman denied a preliminary injunction, finding Respondents could not show a likelihood of success on the merits of the *ex post facto* and due process claims. Her written order disposed of the vagueness and non-delegation issues in a single paragraph entitled "Remaining Arguments," in which she concluded that "these ancillary arguments lack foundation and support." R. p. 46. Judge Newman followed Appellants' urgings and concluded "it is wholly inappropriate for this Court to attempt to usurp the authority of the Supreme Court of South Carolina by effectively nullifying the execution notices." R. pp. 46-47.

One day after that hearing, Director Stirling informed this Court that lethal injection was not available because SCDC had been unable to acquire the necessary drugs. Letter, Stirling to Shearouse (June 8, 2021). As the only evidence of his attempts to acquire lethal injection drugs, Stirling attached a letter from Hikma Pharmaceuticals, reminding him of Hikma's objection to the use of their products for lethal injection. *Id.*, Ex. A.[6] Regarding the firing squad, Stirling asserted

[6] Hikma is a New Jersey pharmaceutical company that sends form letters to Departments of Corrections nationwide. It does not manufacture any of the drugs designated in South Carolina's lethal injection protocol.

that it was not "available" because "SCDC [did] not have the necessary policies and protocols" to conduct "an execution by firing squad."[7] *Id.* at 1-2.

On June 16, 2021, this Court vacated the execution notices for both Sigmon and Owens. The orders in both cases stated:

> Under these circumstances, in which electrocution is the only method of execution available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.

Orders, *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 & *State v. Owens*, No. 2006-038802 (June 16, 2021) (internal citation omitted).

III. PRETRIAL DISCOVERY DISPUTE

On September 27, 2021, Sigmon and Owens filed a second complaint challenging the constitutionality of the firing squad and the electric chair and again requested injunctive relief, expedited discovery, and a hearing. This second action was consolidated with the first and Respondents Terry and Moore were added as plaintiffs. After some delay caused by Appellants' failed attempt to remove the state constitutional claims to federal court, litigation resumed.[8] Judge Newman denied Appellants' motion to dismiss the case on April 14, 2022, R. pp. 457-58, and this Court ordered her to complete the trial within ninety days, Admin. Order (May 5, 2022).

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

[8] The federal district court denied Appellants' request to remove the state law claims because they raised "novel and/or complex issues of State law" that had never been addressed by the South Carolina courts. Order, *Owens v. Stirling*, No. 3:21-cv-03564-JD (D.S.C. Jan. 13, 2022).

Respondents served discovery requests that sought information related to: (1) Appellants' attempts to obtain lethal injection drugs; (2) copies of SCDC's protocols for all three methods of execution and the names of persons involved in creating them; (3) records of prior executions conducted by SCDC; and (4) the selection, training, and professional qualifications of individuals who would participate and carry out executions by all three methods (but Respondents specified that "[n]ames and other specific identifying information of individual execution team members may be redacted"). R. pp. 477-83.

Appellants moved for a protective order on two bases. R. p. 463. First, they argued that any discovery related to lethal injection or SCDC's "protocols, procedures, or policies for an execution by electrocution or firing squad" was "irrelevant." R. pp 465-66. Second, they argued that S.C. Code Ann. § 24-3-580, which prohibits disclosure of the identify of "members of an execution team,"[9] barred Respondents from pursuing any discovery that could require Appellants to: (1) identify anyone with knowledge of the facts of the case; (2) describe their efforts to obtain lethal injection drugs; (3) identify anyone who created any execution protocols; (4) say whether any documents on those topics had ever existed; or (5) discuss the recruitment, qualification, or training of anyone involved in executions carried out by SCDC. R. p. 471. In support of their

[9] This statutory provision provides, in full:

> A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team. However, this information may be disclosed only upon a court order under seal for the proper adjudication of pending litigation. Any person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a willful violation of this section, punitive damages.

S.C. Code Ann. § 24-3-580 (2013).

position, Appellants cited an advisory opinion from the Attorney General—another member of the executive branch—that merely agreed with Stirling's proposal that the statute should be "broadly construed." R. pp. 472-73 (citing Op. Att'y Gen., 2015 WL 4699337 (S.C.A.G. July 27, 2015)).

Respondents then filed an opposition and motion to compel. R. p. 530. They argued information regarding lethal injection was relevant to their *ex post facto* claim because that analysis requires a comparison "to determine if the newly imposed punishment is greater than the punishment imposed at the time of the offense." R. p. 533. In addition, discovery related to what steps, if any, Appellants had taken to obtain lethal injection drugs was "directly relevant" to Respondents' claims alleging a statutory violation based on what "the term 'available' means" in Act 43.[10] R. p. 534.

Following a hearing by WebEx on June 23, 2022, on July 5, 2022, Judge Newman issued a form 4 Order that required Appellants to produce the execution protocols pursuant to a Confidentiality Order but granted Appellants' protective order "as to the remaining topics (i.e., lethal injection information, members of the execution team, etc.)." R. p. 56. Appellants produced the protocols. R. pp. 1743-52. Then, during depositions, their attorneys directed the witnesses not to answer most questions about how those protocols were developed, whether there are any records of or witnesses with knowledge about prior executions performed by SCDC, and similar topics. R. pp. 620-23. Appellants moved for a second protective order, R. pp. 610-14, which Respondents again opposed, R. pp. 861-64.

[10] Although Respondents disagreed that their discovery requests would require disclosure of the identity of execution team members, they requested, if the Court believed otherwise, that it "order the disclosure 'under seal for the proper adjudication of pending litigation.'" R. pp. 535-36 (quoting S.C. Code Ann. § 24-3-580, which permits disclosure of protected information with a court order).

The trial commenced without these discovery disputes being resolved, and, on the first day of trial, Judge Newman heard the motions and ordered Appellants to produce any autopsy reports of prior South Carolina executions by electrocution, R. p. 969:6-24, but she otherwise adhered to her July 5th Order, R. pp. 979-80, 1684-86. Over the next three days, Judge Newman heard from eight witnesses whose testimony is discussed below in the relevant argument sections.

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).

"A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion." *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). With respect to discovery matters, "[a]n 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable

factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

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 eighteen 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.[11] 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.

[11] 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.

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 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.[12] The drafters of our constitution presumptively intended to give meaning to all three words.

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[12] *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

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

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("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 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").

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 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[13] 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. Moreover, the amendments that gave rise to the current form of article I, section 15, were part of a sweeping set of reforms intended to liberalize and modernize the 1895 Constitution. *See Forrester*, 343 S.C. at 647-48, 541 S.E.2d at 842. Together, the text of article I, section 15, and the legislative history that

[13] 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.

gave rise to that text "favor[] an interpretation offering a higher level of . . . protection than the [Eighth] Amendment." *Id.* at 645, 541 S.E.2d at 841.

Appellants' response—that in the late 1960s and early 1970s, when the West Committee amended the constitution and voters ratified the amendment, electrocution was the only method of execution in use and was therefore understood to be constitutional, Br. of Apps. at 24—misses the mark.[14] 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.

Moreover, 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

[14] 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). Thus, that the legislature endorsed capital punishment at the same time, and while no executions could take place, is neither here nor there because this case is not about the constitutionality of the death penalty; it is about the constitutionality of electrocution and the firing squad.

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.

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).[15] Castration is a form of punishment for sexual assault that is generally accepted as consistent with the federal constitution.[16] 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.[17]

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[15] *Brown* was decided in 1985, after the 1971 amendments took effect but during a period when the drafters of the 1971 amendments were still active in government and politics. *See State v. Austin*, 306 S.C. 9, 16 & n.6, 409 S.E.2d 811, 815 & n.6 (Ct. App. 1991)) (Sanders, C.J.) (noting that article I, section 10 of the South Carolina constitution is "less difficult to interpret than the Fourth Amendment" in part because it "was not adopted until 1971" and "its framers are much easier to locate . . . and consequently, it is less difficult to determine their 'original intent'").

[16] 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.

[17] 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

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.

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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.*

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.[18] *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,

[18] 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).

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. 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.

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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.[19] This understanding of the state constitution is consistent with how the drafters of the state 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)).[20] 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

[19] 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 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).

[20] 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).

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.

II. THE ELECTRIC CHAIR VIOLATES THE SOUTH CAROLINA CONSTITUTION

A. Basic Principles of Electricity

To fully understand how the electric chair operates and how it accomplishes death, it is necessary to understand some basic principles of electricity. At trial, the court qualified Dr. John P. Wikswo, Jr., as an expert in biomedical engineering, molecular physiology and biophysics, and physics, and Dr. Wikswo testified to the following information. A circuit is a pathway along which electricity flows, and it is governed by its voltage, its amperage, and its resistance. R. p. 1172, lines 12-13; R. p. 1175, line 16-p. 1176, line 4. The power behind the current is measured in voltages and the strength of the current as it flows is measured in amperes. The circuit's resistance is a measure of how easily the current flows through the circuit. R. p. 1172 line 16-p. 1173, line 23. The strength of a current (amperes) is equal to its power (volts) divided by its resistance (ohms). This equation—expressed in amperes as $I = \frac{V}{R}$ or expressed in volts as $V = I \times R$—is called Ohm's law. R. p. 1175, line 16-p. 1176, line 4.[21]

[21] Dr. Wikswo explained that a helpful analogy is a swimming pool with a hose in it. R. pp. 1173-75. The hose is connected to a pump on one end and the other end of the hose is in the pool. When the pump is turned off, no water flows through the hose. This is like a circuit before it is supplied with electrical power. R. p. 1174. When the pump is turned on, water flows through the hose and back into the pool. The strength of the pump is analogous to a circuit's voltage. The length and circumference of the hose are analogous to a circuit's resistance; longer and skinnier the hose (the higher the resistance), the slower the water will flow (the lower the amperage). If the pump is turned on low (low voltage), the water moves slowly through the hose (low amperage). If the pump is turned on high (high voltage), the water moves quickly through the hose (high amperage). R. p. 1174, line 12-p. 1175, line 7. No matter the pump's setting, once the "circuit" is flowing, the amount of water in any part of hose is equal to the amount of water in any other part of the hose. This is analogous to the fact that electrons are evenly distributed throughout a circuit. R. p. 1178, lines 4-25.

When a circuit has resistance, its power is converted into one of two things. First, it may be converted into mechanical work, which can be used to move an object. R. p. 1176, line 12-p. 1177, line 15. This is how objects like elevators operate. R. p. 1176, lines 14-16. Second, electrical power may be converted into heat. R. p. 1176, lines 17-20. This is how an electrical stovetop works. R. p. 1176, line 21-p. 1177, line 4. A circuit with significant resistance generates significant heat. R. pp. 1195, line 7-p. 1196, line 16.

B. 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.

Colie Rushton, who has worked for SCDC for nearly fifty years and is currently 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, Rushton 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, Rushton 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.

C. 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.[22] There was no dispute that it is impossible to study the effects of judicial electrocution on the human body using controlled scientific studies because those studies are ethically impermissible.[23] Accordingly, the experts who testified all relied on secondary information about how judicial electrocutions work[24]—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.

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[22] Dr. Wright was admitted 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 physiologist, an electrophysiologist, or a cardiologist—fields that involve the study of electricity. R. p. 1458, line 12-p. 1459, line 6. Over Appellants' objections, Dr. Wikswo was admitted 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 admitted as an expert in forensic pathology. R. pp. 1643-47; R. p. 1321, lines 9-11.

[23] As Dr. Wright testified, "[s]ince we won the war and hanged all those guys, you can't do that kind of experimentation any more. 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.

[24] 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.

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 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* Tr. 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.[25] 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.[26] The tetany also includes

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[25] Dr. Wikswo explained the skull's resistivity using an analogy to bowling balls rolling down a hill:

> Now what happens with the brain is imagine that on the side of this hill—it's a grassy hill with some bushes in it. You have a small green thatch—a green—a green patch. In the middle of the green patch, you have a bowling ball. The goal is to hit the bowling ball, but unfortunately the bowling ball is surrounded by a circle of bushes. So the bowling balls are coming down the hill, they hit the bushes and get deflected from the ball, and that is effectively what's happening with the electric current delivered to the top of the scalp. It's being deflected by the fact that the—the skull is not a particularly good conductor of electric current.

R. p. 1195, lines 7-18.

[26] *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

"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.[27] 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, 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.

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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").

[27] 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. When asked to explain what he understands tetany to be, Dr. Wright testified the heart "[j]ust goes unh, like this, unh." R. p. 1459, lines 17-18.

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 he observed in the South Carolina autopsy reports could only have occurred post-mortem, such as epidural hematomas.[28] R. p. 1350, lines 2-3. Dr. Arden testified that the presence of epidural hematomas is

[28] Epidural hematomas are a form of brain bleed that are usually caused by blunt force injury to the head but that are also commonly seen in autopsies of individuals who die in fires and whose bodies were exposed to extreme heating. R. p. 1350, lines 14-24.

an indication of "the heat and cooking effect on the head" that is a common product of judicial electrocutions. R. p. 1350, line 24-p. 1351, line 1. Other injuries, Dr. Arden testified, could only have happened pre-mortem. R. p. 1351, lines 6-21. Those injuries include bruising, which Dr. Arden observed in many of the autopsies he reviewed, including from South Carolina. Tr. 498:10-18. According to Dr. Arden, "you don't bruise if you don't have a heartbeat and blood pressure," and the presence of bruising is therefore an indication that a person killed in the electric chair 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."[29] 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.[30] Alternatively, he opined that judicial electrocution causes instantaneous loss of sensation because "you get poration of the nerves and those are in the brain."

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[29] "[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.

[30] 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 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, breath, or scream, and he was unable to explain judicial electrocutions in which inmates moved, breathed, and screamed after the application of electrical current. 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. Nevertheless, Dr. Wright testified that "if I had been sentenced to die, [electrocution] would be my choice because it doesn't hurt." R. p. 1453, lines 15-16.

After considering the testimony, the circuit court credited the testimony of the Plaintiffs' 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.

D. 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.

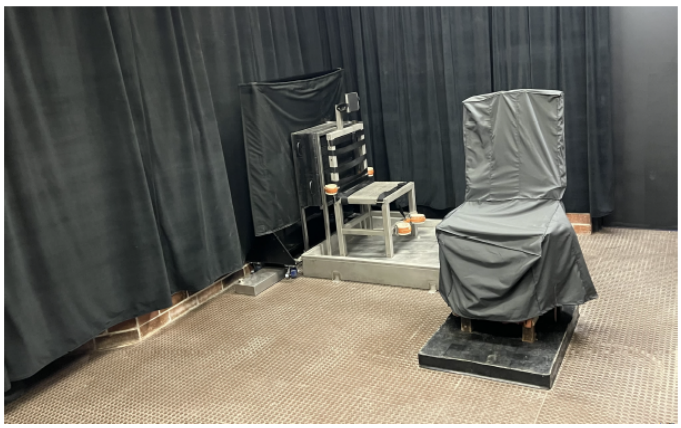
Finally, even if this Court determines that article I, section 15 is not more protective of human dignity that the Eighth Amendment, Respondents still prevail. The circuit court's findings fully support a conclusion that, as compared to lethal injection (the method Respondents all elected or intend to elect) electrocution "cruelly superadds pain to the death sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). As noted previously, the United States Supreme Court has explicitly

recognized that lethal injection, especially when carried out with a single dose of pentobarbital, is the most humane method of execution that renders a person "fully insensate" and does not carry a risk of pain. *Barr*, 140 S. Ct. at 2590. It also is, or should be, readily implementable, as every other state in the country that has recently or is currently carrying out executions has been able to obtain drugs to perform executions by lethal injection.

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 Colie Rushton 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. Rushton 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, Rushton 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

Rushton'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 Rushton called an "aiming point" over his heart. R. pp. 1746-47. Three people—whose qualifications were the subject of a discovery dispute, *see* Section VI, *supra*—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 by Rushton 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.[31] 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 second 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.

[31] 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.

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 since the Civil War, 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 Mr. Rushton 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, lines10-12; 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*, 139 S. Ct. 1112; *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 Mr. Rushton 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. Mr. Rushton 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.[32]

IV. ACT 43 IS EX POST FACTO LEGISLATION

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 (Malloy I)*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). 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.[33] *Jernigan v. State*, 340 S.C. 256, 561 S.E.2d 507 (2000). Under either standard, the 2021 amendment is unconstitutional *ex post facto* legislation because it eliminated lethal injection as the default—a punishment that is, as a matter of law, the most humane—and replaced it with worse punishments of electrocution (or a choice of the firing squad).

A. Changes to a Method of Execution Can Violate the *Ex Post Facto* Prohibition, Even Though Changes in Execution Protocol Do Not

Contrary to Appellants' arguments, a change in the method of execution is not merely a procedural change that cannot violate the *ex post facto* prohibition. In the *Malloy* cases, both the

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[32] 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.

[33] *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.

Supreme Court of the United States and this Court reviewed changes to South Carolina's execution laws and distinguished changes in the *method* of execution (which could violate the Ex Post Facto Clause) from *procedures* for carrying out an execution (which are not *ex post facto*). *See Malloy v. South Carolina (Malloy II)*, 237 U.S. 180 (1915); *Malloy I*, 95 S.C. 441, 78 S.E. 995. According to the *Malloy* courts, statutory changes to execution procedures, such as the number of witnesses who could attend an execution and the place of the execution (the state penitentiary versus the county jails), are not violations of the Ex Post Facto Clauses because "[t]he constitutional inhibition of *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of *humane* punishment." *Malloy II*, 237 U.S. at 183 (emphasis added); *see also Malloy I*, 95 S.C. at 441, 78 S.E. at 997.

A change to the method of execution, however, can violate 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 II*, 237 U.S. at 184; *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."). In *Malloy I* and *Malloy II*, both courts accepted as a given that the Ex Post Facto Clauses apply to changes in methods of execution, even when a person has been sentenced to death. For this reason, the analysis in both cases involved a comparison between the methods of execution in question—hanging versus electrocution—to determine whether execution by electrocution in fact constituted a more severe punishment. *See Malloy II*, 237 U.S. at 184-85; *Malloy I*, 95 S.C. at 441, 78 S.E. at 998. Given the facts that were known at the time, and given that executions by hanging involved "numerous instances[] where the neck was not broken, and the convict died of strangulation" and

"where the head was completely severed from the body," both courts concluded that the electric chair's "tendency is to ameliorate the punishment by hanging." *Malloy I*, 95 S.C. at 441, 78 S.E. at 998; *Malloy II*, 237 U.S. at 185. Because electrocution was not a worse punishment than hanging, the legislation in question did not violate the Ex Post Facto Clauses. Here, however, firing squad and electrocution are worse than lethal injection and Act 43 is therefore *ex post facto*.

B. Electrocution and Firing Squad Are Worse Punishments Than Lethal Injection

As a matter of law, lethal injection, properly administered, is the most humane known method of execution. *See Barr*, 140 S. Ct. at 2591; *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze*, 553 U.S. at 49. Compared to lethal injection, electrocution and firing squad are worse forms of punishment and are therefore *ex post facto*. Specifically, as described above, the circuit court found that "a substantial percentage of individuals [executed in the electric chair] survive and remain sensate long enough to experience excruciating pain and suffering" caused by "electrical burns, thermal heating, oxygen deprivation, muscle tetany, and the experience of high-voltage electrocution," and firing squad "constitutes torture, a possibly lingering death, and pain beyond that necessary for the mere extinguishment of life." R. pp. 22, 26.

Appellants' answer to this—that Respondents did not present any evidence about lethal injection at the trial and therefore cannot have met their burden of proof, *see* Br. of Apps. at 42—is a non-sequitur. First, as a matter of federal law, the method Respondents pled in their complaint—a single dose of pentobarbital—"is widely conceded to be able to render a person fully insensate and does not carry the risks of pain that some have associated with other lethal injection protocols." *Barr*, 140 S. Ct. at 2591. Second, the Supreme Court has already done the comparative assessment that Appellants argue Respondents were required to relitigate below: "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." *Baze*, 553 U.S. at 62. And third, to the extent Respondents were required to produce new evidence that lethal injection is more humane than electrocution or the firing squad, the circuit court's decision limiting discovery on that issue prevented them from putting forward any evidence other than what has already been established in the Supreme Court's precedents. *See* Section VI, *infra*.

V. 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[34] to dictate the method(s) of execution South Carolina will use for any given inmate's execution.[35] As the trial court recognized, however, there are two fundamental 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

[34] 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.

[35] 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.

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.[36] 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.[37] *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010).

[36] *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. 434 S.C. at 389, 864 S.E. 2d at 550.

[37] 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 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.

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 (without any evidence) that it cannot 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 does 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 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. *Baur*, 271 S.C. at 232-33, 246 S.E. 2d at 876.

VI. THE CIRCUIT COURT ERRED WHEN IT LIMITED THE SCOPE OF DISCOVERY

If Act 43 is not, on its face, unconstitutionally vague or violative of the non-delegation doctrine, then the term "available" must have a discernable meaning requiring Appellants to take some affirmative steps to make all three methods of execution available. Whatever those obligations may be, Respondents alleged that Appellants had failed to meet them. In other words, Respondents raised two facial and one as-applied challenge to this portion of the statute. In discovery, Respondents requested information (which is solely in the custody and control of SCDC) about what steps, if any, SCDC has taken to obtain lethal injection drugs. This evidence was relevant to the as-applied challenge and it was an abuse of discretion for the trial court to prohibit discovery into this topic. *Dunn*, 298 S.C. at 502, 381 S.E.2d at 736. This Court need not reach these issues if it affirms the trial court's decision regarding either facial challenge. However, if Act 43 is not unconstitutional on its face, discovery is warranted, and this Court should reverse and remand with additional instructions for further fact-finding.

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

Act 43 provides death-sentenced inmates a right "to elect the manner of their execution." Order, *Sigmon*, No. 2002-024388; Order, *Owens*, No. 2006-038802. That statutory right is violated under circumstances "in which only a single method of execution is available." *Id.* That is true because 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 violates article I, section 15 is equally meaningless. To satisfy the statute SCDC must, at a minimum,

present a death-sentenced inmate with a choice between at least two constitutional methods of execution on which he can exercise his statutory right of election.

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)
Hannah L. Freedman (No. 103373)
Brendan Van Winkle (No. 104768)
Allison Franz (No. 105189)
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

John H. Blume (No. 743)
CORNELL LAW SCHOOL
158 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

Elizabeth Franklin-Best (No. 72555)
ELIZABETH FRANKLIN-BEST, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204

Counsel for Respondents-Appellants

November 3, 2022.