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Oct 27 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

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

v.

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

FINAL BRIEF OF APPELLANTS-RESPONDENTS

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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.

INTRODUCTION

The South Carolina Constitution permits capital punishment. S.C. Const. art. I, § 15; *id.* art. IV, § 14; *see also State v. Allen*, 266 S.C. 175, 186–87, 222 S.E.2d 287, 292 (1976), *overruled on other grounds sub. nom. by Allen v. South Carolina*, 432 U.S. 902 (1977). The General Assembly has determined that murder can warrant a death sentence. S.C. Code Ann. § 16-3-20(A). If the Constitution permits capital punishment and the General Assembly has authorized that punishment, "it necessarily follows that there must be a constitutional means of carrying it out." *Glossip v. Gross*, 576 U.S. 863, 869 (2015) (cleaned up).

From 1995 until last year, lethal injection was the statutory default method of carrying out a death sentence in South Carolina. But despite its diligent efforts, the South Carolina Department of Corrections has, for almost a decade, been unable to obtain the drugs necessary to carry out an execution by lethal injection. Thus, by simply not electing electrocution (which was, under the prior statutory scheme, an alternative method approved by the General Assembly), a condemned

inmate could prohibit the State from carrying out a duly imposed sentence even after he had exhausted his direct and collateral appeals.

Just last year, the General Assembly passed and the Governor signed into law Act 43 to resolve this specific conundrum. This Act changed the statutory default method of execution to electrocution (a method South Carolina law has allowed for more than a century) and added the firing squad as an alternative method. *See* 2021 S.C. Acts No. 43. Under Act 43, a death sentence must be carried out by electrocution unless a condemned inmate instead chooses the firing squad or lethal injection, if those methods are "available" at the time of his election. *Id.* § 1.

Respondents have all been convicted of murder and sentenced to death. Three of Respondents have already exhausted all of their direct and collateral appeals. Following the enactment of Act 43 and adoption of the firing squad protocols, SCDC was again able to carry out these duly imposed sentences upon receipt of a notice of execution from the Clerk of this Court. Yet, in the "Groundhog Day" that has become capital litigation, Respondents sued to stop their executions. *Glossip*, 576 U.S. at 893 (Scalia, J., concurring). They claimed that both electrocution and the firing squad violate the South Carolina Constitution's prohibition on cruel, unusual, or corporal punishments, *see* S.C. Const. art. I, § 15, and raised various challenges to Act 43 itself, from ex post facto to whether the word "available" is unconstitutionally vague to nondelegation.

Despite having previously rejected many of these same arguments at the preliminary injunction stage, the circuit court granted Respondents declaratory and permanent injunctive relief based on all of their theories. The lower court declared that electrocution and the firing squad violate the State Constitution and that Act 43 is unconstitutional and enjoined Appellants from carrying out Respondents' executions by either of those methods. On the article I, section 15 claim that has been the central focus of this case, the circuit court disregarded more than a century of

precedent from this Court. Instead of interpreting the Constitution "in light of the intent of its framers and the people who adopted it," *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014), the circuit court broke new ground in South Carolina law and adopted an evolving standards of decency test that is at odds with law and logic.

The circuit court's error is not limited to the wrong method of interpretation. The circuit court also erred in shifting the burden of proof from Respondents to Appellants. As the parties challenging the constitutionality of state law, Respondents "bear[] the heavy burden," *Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013), to prove Act 43's "repugnance to the Constitution is clear and beyond a reasonable doubt," *Curtis v. State*, 345 S.C. 557, 570, 549 S.E.2d 591, 597 (2001). But the circuit court didn't hold Respondents to that high standard. Instead, the circuit court ruled in Respondents' favor based on testimony like "there's no way to predict does the current immediately render you unconscious or not," R. p. 1327 (Tr. 491:20–22), "we don't really know how this effects people," R. p. 1330 (Tr. 494:11–12), and "there is no proof that a judicial electrocution . . . is instantaneous and painless," R. p. 1282 (Tr. 446:21–23). Such testimony gets nowhere close to carrying Respondents' burden of proving Act 43 is unconstitutional beyond a reasonable doubt and supporting the circuit court's findings and conclusions, and instead demonstrates how the circuit court erroneously shifted the burden to Appellants to prove the challenged methods were painless and instantaneous.

The circuit court's analysis of Respondents' objections to Act 43 fares no better. The ex post facto analysis is premised on the assertion that "[l]ethal injection is the least severe of the three statutorily authorized punishments." R. p. 29 (Order 29). Respondents, however, offered no evidence whatsoever about any protocol for lethal injection, so there is no legal or factual basis for the circuit court's conclusion. Nor did the circuit court recognize (as it did in denying the motion

for a preliminary injunction) that Respondents' punishment was and remains the same: death. The vagueness and nondelegation analyses both rest on the idea that Act 43's use of "available" in setting forth when a condemned inmate may elect the firing squad or lethal injection is so indeterminate that (1) a constitutional construction of the Act is not possible and (2) the SCDC Director has such unfettered discretion that the General Assembly essentially gave him legislative power to determine what method will be used. The circuit court's interpretation of the Act is belied not only by the text itself but also by the undisputed circumstances surrounding the General Assembly's bipartisan enactment of Act 43.

Making all of this analysis even more troubling is the unacknowledged about-face the circuit court did from its order in June 2021 denying Respondents' motion for a preliminary injunction. In that order, the circuit rightly rejected Respondents' the ex post facto claim because "[n]othing has changed about" the fact that Respondents "have known for many years that they were to be punished for their crimes by the loss of their own lives." R. p. 44 (June 11, 2021 Order 5). That is still true today. On the vagueness claim, the circuit court originally observed that Act 43 "on its face can be clearly understood." R. p. 46 (June 11, 2021 Order 7). Act 43 has not changed since June 2021. And the circuit court explained the nondelegation claim was "unavailing." R. p. 46 (June 11, 2021 Order 7). That claim is the same now as it was then. The circuit court never even tried to explain what's different now on any of these claims.

The circuit court's order should be reversed, and the case should be remanded with instructions to enter judgment for Appellants on all causes of action.

STATEMENT OF THE CASE

A. Respondents are death row inmates

All four Respondents in this case are death row inmates, convicted of heinous crimes and

sentenced to death. None challenges his conviction or sentence in this case.

Brad Keith Sigmon was convicted of two counts of murder and sentenced to death after he beat his ex-girlfriend's parents to death with a baseball bat. His conviction and sentence were affirmed on direct appeal. *See State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005). State and federal courts rejected his collateral appeals. *See Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021).

Freddie Owens was convicted of murder and sentenced to death after he shot a convenience-store clerk in the head when she could not open the safe during a nighttime robbery. Owens's conviction and sentence were affirmed on direct appeal. *See State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001) (conviction); *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008) (sentence). Like Sigmon, Owens has exhausted his direct and collateral appeals. *See Owens v. Stirling*, 967 F.3d 396 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2513 (2021).

Gary Terry was convicted of murder and sentenced to death after he disconnected the telephone line to a woman's home, raped her, and then killed her by cracking her skull before leaving her "mostly nude" body in her living room. *State v. Terry*, 339 S.C. 352, 354, 529 S.E.2d 274, 275 (2000). This Court affirmed his conviction and sentence. *See id.* Terry has also exhausted all of his collateral appeals with the exception of a pending second application for post-conviction relief, which alleges he has an intellectual disability that renders him ineligible for the death penalty. *See Terry v. Stirling*, 854 F. App'x 475 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 745 (2022); Order, *State v. Terry*, No. 1997-006197 (S.C. Apr. 6, 2022).

Richard Bernard Moore was convicted of murder and sentenced death after he shot a store clerk in the chest during a nighttime robbery. Moore's conviction and sentence were affirmed on direct appeal. *See State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). Moore's collateral appeals

failed. *See Moore v. Stirling*, 952 F.3d 174 (4th Cir.), *cert. denied*, 141 S. Ct. 680 (2020). Earlier this year, this Court rejected Moore's habeas petition challenging the proportionality of his sentence. *See Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022).

B. Act 43 of 2021

From 1995 until May 2021, South Carolina law provided for execution by both electrocution and lethal injection for individuals convicted of a capital crime and sentenced to death. *See* 1995 S.C. Acts No. 108, § 1 (codified at S.C. Code Ann. § 24-3-530(A) (2007)). Under the statutory process established in 1995, an inmate had to elect one of those methods 14 days before his execution; if he made no election, lethal injection was the default method. *See id.*

For about a decade, SCDC has been unable to obtain or compound the drugs necessary for lethal injection. Thus, SCDC could not execute a condemned inmate who did not affirmatively elect electrocution. In other words, even after condemned inmates had exhausted their direct appeals and collateral challenges, SCDC was unable to carry out duly imposed death sentences upon receipt of an execution notice from the Clerk of this Court unless the condemned inmate chose electrocution. Without such an election by the condemned inmate, there was a de facto inmate-imposed moratorium on executions in South Carolina. *See* S.C. House, Video of Judiciary Subcommittee on Constitutional Laws, 1:45 (Apr. 21, 2021), https://tinyurl.com/4czcc4yc (testimony from Director Stirling to a House Judiciary subcommittee that SCDC "cannot carry out an execution by lethal injection because [SCDC] could not obtain the drugs").

The General Assembly introduced and passed Act 43, on a bipartisan basis, for the specific purpose of resolving the quandary in which SCDC found itself. In the Senate, Senator Hembree, the primary sponsor of the legislation—and a coauthor (with Senator Harpootlian) of the principal Senate amendment—that eventually became Act 43, began his remarks by explaining that "South

Carolina has not been able to carry out executions" because "the companies that provide us the chemicals for execution by lethal injection refuse to sell those chemicals to the State of South Carolina, so we are blocked because of our statutory structure from carrying out what the law requires." S.C. Senate, Video of Floor Proceedings, 1:09:28 (Mar. 2, 2021), https://tinyurl.com/4czcc4yc. Under the prior version of section 24-3-530, Senator Hembree explained, "all the defendant has to do to avoid the sentence being carried out is just say, 'I don't choose the electric chair,'" leaving the State in a "conundrum." *Id.* at 1:11:06. In the House, Representative Newton introduced the bill and explained that, under this legislation, "lethal injection is an option only when it is available." S.C. House, Video of Floor Proceedings, 1:08:40 (May 5, 2021), https://tinyurl.com/4czcc4yc. He explained that this is a change from "current law," which made lethal injection the "default method." *Id.* But "the chemicals are not available," which means that "lawfully imposed sentences cannot be carried out." *Id.*

In 2021, the General Assembly passed and Governor McMaster signed into law Act 43. The Act changed the default method of execution to electrocution and added the firing squad as a third statutorily approved method. *See* 2021 S.C. Acts No. 43, § 1 (amending S.C. Code Ann. § 24-3-530 (Supp. 2021)). Under the Act, a "person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election." *Id.*

Under the Act, SCDC must notify an inmate of his opportunity to elect a method and which methods are available. *Id.* If the inmate does not make an election within 14 days of his execution or if lethal injection and the firing squad are not available, electrocution is the default method. *Id.* Finally, the Act makes clear that it "applies to persons sentenced to death as provided by law prior to and after [its] effective date." *Id.* § 3.

C. Execution protocols

No one in this case disputes how the two challenged methods of execution are carried out. For electrocution, a three-phase protocol is used. The condemned inmate is secured in a chair, and one electrode is placed on the head and another on the right leg, just below the knee. The first phase is 2,000 volts for four-and-a-half seconds. The second phase is 1,000 volts for eight seconds. And the third phase is 120 volts for 120 seconds. There is no pause between these phases, and the process is automated. R. p. 7 (Order 7). The high-voltage phases are designed to cause immediate brain death, while the low-voltage phase is designed to stop the heart. R. p. 1444 (Tr. 608:2–25).

For the firing squad, the condemned inmate is secured in a specially designed chair, and an aiming point is placed over the condemned inmate's heart, after the heart is located by a physician. Three members of the firing squad are positioned 15 feet away from the condemned inmate and, upon the order of their team leader, simultaneously fire at the aiming point. They each use a rifle loaded with a .308-caliber frangible round. That round fragments on impact and cavitates, thereby causing greater damage to the heart of the condemned inmate for the purpose of achieving a more immediate death. R. pp. 6–7 (Order 6–7).

D. Procedural history

Shortly after Act 43 was signed into law, Respondents filed multiple suits in circuit court. They also filed multiple suits in federal court (one of which, like the circuit court here, denied a motion for a preliminary injunction to halt their executions in June 2021). Eventually, after starts and stops and stays, this case got going in earnest in March 2022. After the circuit court denied a motion to dismiss and this Court stayed execution notices issued for Sigmon and Moore that were issued while the motion to dismiss was pending, this Court gave the parties 90 days to try the case

and the circuit court 30 days after that to decide it. Respondents started with eight claims, but after withdrawing a retroactivity claim and after severing and dismissing under Rule 40(j), SCRCP, a single as-applied challenge, the case proceeded to trial on six claims: (1) a cruel, unusual, or corporal punishment claim under article I, section 15, (2) an ex post facto claim, (3) a void-for-vagueness claim, (4) a nondelegation claim, (5) a statutory violation claim based on SCDC's failure to make lethal injection available, and (6) a statutory claim based on having to choose between electrocution and the firing squad.

At trial, Respondents called three fact witnesses: SCDC Director Bryan Stirling, Director of Security and Emergency Operations Colie Rushton, and Witness X, who testified under seal, pursuant to S.C. Code Ann. § 24-3-580. Respondents also called two expert witnesses: John Wikswo, Ph.D., and Jonathan Arden, M.D. Appellants, meanwhile, called three expert witnesses: Jorge Alvarez, M.D., Ronald Wright, M.D., and D'Michelle DuPre, M.D.

Appellants' expert explained that the first phase of electrocution renders a condemned inmate immediately insensate and brain dead, and then the third, low-voltage phase stops the heart (during which time the inmate cannot feel anything). *See, e.g.*, R. pp. 1446–51 (Tr. 610–15). Appellants' experts explained that the firing squad, with the use of fragmented rounds, destroys the heart, and the condemned inmate is unconscious (and insensate) in less than ten seconds and dies soon thereafter. *See, e.g.*, R. pp. 1419–26, 1477–82 (Tr. 583–90, 641–46).

But the circuit court gave more weight to Respondents' experts. Their experts testified that "there is no proof that a judicial electrocution . . . is instantaneous and painless," R. p. 1282 (Tr. 446:21–23) (Wikswo), "we don't really know how this effects people," R. p. 1330 (Tr. 494:11–12) (Arden), and "there's no way to predict does the current immediately render you unconscious or not," R. p. 1327 (Tr. 491:20–22) (Arden). They suggested that electrocution does not render a

condemned inmate instantly insensate, so the inmate will feel as if he's being burned. *See, e.g.*, R. pp. 1185–87, 1322–30 (Tr. 349–51, 486–94). And they claimed that the up-to-fifteen seconds a condemned inmate will be conscious after being shot in the heart by the firing squad will be painful. *See, e.g.*, R. pp. 1322–25 (Tr. 486–89).

The circuit court held for Respondents on all of their claims (except for one about a statutory violation that the circuit court said it did not need to decide in light of its other conclusions). The circuit court found that both electrocution and the firing squad violate article I, section 15. *See* R. pp. 28–28 (Order 20–28). It also found myriad flaws in Act 43, including ex post facto, vagueness, and nondelegation problems. *See* R. pp. 28–36 (Order 28–36).

STANDARD OF REVIEW

"Declaratory judgments are neither legal nor equitable," so the standard of review is "determined by the nature of the underlying issue." *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). Respondents sought injunctive relief with a declaratory judgment, and "[a]ctions for injunctive relief are equitable in nature." *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

When the Court reviews "an action in equity, this Court may make factual findings based on its own view of the preponderance of the evidence." *Id.* And it reviews questions of law de novo. *Id.*

ARGUMENT

At the outset, it's important to keep in mind what this case is *not* about: the constitutionality of capital punishment. The "wisdom of this policy [to allow the death penalty] is a legislative question, not a judicial one." *State v. Crowe*, 258 S.C. 258, 271, 188 S.E.2d 379, 385 (1972). The General Assembly has made the decision that South Carolina will have capital punishment. *See*

S.C. Code Ann. § 16-3-20(A). Indeed, Respondents have conceded as much. *See* R. p. 1041 (Tr. 200:9–11). This case is therefore only about Respondents' objections to how South Carolina carries out capital punishment.

One additional threshold consideration is how the Courts must approach constitutional challenges. The Court has "a limited scope of review in cases involving a constitutional challenge to a statute." *Curtis*, 345 S.C. at 569, 549 S.E.2d at 597. The Court "begins with a presumption of constitutionality." *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014). And the Court must, "if possible," interpret a statute "to render [it] valid." *Id.* Only when a statute's "repugnance to the Constitution is clear and beyond a reasonable doubt" can it be declared unconstitutional. *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597. The party challenging the constitutionality of a statute "bears the heavy burden." *Bodman*, 403 S.C. at 66, 742 S.E.2d at 366.

I. Electrocution and the firing squad are constitutional methods of execution.

The South Carolina Constitution declares that the State shall not inflict "cruel, nor corporal, nor unusual punishment." S.C. Const. art. I, § 15. The primary claim Respondents have pushed in this litigation is that electrocution and the firing squad violate this provision. The circuit court erred when it agreed with Respondents.

A. Both methods are constitutional as an original matter.

1. The original understanding of article I, section 15 controls.

One of the great disputes in this case has been how to analyze Respondents' constitutional claim. Respondents have insisted that a court simply needs to pick up any current dictionary to define the words in the Constitution and that a court should not let the understanding of the framers and people dictate the interpretation of the Constitution today. *Cf.* R. pp. 1505–06 (Tr. 669:25–670:1) (Respondents' closing argument: "Originalism has become recently a way to keep us from

progressing as a people.").

The circuit court accepted Respondents' contention. *See* R. p. 37 (Order 37) ("the General Assembly ignored advances in scientific research and evolving standards of humanity and decency"). In doing so, the circuit court appears to have misapprehended Appellants' argument. The circuit court said it "reject[ed]" the argument that "the South Carolina Constitution should be analyzed in the same manner as the United States Constitution," insisting that the "disjunctives" in article I, section 15 make the South Carolina Constitution different from the Eighth Amendment and noting that the state Constitution provides a "second layer of constitutional rights."[1] R. pp. 20–21 (Order 20–21).

Appellants never argued that article I, section 15 and the Eighth Amendment were necessarily coextensive. Indeed, no one disputes that article I, section 15 includes "corporal" and uses "or" while the Eighth Amendment does not include "corporal" and uses "and." Instead, Appellants argued—in the alternative, no less—that the standard for analyzing a state-law cruel-or-unusual punishment claim challenging a method of execution should be the same as the United States Supreme Court's well-established test for evaluating method-of-execution claims. *See, e.g.*, R. pp. 1528–29 (Tr. 692:23–693:10); *cf. State v. Wilson*, 306 S.C. 498, 509–10, 413 S.E.2d 19, 26 (1992) (using the Eighth Amendment as a guide for interpreting article I, section 15, despite the textual differences in those provisions).

But Appellants' primary argument was that the original understanding of the terms in article I, section 15 controls. *See, e.g.*, R. pp. 1522–23 (Tr. 686:4–687:3). The circuit court erred by not applying that legal framework because in South Carolina, our "Constitution is construed in

[1] The circuit court could not have meant it was inappropriate to look to federal caselaw for guidance about the meaning of "cruel" or "unusual," as the circuit court itself did just that. *See, e.g.*, R. p. 22 (Order 22).

light of the intent of its framers and the people who adopted it." *Long*, 406 S.C. at 514, 753 S.E.2d at 426.

i. Originalism is logically sound.

The original understanding of constitutional terms controls because, in our system of government, the people make the law, and the written law is what "the citizenry and the General Assembly have worked to create." *Id.* Thus, courts must "look at the ordinary and popular meaning of the words used, keeping in mind that amendments to our Constitution become effective largely through the legislative process." *Id.* (cleaned up). This is a longstanding and well-established rule. *See, e.g.*, *City of Rock Hill v. Harris*, 391 S.C. 149, 153, 705 S.E.2d 53, 55 (2011); *Sheppard v. City of Orangeburg*, 314 S.C. 240, 243, 442 S.E.2d 601, 603 (1994); *Shaw v. Shaw*, 256 S.C. 453, 455–56, 182 S.E.2d 865, 865 (1971); *McKenzie v. McLeod*, 251 S.C. 226, 231, 161 S.E.2d 659, 661 (1968); *McWhirter v. Bridges*, 249 S.C. 613, 621, 155 S.E.2d 897, 901 (1967); *Mungo v. Shedd*, 247 S.C. 195, 198, 146 S.E.2d 617, 618 (1966); *Miller v. Farr*, 243 S.C. 342, 347, 133 S.E.2d 838, 841 (1963); *Witsell v. City of Charleston*, 7 S.C. 88, 102 (1876); *State v. Dawson*, 21 S.C. 100, 1836 WL 1498, at *3 (S.C. App. L. 1836).

Moreover, this rule is essential to the separation-of-powers doctrine that protects our liberties. *Cf.* Antonin Scalia, *The Essential Scalia* 38 (Jeffrey S. Sutton and Edward Whelan, eds. 2020) ("Those who seek to protect individual liberty ignore threats to this constitutional structure at their peril."). "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other." S.C. Const. art. I, § 8. Courts must therefore be careful about creating new rights: "In the exercise of proper judicial self-restraint, the courts should leave it to the people, through their elected representatives in the General Assembly, to say whether or not [legal rules] should be revised or discarded." *Decker v.*

Bishop of Charleston, 247 S.C. 317, 325, 147 S.E.2d 264, 268 (1966) (cleaned up).

None of this means the Constitution cannot change. Of course the Constitution can change. But it must be changed the proper way: through the amendment process, which leaves these changes to the people and their elected representatives. *See* S.C. Const. art. XVI, § 1. To change it any other way would itself violate the Constitution because that change would usurp the people's power to govern themselves. *See id.* art. I, § 1 ("All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government.").

ii. Evolving standards of decency is not logically sound.

Relying on the original understanding of constitutional terms is far sounder that the circuit court's evolving standards of decency approach. As an initial matter, evolving standards of decency has never been the test for claims under article I, section 15. Indeed, in all seven cases in which this Court has used the phrase "evolving standards of decency," the Court has done so explicitly in the context of an Eighth Amendment claim. *See Moore*, 436 S.C. at 219 n.2, 871 S.E.2d at 430 n.2; *State v. Smith*, 428 S.C. 417, 421–22, 836 S.E.2d 348, 350 (2019); *Aiken v. Byars*, 410 S.C. 534, 538, 765 S.E.2d 572, 574 (2014); *State v. Stanko*, 402 S.C. 252, 283, 741 S.E.2d 708, 724 (2013); *State v. Pittman*, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007); *State v. Standard*, 351 S.C. 199, 204, 569 S.E.2d 325, 328–29 (2002); *Wilson*, 306 S.C. at 509–10, 413 S.E.2d at 26. This Court has not established any standard based on this analysis that applies to the State Constitution. Thus, the circuit court not only defied this Court's instruction to interpret the Constitution based on the original understanding but also broke new ground in applying the evolving standards of decency analysis to article I, section 15.

This Court has never adopted the evolving standards of decency test for method-of-execution claims for good reason. That test is nothing more than *carte blanche* for courts to impose

their own standards, no matter how much a court may try to look to other external sources. The test effectively allows courts to perform a "magic trick" by reinterpreting constitutional terms to reach a certain result untethered to anything outside of their own conscience. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting). As Justice Scalia incisively put it, under the evolving standards of decency approach, judges have "sought to replace the judgments of the People with their own standards of decency." *Glossip*, 576 U.S. at 899; *see also Nebraska v. Mata*, 745 N.W.2d 229, 288 (Neb. 2008) (Heavican, C.J., concurring in part and dissenting in part) ("There is no doubt that the temptation for judges to inject subjective values into their decisions is always present. But assigning weight to conventional standards of decency does not merely open the door to subjectivity; it invites it.").

Moreover, even under this test as it is usually applied, the circuit court's analysis is flawed. The courts that have applied this test have recognized the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002), and our legislature just spoke on this very question in Act 43. Other considerations under the evolving standards of decency test include "the public attitudes concerning a particular sentence history and precedent," "the response of juries reflected in their sentencing decisions are to be consulted," *Coker v. Georgia*, 433 U.S. 584, 592 (1977), and even "international opinion," *Enmund v. Florida*, 458 U.S. 782, 788 (1982). None of those subjects are considered anywhere in the circuit court's order.

2. Article I, section 15 prohibits only certain types of punishment.

South Carolina first introduced a clause like article I, section 15 in the 1790 Constitution. There, the Constitution prohibited infliction of "cruel punishments." S.C. Const. art. IX, § 4

(1790). This same prohibition was included in the 1861 Constitution, *see* S.C. Const. art. IX, § 4 (1861), and the 1865 Constitution, *see* S.C. Const. art. IX, § 5 (1865). The 1868 Constitution brought the language of "cruel" or "unusual" punishment into South Carolina's constitutional lexicon, S.C. Const. art. I, § 38 (1868), and it included ban on corporal punishment in a separate provision, *id.* art. I, § 16. The 1895 Constitution ultimately put all three terms together in a single prohibition on these types of punishment. *See* S.C. Const. art. I, § 19 (1895).

About seven decades later, the West Committee undertook its work to revise the South Carolina Constitution. The Committee called this protection against such punishments "essential" and explained that its amendment merely "modernized the language." *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895* 19 (1969) ("*West Report*"). The revision therefore kept the same operative words with the same operative meanings (and in the same provision that expressly contemplates "capital offenses"). S.C. Const. art. I, § 15.

i. The original understanding of "cruel."

Given the historical roots of the Cruel or Unusual Punishments Clause, it is essential to look back to see how the framers of our Constitution understood this long-used provision. In 1689, when William and Mary forced James II off the throne in the Glorious Revolution, England enacted its bill of rights, which prohibited "cruel and unusual punishments." English Bill of Rights, cl. 10 (1689), https://tinyurl.com/5rce8xre. Various States later enacted similar prohibitions as the Revolution began. *See, e.g.*, Virginia Declaration of Rights, § IX (June 12, 1776) ("nor cruel and unusual punishments inflicted"), https://tinyurl.com/4a8tbhkn; North Carolina Declaration of Rights, § X (Dec. 18, 1776) ("nor cruel or unusual punishments inflicted"), https://tinyurl.com/2vepe2yy. Congress did the same in the Northwest Ordinance. *See* Northwest Ordinance of 1787, § 14, art. 2 (1787) ("no cruel or unusual punishments shall be inflicted"). When

the States ratified the Eighth Amendment's Cruel and Unusual Punishments Clause, its "text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). "Cruel" was thus a well-known and commonly used term.

In the late eighteenth century, the leading English-language dictionary defined "cruel" as "pleased with hurting others, inhuman, hard-hearted, void of pity, wanting compassion, savage, barbarous, unrelenting." 1 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785) ("I Johnson *Dictionary*"), https://tinyurl.com/2p9dz5x6; *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019). By that time, English law had, "by tacit consent," stopped using methods of execution that were considered "torture or cruelty." 4 William Blackstone, *Commentaries on the Laws of England* 370 (1769) ("4 Blackstone *Commentaries*"). Thus, methods like the rack, the stake, the wheel, disemboweling, quartering, and public dissection were prohibited. *Bucklew*, 139 S. Ct. at 1123. So too were methods in which "the prisoner was drawn or dragged to the place of execution, in treason; or . . . . burn[ed] alive in treason committed by a female." *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878). These banned methods were ones that were "designed to inflict pain and suffering beyond that necessary to cause death." *Baze v. Rees*, 553 U.S. 35, 96 (2008) (Thomas, J., concurring).

As the United States Supreme Court recently explained, the prohibition on cruel punishments "does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." *Bucklew*, 139 S. Ct. at 1124. Instead, it prohibits those punishments "that intensified the sentence of death." *Id.*; *see also* Stuart Banner, *The Death Penalty: An American History* 54 (2002) (describing "burning at the stake, public display of the corpse, dismemberment, and dissection" as "a set of tools capable of

intensifying a death sentence").

The prohibition on such cruelty was known by "every schoolboy in America" during the late 1700s. Akhil Reed Amar, *The Bill of Rights* 87 (1998). In fact, it was so popular that the need for protection against such punishment was a point raised repeatedly by Anti-Federalists during the ratification debates, as they criticized the lack of a bill of rights. *See, e.g.*, Brutus, *Essay II* (Nov. 1, 1787), in *The Anti-Federalist*, at 120 (Herbert J. Storing ed., 2d ed. 1985); *Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Pennsylvania Packet and Daily Advertiser (Dec. 18, 1787), in *The Anti-Federalist*, at 207. This demand for a bill of rights, of course, culminated in the Bill of Rights (including the Eighth Amendment), which South Carolina ratified in 1790—the very same year the State itself prohibited cruel punishments in the South Carolina Constitution. *See* South Carolina Ratification Resolution (Jan. 19, 1790), *in* 2 *Documentary History of the Constitution of the United States of America, 1786-1870*, at 340–44 (1894), https://tinyurl.com/2urt8xzx.

About four decades after both the Eighth Amendment and the South Carolina Constitution prohibited cruel punishments, Justice Joseph Story discussed the ban on cruel and unusual punishments in detail. Such a prohibition, he observed, "would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct." 3 Joseph Story, *Commentaries on the Constitution of the United States* 750 (§ 1896) (1833). Nevertheless, this protection was included in the Bill of Rights "as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in the England in the arbitrary reigns of some of the Stuarts." *Id.* Those monarchs (including James II, who reigned during the Bloody Assizes in the 1680s just a few years before the Glorious Revolution) imposed "vindictive punishments," *id.* at

751, which inspired the English Bill of Rights in 1689, which in turn inspired the American prohibitions on such punishments.

ii. The original understanding of "unusual."

A ban on "unusual" punishment in South Carolina came in 1868, so the latter part of the nineteenth century is the critical time period for this analysis. That said, "unusual" was a well-established legal term by that time, so the earlier history is illuminating.

The dictionary definition of "unusual" in the late eighteenth century was "not common, not frequent, rare." 2 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785), https://tinyurl.com/vfe83u6f. But in a legal context, this word "was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'" John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1745 (2008). Thus, the United States Supreme Court described this term as banning "long disused" forms of punishment. *Bucklew*, 139 S. Ct. at 1124.

This conclusion makes sense, given how "unusual" was used around the time the Eighth Amendment was adopted. For example, in the growing tension between England and the colonies before the Revolutionary War, leading Americans such as Richard Henry Lee noted "immemorial usage" in opposing Parliament's Declaratory Act of 1766, which decreed that Parliament had virtually unlimited power to make any laws for the colonies. Stinneford, *supra*, at 1795 (quoting John Adams, *Notes of Debates* (Sept. 8, 1774), in 1 *Letters of Delegates to Congress, 1774-1789*, at 46 (Paul H. Smith ed., 1976)). "Unusual" was used this way in the Declaration of Independence to describe the way George III had wrongly "called together legislative bodies at places *unusual*, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures." Decl. of Independence para. 6 (1776)

(emphasis added). And Patrick Henry repeatedly used "unusual" in this same manner during the Virginia ratifying convention over a decade later. For example, Henry described how, under the treaty power, "[a] treaty may be made giving away your rights, and inflicting *unusual* punishments," after describing an incident involving Queen Anne and the Russian ambassador earlier that century. Patrick Henry, *Speech to the Virginia Ratifying Convention for the United States Constitution* (June 18, 1788), in 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 503 (Jonathan Elliot ed. 2d ed. 1836) ("3 Elliot's *Debates*"), https://tinyurl.com/4e3b5bya (emphasis added). Henry made a similar point about congressional power to impose punishments that are "unusual" in the absence of a bill of rights that protects longstanding common-law rights. Patrick Henry, *Speech to the Virginia Ratifying Convention for the United States Constitution* (June 14, 1788), in 3 Elliot's *Debates*, at 447.

In the following decades, courts across the country consistently held that a punishment was not unusual if it was permitted by the common law. In New York, for instance, a court held that "disfranchisement of a citizen is not an unusual punishment" because "it was the consequence of treason, and of infamous crimes." *Barker v. New York*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823). A Virginia court reached the same conclusion about stripes, holding that punishment was not unusual because it was "of the same character with the discretion always exercised by Common Law Courts to inflict fine and imprisonment, and subject to be restrained by the same considerations." *Virginia v. Wyatt*, 27 Va. 694, 701 (Va. Gen. Ct. 1828). On the other hand, when the imposition of a joint fine was inconsistent with the common law, a Virginia court held it was an unconstitutional punishment. *See Jones v. Virginia*, 5 Va. 555, 557 (1799) (Carrington, J.). And in 1878 (close to the time "unusual" punishments were first prohibited under the South Carolina

Constitution), the United States Supreme Court looked to common law to uphold the firing squad as constitutional. *See Wilkerson*, 99 U.S. at 133–35.

South Carolina has long held to this view that the common law and long custom dictates whether a punishment is unusual. For criminal statutes that did not impose any specific punishment, courts were to impose "such sentence as is *comfortable to the common usage and practice in this State*, according to the nature of the offense, and not repugnant to the Constitution." S.C. Criminal Code § 78 (1902) (emphasis added); *accord* S.C. Code § 17-553 (1962); S.C. Code § 17-553 (1952); S.C. Criminal Code § 1038 (1942); S.C. Criminal Code § 1038 (1932); S.C. Criminal Code § 105 (1912). This Court repeatedly upheld sentences imposed under this standard, indicating that the common law and custom provided a ready guide for constitutional (and thus not unusual) punishment. *See, e.g.*, *State v. Ferguson*, 221 S.C. 300, 306, 70 S.E.2d 355, 358 (1952); *State v. Dalby*, 86 S.C. 367, 68 S.E. 633, 634 (1910).

Moreover, this is still the law today. *See* S.C. Code Ann. § 17-25-30. And this Court is still affirming sentences under this statute. *See State v. Simms*, 412 S.C. 590, 599, 774 S.E.2d 445, 449 (2015). Thus, South Carolina's understanding of "unusual" comports with the understanding of that word generally in American jurisprudence.

iii. The original understanding of "corporal."

Like "unusual," a prohibition on "corporal" punishment first appeared in a South Carolina constitution in 1868. Yet again, like "unusual," corporal was a well-entrenched legal concept by that time, so earlier history is relevant to determine the original understanding of "corporal."

Johnson's dictionary defined "corporal" as "relating to the body; belonging to the body." I Johnson *Dictionary*. The word had essentially the same definition in the years after it became part of South Carolina's Constitution. *See, e.g.*, 2 *Century Dictionary* 1275 (1906) ("corporal" meant

"pertaining or relating to the body"). But once again like "unusual," "corporal" has a particular legal meaning in the context of punishment.

Take, for example, Blackstone's description of different ways the law sought to prevent "future offenses of the same kind." 4 Blackstone *Commentaries*, at 11. One type of punishment was "amendment of the offender himself; for which purpose all corporal punishments, fines, temporary exile or imprisonment are inflicted." *Id.* These are all types of punishment that temporarily limit someone's ability to commit a crime. A separate type of punishment was "depriving the party injuring of the power to do future mischief," such as "putting him to death, or condemning him to perpetual confinement." *Id.* at 11–12. These punishments were all final, totally depriving the convicted person of committing future crimes.

Case law from the nineteenth century confirms that corporal punishment was something different from capital punishment. This Court cited being "publickly whipped" as an example of "corporal punishment." *State v. Hamblin*, 4 S.C. 1, 3 (1872). The North Carolina Supreme Court listed "branding for manslaughter, cropping the ears for perjury, sitting in the stocks, and flogging" as examples of corporal punishment. *North Carolina v. Nipper*, 81 S.E. 164, 165 (N.C. 1914). Tennessee's high court observed that "corporal chastisement by the infliction of blows on the bare back [is] one of the ordinary modes of punishment." *Cornell v. Tennessee*, 74 Tenn. 624, 629 (1881); *accord Smith v. Doe*, 538 U.S. 84, 98 (2003) ("Punishments such as whipping, pillory, and branding" had a "corporal component").

Such punishment is separate and distinct from capital punishment. The South Carolina Constitution indicates as much. In article I, section 15, the sentence before the prohibition on cruel, unusual, or corporal punishments discusses bail in the specific context of "capital offenses." S.C. Const. art. I, § 15. So does caselaw. The United States Supreme Court discussed imprisonment,

corporal punishment, and death as different types of punishment. *See Anderson v. Dunn*, 19 U.S. 204, 232 (1821) (discussing the powers of Congress). Other courts were even more explicit in this distinction. The North Carolina Supreme Court put it bluntly: A person who "thought capital punishment and corporal punishment were the same" was "totally ignorant of technical terms." *North Carolina v. Lumbrick*, 4 N.C. 156, 157 (1814); *accord* Thomas Hutchinson, *The History of the Colony of Massachusets-Bay* 204 (1764) (discussing the treatment of Quakers in 1661 and an order from Charles I "requiring that a stop should be put to all capital *or* corporal punishment of those of his subjects called quakers" (emphasis added)), https://tinyurl.com/2p8uec5m.

Notably, the circuit court didn't rely on any of this history. Instead, the circuit court simply went to Merriam-Webster's website and used today's definition of the word. *See* R. p. 23 (Order 23). Not only is the failure to use a dictionary from the proper time period emblematic of the circuit court's errant approach for analyzing Respondents' constitutional claim, but also, had the circuit court read Merriam-Webster's notes about the uses of "corporal," the circuit court would have realized that even today, there is a distinction between corporal and capital punishment: "execution comes under the separate heading of 'capital punishment', which originally involved losing your head (*capit-* meaning 'head')." Merriam-Webster Dictionary (Online) (2022), https://tinyurl.com/yc4bcth4.

In fact, the little caselaw the circuit court did cite on this front bolsters Appellants' conclusion. In *State v. Brown*, this Court held that "[c]astration, a form of mutilation, is prohibited by Article I, § 15." 284 S.C. 407, 411, 326 S.E.2d 410, 412 (1985). That is a form of bodily punishment that is distinct from capital punishment.[2]

[2] The circuit court also cited *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993), but it's unclear how a case about invasions of privacy and forced medication has anything to do with the issues raised in this case.

3. Neither electrocution nor the firing squad violates article I, section 15.

With a proper understanding of what article I, section 15 prohibits, the analysis can now turn to the core of this issue: whether electrocution or the firing squad violates that prohibition. Neither does.

i. Electrocution is constitutional.

South Carolina adopted electrocution as the State's sole method of execution in 1912. *See* 1912 S.C. Acts No. 402, § 1. It remained the State's sole method of execution until 1995, when lethal injection was added as a method the State could use. *See* 1995 S.C. Acts No. 108, § 1.

In the middle of those eight-plus decades was the enactment of article I, section 15 in 1971. When the people approved and the General Assembly ratified that provision, everyone knew that electrocution was the State's only way of carrying out a death sentence. "The framers of this Constitution were aware of the policy then prevailing" on capital punishment and the method of execution, and "[i]f there had been any intention to change this policy, it would have been clearly expressed in the Constitution." *Powers v. State Educ. Fin. Comm'n*, 222 S.C. 433, 441–42, 73 S.E.2d 456, 459 (1952). But article I, section 15 said nothing different about capital punishment or the method of execution. Indeed, the West Committee wanted to preserve the meaning of this provision. *See West Report*, at 19; *cf.* S.C. Const. art. XVII, § 10 ("All laws now in force in this State and not repugnant to this Constitution shall remain and be enforced until altered or repealed by the General Assembly, or shall expire by their own limitations."); *id.* art. I, § 15 (referencing "capital offenses"); *id.* art. IV, § 14 (giving the Governor power "to commute a sentence of death").

Further confirming this conclusion is this Court's decision in *Allen* five years after the ratification of article I, section 15. That case raised a challenge to the constitutionality of capital punishment under article I, section 15. This Court quickly rejected that argument, explaining that

the Court had "considered this issue on no less than four occasions under Article 1, Section 19, the predecessor provision of Article 1, Section 15," and that "[o]n each occasion, the constitutionality of capital punishment was upheld." 266 S.C. at 186–87, 222 S.E.2d at 292. Although *Allen* did not specifically discuss electrocution, electrocution was the only method of execution South Carolina used in the 1970s, and it was the only method of execution South Carolina had used for the previous six decades. Thus, if electrocution were viewed as a method that violated the Constitution, it is inconceivable this Court would have rejected the challenge to capital punishment as succinctly as it did.

Given this history, electrocution does not violate article I, section 15. A word-by-word analysis of that section confirms as much. At the outset, it is easy to dispose of *corporal*. That is a different category of punishment from capital punishment. *See supra* Part I.A.2.iii. Plus, every method of execution involves some damage to the body. After all, whatever the method is, it has to do something to disrupt the body and end life, thereby carrying out the duly imposed punishment. Even lethal injection damages the body because it requires an IV be inserted into a vein and would leave a bruise. Under the circuit court's reasoning, even something as small as bruising is corporal punishment. *See* R. p. 26 (Order 26). Nowhere in its order did the circuit court explain *how much* damage is required before a punishment is corporal and therefore prohibited.

Turning to *unusual*, electrocution passes constitutional muster. It has been an accepted method of execution for more than a century, both in South Carolina and in the United States. *See In re Kemmler*, 136 U.S. 436 (1890). Far from being contrary to long usage, *see supra* Part I.A.2.ii., electrocution has been a regular method of execution. Even if it is not as frequently used as it once was, *see* R. p. 27 (Order 27), it has been a continuously authorized method in South Carolina for

110 years, and it remains an authorized method in nine States, *see Authorized Methods of Execution*, Death Penalty Information Center (last accessed Aug. 24, 2022), https://tinyurl.com/429b3xcx. Moreover, this "[r]edefining" of "unusual" as "decline in use" is precisely what Justice Scalia criticized in *Glossip* as more "white paper" than "legal argument." *Glossip*, 576 U.S. at 895.

Finishing with *cruel*, electrocution does not violate this prohibition. As a threshold matter, the framers and ratifiers of article I, section 15 did not understand electrocution to be unconstitutionally cruel. *See Allen*, 266 S.C. at 186–87, 222 S.E.2d at 292; *Powers*, 222 S.C. at 441–42, 73 S.E.2d at 459. To the extent the circuit court and Respondents contend the people's understanding of how electrocution killed someone was factually wrong in earlier years, that argument should be made to legislators and voters, not judges.

The circuit court reached a different conclusion based on two lines of reasoning. The first was caselaw from Georgia and Nebraska holding electrocution unconstitutional under state law. *See* R. pp. 24–25 (Order 24–25). Those courts, however, applied the evolving standards of decency test, which is not how South Carolina courts interpret the South Carolina Constitution. *Compare* Part I.A.1., *with Dawson v. Georgia*, 554 S.E.2d 137, 139 (Ga. 2001); *Mata*, 745 N.W.2d at 256 (majority opinion). Moreover, those decisions came long before jurisdictions became unable to obtain lethal injection drugs and before questions about whether lethal injection really is painless were raised in earnest. *See Dawson*, 554 S.E.2d at 143; *Mata*, 745 N.W.2d at 286 (Heavican, C.J., concurring in part and dissenting in part). Those out-of-state cases are therefore neither controlling nor persuasive.

The second line of reasoning is what the evidence supposedly was at trial. *See* R. pp. 26–28 (Order 26–28). On this front, the circuit court's burden shifting is glaring. The circuit court

openly admitted that "[t]here is no evidence to support the idea that electrocution produces an instantaneous or painless death," as if it were Appellants' burden to prove that. R. p. 26 (Order 26). Indeed, Respondents' experts didn't try to hide this burden-shifting. The circuit court candidly recognized that Wikswo (Respondents' expert on electrocution) "opined that there is no scientific evidence that electrocution . . . causes painless, instantaneous death." R. p. 12 (Order 12). In fact, Wikswo could not even begin to put a timeframe on how long death from electrocution took—perhaps it was ten seconds, but perhaps it was less than two seconds. R. pp. 1229–31 (Tr. 393:3–395:3). Wikswo even openly conceded he was not "arguing for" or "against" the assertion that "judicial electrocution is instantaneous." R. p. 1240 (Tr. 404:9–12). All he claimed was that he did not "happen to support the fact that anyone without the appropriate instrumentation can claim" electrocution is "instantaneous." R. p. 1240 (Tr. 404:17–19) (Wikswo). But this only underscores the lack of evidence that *proves* electrocution "superadd[s]" pain, which was Respondents' burden here. *Bucklew*, 139 S. Ct. at 1125. This failure to carry their burden is fatal to Respondents' claims, and the circuit court's failure to hold Respondents to that burden is reversible error.

Getting further into the proverbial weeds, one of the major points of dispute about electrocution at trial was whether an inmate is rendered immediately insensate when the first phase is started. Arden testified that "there's no way to predict does the current immediately render you unconscious or not." R. p. 1327 (Tr. 491:20–22); *see also* R. pp. 1184–85, 1240 (Tr. 348:23–349:3, 404:21–22) (Wikswo); R. p. 1282 (Tr. 446:21–23) (Arden). But again, it was not Appellants' burden to prove electrocution causes such a death. It was Respondents' burden to prove it does not.

The circuit court's burden-shifting conclusion is premised on the idea that the resistance of the human skull means that some electric current will not enter the condemned inmate's brain and the inmate will not be rendered immediately insensate. That is based on Wikswo's testimony, but

that testimony was based on studies about the resistance of the skull at "very low voltages," not "thousands of volts," as the first two phases of South Carolina's protocol call for. R. p. 1462 (Tr. 626:17–19) (Wright). Moreover, even the circuit court noted that "Wikswo admitted that he cannot quantify the percentage of electric current that reaches the brain and that there is *no evidence* of how much the brain is rendered nonfunctional" during the initial application of current. R. p. 11 (Order 11) (emphasis added); *see also* R. p. 1187, 1201 (Tr. 351:1–2, 365:1–2) (Wikswo). Indeed, Wikswo admitted that "the great question is what fraction of the current goes into the brain." R. p. 1196 (Tr. 360:14–16). Whatever that fraction is, even Wikswo admitted that at least "some" of the high-voltage current immediately enters the brain. R. p. 1196 (Tr. 360:13).

If somehow Wikswo's inability to quantify the current were not enough, the circuit court also did not account for the fact that Wikswo tried to quantify this amount, but he lacked the technical skills to do so in a way that would convince the "foremost" peer-review journal in his field to publish his manuscript. R. p. 1269 (Tr. 433:5–8); *see also* R. p. 1266, 1304 (Tr. 430:3–14, 468:6–11). The circuit court gave too little weight to Wikswo's failure on this front. *See State v. Jones*, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001) (expert testimony was improperly admitted when an expert "candidly acknowledged that earlier work in this area had been discredited"). Given that Respondents had the burden of proof, their own expert's inability to quantify how much current does not enter the brain must be held against them, not against Appellants.

The circuit court's conclusion about the amount of electricity that enters the brain is further undermined by more testimony the circuit court didn't acknowledge anywhere in its order. The circuit court cited Wikswo's statement that the "vast majority" of current does not enter the brain. R. p. 11 (Order 11). Yet nowhere did the circuit court note that the word "vast" was originally inserted into Wikswo's affidavit in this case by *Respondents' counsel*. Wikswo actually asked

those lawyers, "What do we have to prove 'vast'?" R. p. 1463 (Tr. 427:19). Wikswo never—in his deposition or at trial—pointed to any evidence that justified the use of "vast." Unsurprisingly so, given that he couldn't do the calculations and his efforts to quantify how much current entered the brain were rejected by the leading peer-review journal in his field.[3]

In contrast with Respondents' expert on whom the circuit court relied, Appellants' electrocution expert testified that the high-voltage shock causes immediate poration of the brain, leaving the condemned inmate insensate and from which the condemned inmate cannot recover. *See* R. p. 1449 (Tr. 613:4–14); *cf.* S.C. Code Ann. § 44-43-460 ("An individual who has sustained irreversible cessation of circulatory and respiratory functions *or* irreversible cessation of all functions of the entire brain, including the brain stem, is dead." (emphasis added)). The circuit court also never took into account this expert's uncontroverted testimony that electricity travels at approximately the speed of light and therefore significantly faster than the body's pain receptors that send signals to the brain for interpretation. R. p. 1447–48 (Tr. 611:6–612:6).

The circuit court discounted this evidence because of examples of previous executions in which the condemned inmate breathed, moved, or screamed after the first shock. R. p. 15 (Order

[3] During trial, the circuit court recognized that Wikswo's testimony raised serious credibility issues. At the end of Wikswo's cross-examination, the circuit court put it bluntly: Wikswo had "offered contradicting testimony to the Court." R. p. 1302 (Tr. 466:1–2). Yet nowhere in its order does the circuit court acknowledge, much less reconcile, that contradictory testimony. Nor did the circuit court wrestle with the fact that Wikswo's testimony was tainted with his inability to define death clearly. He was adamant that "death is not black and white," R. p. 1257 (Tr. 421:5), and he had to "amend" his own definition of death twice (and it ultimately still did not match South Carolina's statutory definition), R. p. 1255 (Tr. 419:2–6). His own inability to define death undermines any conclusions he offers about when a person does (or does not) die as a result of electrocution.

For these reasons and others, Appellants moved to exclude Wikswo from testifying as expert. *See* R. pp. 625–36 (Mot. to Exclude Wikswo Expert Testimony). After hearing arguments on that motion before trial started, the circuit court denied it but said it would "pay extra particular attention to each and every word that Dr. Wikswo says." R. p. 939 (Tr. 66:15–16). Yet, as explained here, the circuit court ignored many of Wikswo's words that undermined his testimony.

15). But any movement can be explained by the fact that muscles can tetanize (or contract) when electrical current is applied. *See* R. p. 1326 (Tr. 490:4–7) (Arden). This can happen until a body reaches rigor mortis, about four hours after death. *See* R. p. 1470 (Tr. 634:6–16) (Wright). As for breathing and screaming, Respondents and their experts offered only one example, out of Florida in which a newspaper article described a "muffled scream." R. p. 1388 (Tr. 552:19–21). At most, this is an example of a botched execution.[4]

On the subject of botched executions, the circuit court concluded that an "intolerably high percentage" of electrocutions are botched. R. p. 27 (Order 27). Yet the only evidence at trial on the percentage of botched electrocutions: 1.92%. R. p. 1274 (Tr. 439:10–14). That's significantly lower than the rate of botched lethal injections (the method championed by the circuit court and Respondents), even if it is slightly higher than the 0.0% rate for the firing squad. *See* Austin Sarat, *Gruesome Spectacles* 177 (2014) (providing a chart of "Botched execution rate[s]" for 1900-2010, with a rate of 1.92% for electrocution, 0.0% for firing squad, and 7.12% for lethal injection).[5]

What Respondents never offered evidence of—and what the circuit court never found—was evidence of any botched executions in South Carolina. A witness from SCDC who testified in camera under S.C. Code Ann. § 24-3-580 explained that he would "have been advised" of "a

[4] The circuit court also said that bruising was as sign that an inmate suffers during an electrocution. Not so. The fact that a condemned inmate's body might be bruised during an electrocution is not inconsistent with the inmate being insensate upon the first application of current. *See* R. p. 27 (Order 27). The three-phase protocol is designed to render the inmate insensate with the high-voltage phases, and then the last, low-voltage phase stops the heart. During some period of time then, the inmate's heart will not have stopped beating (and hence bruising can occur), even if the inmate is insensate. This could also occur after the straps are secured but before the electricity is even applied as an inmate might struggle against the straps.

[5] Arden admitted that he did not do any independent research on botched executions here. Instead, he reviewed 80 electrocutions hand-selected and given to him by Respondents' counsel, *see* R. p. 1387 (Tr. 551:4–14), only eight of which he said were botched (the circuit court wrongly said ten), *compare* R. p. 1329 (Tr. 493:21–22), *with* R. p. 14 (Order 14). The 80 cases Arden reviewed pale in comparison to the more than 4,300 electrocutions Sarat reviewed in his study.

problem during an execution" and had never "been informed of any problems during any executions." R. p. 1699 (Tr. 288:3–12).

The circuit court's mistakes in evaluating the expert testimony about electrocution do not stop there. As for the burns caused by electrocution, the circuit court concluded "some" occur premortem. R. p. 26 (Order 26). Yet Respondents' own experts admitted there is no way to tell whether burns actually occur before death. R. p. 1215 (Tr. 379:15–16) (Wikswo: "I am not able to determine whether a burn occurred before or after death."); R. p. 1372 (Tr. 536:12–24) (Arden: "I cannot look at the individual burn and say this one is antemortem, this one is postmortem. That's not possible."). Thus, any finding or conclusion that burns occur while the condemned inmate is still alive is at odds with the evidence and turns entirely on the (mistaken) conclusion that Respondents had proved that the inmate is not rendered insensate immediately and does not take into account South Carolina's definition of death in section 44-43-460.

A good example of the shortcomings in the circuit court's (and Respondents') analysis about burns is the Medina execution from Florida. During that execution, witnesses reported flames from Medina's head and a burning smell, so Florida had four forensic pathologists investigate (two appointed by the State, and two by an anti-death penalty group). R. pp. 1648–56 (Defs.' Ex. 1). All four agreed that Medina died instantly and any burns occurred *post*mortem. Wikswo and Arden disagreed with the four pathologists who examined Medina, but neither Wikswo nor Arden could offer anything specific to justify their disagreement (nor did Arden or Wikswo personally examine Medina, as the other four pathologists did). *See* R. p. 1233 (Tr. 397:4–25) (Wikswo); R. p. 1382–83 (Tr. 546:22–547:5) (Arden). In the same way, Respondents' experts pointed to burns in autopsies performed following judicial electrocutions in South Carolina, without being able to say with any certainty or proof that these burns came while the inmate was

sensate. *See* R. p. 1208 (Tr. 372:10–15) (Wikswo); R. pp. 1332–33 (Tr. 496:16–497:4) (Arden).

For all of the circuit court's discussion of the pain supposedly caused by electrocution, at no point did the circuit court ever explain how much pain is required before a method of execution violates the Constitution. This matters because prohibitions on cruel punishments have never been understood to "guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." *Bucklew*, 139 S. Ct. at 1124. Indeed, "some risk of pain is inherent in any method of execution." *Glossip*, 576 U.S. at 869 (majority opinion). Requiring "the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether," *id.*, but this Court has made clear that capital punishment is constitutional, *Allen*, 266 S.C. at 186–87, 222 S.E.2d at 292, so "no pain" and "instant" cannot be the standard. Yet that appears to be the bar to which the circuit court (in its burden shifting) held Appellants.

Finally, at no point did the circuit court take into account the fact that condemned inmates in other States are *choosing* electrocution over lethal injection. *See* R. p. 1453 (Tr. 617:13–17); Travis Loller, *Tennessee Man Gets Electric Chair for Killing Fellow Inmate*, Associated Press (Feb. 20, 2020), https://tinyurl.com/2cpz95dp (five inmates in the past 16 months have chosen the electric chair over lethal injection). These choices—particularly by the second, third, fourth, and fifth inmates, who would have been told by their lawyers if previous electrocutions looked painful—seriously undermine the circuit court's findings and conclusion on electrocution. Further undermining the circuit court on this front is that Wright—Appellants' electrocution expert, who was complimentary of the South Carolina design—actually redesigned Tennessee's electric chair, and Wright's design is the one that Tennessee has used for these executions in recent years. *See* R. pp. 1451–53 (Tr. 615:22–617:12).

ii. The firing squad is constitutional.

Start with the obvious: The firing squad is new in South Carolina. But that does not mean it is unconstitutional. The focus of the analysis must be on each term in article I, section 15.

At the outset, it is once again easy to dispose of *corporal* because it's a different category of punishment from capital punishment. *See supra* Part I.A.2.iii.

As for *unusual*, such a punishment is one that was contrary to immemorial usage and violated the common law. *See supra* Part I.A.2.ii. When the United States Supreme Court was faced with the question of whether the firing squad violated the Eighth Amendment, that Court looked to common law and concluded that the firing squad was not a cruel and unusual punishment. *See Wilkerson*, 99 U.S. at 134–35 ("Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment."). This result isn't surprising. America's "first documented firing squad execution occurred in Virginia in 1608." Deborah W. Denno, *The Firing Squad As "A Known and Available Alternative Method of Execution" Post*-Glossip, 49 U. Mich. J.L. Reform 749, 778 (2016). That makes the firing squad one of "this country's oldest methods of execution." *Id.* The method continued to be used in the next century, as, for example, the Continental Army executed soldiers guilty of mutiny by firing squad. *See* Robert A. Mayers, *Hub of the Revolution* 6 (2012), https://tinyurl.com/9n5xpcm6 (discussing the Pompton Mutiny in New Jersey); *see also Baze*, 553 U.S. at 48 (plurality opinion) ("the firing squad was routinely used as a method of execution for military officers"); Banner, *supra*, at 46 (discussing the use of the firing squad by the military in seventeenth and eighteenth centuries).

In fact, there do not appear to be any Founding-era sources indicating that the firing squad was considered cruel or unusual. Nor does there appear to be any court in the United States that has held the firing squad is unconstitutional. It is authorized as a method of execution in four States, *see Authorized Methods of Execution*, Death Penalty Information Center (last accessed Aug. 24, 2022), https://tinyurl.com/429b3xcx, and it was used as recently as 2010, *see* Kirk Johnson, *Double Murderer Executed by Firing Squad in Utah*, N.Y. Times, A12 (June 19, 2010). And even a condemned inmate in a United States Supreme Court case from this year proposed the firing squad as a constitutional alternative method. *See Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022).

According to the circuit court, the firing squad is unusual because it has been more frequently used for military executions and has not been used in South Carolina before. *See* R. pp. 21–22 (Order 21–22). This cannot be right. If it were right, then any new method would be unconstitutional. Recall article I, section 15 uses "or," so even if a new method is not cruel or corporal, it still would be unusual, according to the circuit court. This "unusual" analysis, of course, would include lethal injection by pentobarbital, which Respondents propose as an alternative method but which has *never* been used in South Carolina. R. p. 113 (Compl. 20).

Finally, as for *cruel*, this prohibits a punishment that "seek[s] to superadd terror, pain, or disgrace." *Bucklew*, 139 S. Ct. at 1125; *see also supra* Part I.A.2.i. The firing squad has never been understood to do that. Instead, it has been understood to lead to a quick death. Even Respondents' expert acknowledged that a person whose heart stops beating may remain conscious for "approximately fifteen seconds" due to oxygenated blood in the brain, R. p. 13 (Order 13), which that expert called a "brief period," R. p. 1365 (Tr. 529:17) (Arden). (For what it's worth, Respondents' expert admitted that he had not reviewed the studies showing that consciousness in

this situation would actually last only four to ten seconds, *see* R. p. 1393 (Tr. 557:2–11) (Arden), nor did his 15-second estimate appear to account for the fact that the circulatory system would be ruptured, so gravity would be pulling blood out of the brain, *see* R. p. 1423 (Tr. 587:22–23) (Alvarez).) Appellants' expert cardiologist testified a condemned inmate would lose consciousness in less than ten seconds. R. p. 17 (Order 17). The circuit court wrongly gave no credence to Appellants' expert cardiologist's estimate of timing, which was based on his firsthand experience of how quickly patients lose consciousness when the heart wall ruptures, as they go from "talking" "in full sentences" to unconscious in mere seconds. R. p. 1426 (Tr. 587:24–25) (Alvarez). Indeed, the circuit court never explained why it credited 15 seconds, rather than less than ten seconds, or, as Appellants' forensic-pathologist expert put it, "almost immediate[]" loss of consciousness.[6] R. p. 1482 (Tr. 646:7–8) (DuPre).

But even accepting Respondents' expert's testimony, the circuit court's conclusion boils down to this: That for perhaps 15 seconds, a condemned inmate's pain from breathing with broken bones[7]—assuming he can in fact comprehend that pain despite the shock of what has happened—is a constitutional violation. But the circuit court never explained why 15 seconds is a constitutionally relevant timeframe. Would ten seconds be? Five? One? Again, prohibitions on cruel punishments have never been understood to "guarantee a prisoner a painless death." *Bucklew*, 139 S. Ct. at 1124. This underscores a glaring flaw in the circuit court's order: The order never

[6] The circuit court criticized the testimony about the firing squad from this expert, D'Michelle DuPre, because her opinions were "premised on assumptions" about how the firing squad would be carried out. R. p. 18 (Order 18). But Respondents asserted a facial challenge to the firing squad, so DuPre was entitled to assume that the protocols would be followed. Indeed, even the circuit court held in discovery that information about training and members of the execution team was irrelevant. R. p. 56 (July 5, 2022 Order).

[7] Respondents' expert was clear that the pain was from breathing with the broken ribs, not necessarily the broken ribs themselves. R. p. 1356 (Tr. 520:14–21) (Arden).

explains what, if any, pain is permitted in carrying out a validly imposed death sentence.

Bolstering the conclusion that the firing squad is not unconstitutionally cruel are the myriad statements from courts speaking approvingly of the firing squad and claims from condemned inmates (and their experts) who have proposed the firing squad as a less-painful alternative method of execution. As for courts, Justice Sotomayor has been a strong proponent. She observed that the firing squad "has a long track record of successful use." *Johnson v. Precythe*, 141 S. Ct. 1622, 1626 (2021) (Sotomayor, J., dissenting from denial of certiorari). In fact, "there is evidence to suggest that the firing squad is significantly more reliable than other methods." *Glossip*, 576 U.S. at 976 (Sotomayor, J., dissenting); *see also* Denno, *supra*, at 787 (supporting firing squad as a constitutional form of execution and noting only two of 144 non-military firing squads have been botched going back to colonial times). Looking back to *Wilkerson*, Justice Thomas (only a few years ago) observed that the "unanimous Court had no difficulty concluding that death by firing squad did not fall within that category" of prohibited punishments. *Baze*, 553 U.S. at 100 (Thomas, J., concurring) (cleaned up).

In addition to its reliability, courts have described the firing squad as "comparatively painless." *Arthur v. Dunn*, 137 S. Ct. 725, 734 (2017) (Sotomayor, J., dissenting from denial of certiorari) (citing Banner, *supra*, at 203). The majority in *Glossip* agreed with this point, observing "there is some reason to think that [the firing squad] is relatively quick and painless." 135 S. Ct. at 880 (majority opinion); *see also* Denno, *supra*, at 785 ("a competently performed shooting may lead to nearly instant death"). Lower court judges are in accord. *See, e.g.*, *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 882 (11th Cir. 2017) (Wilson, J. concurring in the judgment) (the firing squad may be less painful than other methods, given "judicial experience and common sense"); *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir.) (Kozinski, C.J., dissenting from denial of

rehearing en banc), ("The firing squad strikes me as the most promising [method of execution]."), *vacated*, 573 U.S. 976 (2014).

"Certainly, use of the firing squad could be seen as a devolution to a more primitive era." *Glossip*, 576 U.S. at 977 (Sotomayor, J., dissenting). Indeed, the circuit court suggested as much when it claimed the General Assembly "turned back the clock." R. p. 37 (Order 37). But "[t]hat is not to say, of course, that [the firing squad] would therefore be unconstitutional." *Glossip*, 576 U.S. at 977. "[T]raditionally accepted methods of execution" (including "the firing squad") are not "necessarily rendered unconstitutional as soon as an arguably more humane method . . . becomes available."[8] *Bucklew*, 139 S. Ct. at 1125.

B. Alternatively, both methods are constitutional under federal law's *Glossip* test.

This Court's repeated pronouncements that the original understanding of the South Carolina Constitution controls should be sufficient to resolve this issue. But if the Court were inclined to look to federal Eighth Amendment jurisprudence, the result is the same. *Cf. Wilson*, 306 S.C. at 512, 413 S.E.2d at 27 ("Having determined that no violation of the Eighth Amendment occurred, we also hold there is no violation of the South Carolina Constitution.").

Federal law does not apply the evolving standards of decency test to methods-of-execution cases. Instead, the United States Supreme Court requires a plaintiff challenging a method of execution to "show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125 (citing *Glossip*, 576 U.S. at 869).

[8] It's ironic that the circuit court never discussed any of this caselaw about the firing squad, but the circuit court was quick to rely on even older caselaw about lethal injection. *See* R. p. 29 (Order 29). The reliance on that lethal injection caselaw, when Respondents offered *no* evidence about lethal injection being a less painful alternative method, is untenable. *See infra* Part I.B.

Other States have adopted this test in the past decade for state-law claims. *See Kelley v. Johnson*, 496 S.W.3d 346, 357 (Ark. 2016); *Correll v. Florida*, 184 So. 3d 478, 489 (Fla. 2015); *Missouri ex rel. Johnson v. Blair*, 628 S.W.3d 375, 390 (Mo. 2021); *West v. Schofield*, 519 S.W.3d 550, 567–68 (Tenn. 2017).

If this Court is inclined to move away from an originalist interpretation of article I, section 15, the federal test is the best alternative. Like the United States Constitution, the South Carolina Constitution permits capital punishment. *Compare Glossip*, 576 U.S. at 869, *with* S.C. Const. art. I, § 15; *id.* art. IV, § 14; *Allen*, 266 S.C. at 186–87, 222 S.E.2d at 292. Again, if capital punishment is constitutional, "it necessarily follows that there must be a constitutional means of carrying it out." *Glossip*, 576 U.S. at 869 (cleaned up). Thus, if a condemned inmate is going to insist one method of execution is too painful to be constitutional, it only makes sense that he be required to offer an alternative method that is decidedly less painful and that could be easily used to carry out his execution. Moreover, the *Glossip* test also recognizes the reality that "some risk of pain is inherent in any method of execution," so constitutional law cannot "require the avoidance of all risk of pain." *Id.* Indeed, requiring "the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether," *id.*, but courts have rightly refused to condone such backdoor attacks on capital punishment. Additionally, not having such a high hurdle (that a different method would "*significantly* reduce a *substantial* risk of *severe* pain") would lead to even more lawsuits from condemned inmates on the eve of execution, each of whom would claim that he has a right to offer, and in fact could offer, evidence showing the method he faced was just a little bit more painful than another method.

As discussed already, neither electrocution nor the firing squad carries a substantial risk of severe pain, and the circuit court's findings to the contrary were based primarily on burden-

shifting. *See supra* Part I.A.3. That alone means Respondents lose under the *Glossip* test.

But it is not the only reason Respondents lose under that test. One additional reason is that Respondents offered *no* evidence—literally, none—of a comparative method of execution. *See* R. pp. 874–1554, 1657–701 (Tr. 1–718). Respondents pled that a single dose of pentobarbital was a more humane method of execution. R. p. 113 (Compl. 20). But that was just an allegation. Respondents had to offer evidence to prove that allegation at trial. They did not do so. *See State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("given that Jones has offered no evidence in support of his claim, he has utterly failed in his burden").

Despite this complete lack of evidence, the circuit court held that "[l]ethal injection is the least severe of the three statutorily authorized punishments." R. p. 29 (Order 29). Putting aside the basic fact that that's not how trials work, there is also too much conflicting case law on this front for the Court to assume anything about lethal injection. Attacks on lethal injection now come from many sources, including from Justices on the United States Supreme Court. Justice Sotomayor has repeatedly questioned the use of lethal injection. She has observed that lethal injection was initially adopted as "a more humane and palatable method of execution," but that in "cruel irony," lethal injection "may turn out to be our most cruel experiment yet." *Arthur*, 137 S. Ct. at 732–33. In her dissent from the denial of certiorari in *Arthur*, Justice Sotomayor catalogued claims of lethal injections that supposedly caused pain. *See id.* at 733; *see also* Sarat, *supra*, at 177 (lethal injections are botched significantly more often than electrocution or the firing squad). She wanted the Supreme Court to take up the petitioner's claim that the firing squad would substantially reduce the risk of pain. *See Arthur*, 137 S. Ct. at 733–34. Just last year, Justice Sotomayor reiterated that point. *See Johnson*, 141 S. Ct. at 1623. Justice Breyer has also insisted that "there are significant questions regarding the constitutionality of" lethal injection. *Barr v. Lee*, 140 S. Ct. 2590, 1592

(2020) (Breyer, J., dissenting).

Perhaps the circuit court assumed, without explicitly saying, that lethal injection is the least painful method because it looks the most "clinical" to people observing the execution. Even putting aside the botched lethal injections that probably don't look so clinical, *see, e.g.*, Ariane de Vogue, *New Documents Reveal Botched Oklahoma Execution Details*, CNN (Mar. 16, 2015 6:33 PM), https://tinyurl.com/4aju38zv, the witnesses are not the focus here. The condemned inmate is.

And from the inmate's perspective, constitutional challenges to pentobarbital abound in federal courts. *See, e.g.*, *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (per curiam); *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275 (11th Cir. 2015); *Jackson v. Danberg*, 656 F.3d 157 (3d Cir. 2011); *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010). Consider one pentobarbital challenge in particular. In *Barr v. Lee*, the condemned inmates brought an Eighth Amendment challenge to using a single dose of pentobarbital for their executions. The inmates in *Lee* claimed a single dose of pentobarbital would create "respiratory distress that temporarily produces the sensation of drowning or asphyxiation." *Lee*, 140 S. Ct. at 2591 (per curiam). The district court issued a preliminary injunction because, in its mind, the "scientific evidence before the court overwhelmingly indicates that [a single dose of pentobarbital] is very likely to cause Plaintiffs extreme pain and needless suffering during their executions." *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 218 (D.D.C. 2020), *vacated sub nom. Barr v. Lee*, 140 S. Ct. 2590. The United States Supreme Court quickly vacated that injunction, but the fact that a federal district judge could enter the injunction at all demonstrates how difficult and debatable questions about degree of pain are. Or put another way, if pentobarbital would significantly reduce a substantial risk of severe pain, then it is inconceivable any plaintiff could ever prevail on a challenge to pentobarbital at any stage of litigation.

Nothing the circuit court cited in assuming (or conclusorily finding, if it in fact found that) lethal injection is less painful withstands scrutiny. The circuit court's quote from the United States Supreme Court in *Baze* that lethal injection is "believed to be the most humane execution method available," R. p. 29 (Order 29) (quoting *Baze*, 553 U.S. at 62 (plurality opinion)), is not the opinion of the high Court, but of "Kentucky" almost two decades ago, *Baze*, 553 U.S. at 62. The invocation of *Barr v. Lee* never acknowledges, much less engages with, how the district court found federal death row inmates' expert sufficiently compelling to enjoin the use of pentobarbital. And the Sixth Circuit's 2007 opinion not only predates any of the more recent doubts about lethal injection but also was discussing a three-drug protocol that is not the one Respondents here demand that SCDC use. *See Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

A second additional reason that Respondents fail under the *Glossip* test is that they did not show that their proposed method of a single dose of pentobarbital was one that the State could readily implement. Once again, they offered "no evidence" on this question, so they have "utterly failed" to carry their burden. *Jones*, 344 S.C. at 58, 543 S.E.2d at 546.

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

Both the federal and state constitutions prohibit ex post facto laws. *See* U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4. As relevant here, an ex post facto law retroactively "increases the punishment for a crime." *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.).

The circuit court held that Act 43 increases Respondents' punishment because electrocution and the firing squad are more severe than lethal injection. R. pp. 28–29 (Order 28–32). This conclusion is incorrect.

The most obvious problem in the circuit court's analysis is that it rests on the assertion that

"[l]ethal injection is the least severe of the three statutorily authorized punishments." R. p. 29 (Order 29). But as just discussed at length, Respondents offered no evidence whatsoever about lethal injection,[9] and the circuit court's conclusion is built solely on the sandy foundation of old and misread caselaw. *See supra* Part I.B. To be sure, the circuit court's conclusion that an ex post facto challenge requires some comparison of methods of execution is correct because an ex post facto challenge, in the context of a method-of-execution case, necessarily involves a change from one method to another method. *See* R. p. 31 (Order 31) (discussing *State v. Malloy*, 95 S.C. 441, 78 S.E. 995 (1913)). To do that comparison, however, a court must have some evidence regarding each method. Here, the circuit court had no evidence about what pain lethal injection may cause, so there is no way the circuit court can find on this record whether the new method is sufficiently more "odious" than old methods to be an ex post facto violation. *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). In other words, the circuit court had no way to do this comparative analysis, so Respondents, as the parties with the burden of proof, must necessarily lose.

What makes the circuit court's order even more incredulous is how blatantly inconsistent it is with the circuit court's own reasoning from its June 2021 order denying the motion for preliminary injunction. There, the circuit court accurately explained that "[n]othing has changed about" the fact that Respondents "have known for many years that they were to be punished for their crimes by the loss of their own lives." R. p. 44 (June 11, 2021 Order 5). Respondents were, and in fact still are, sentenced to "death." R. pp. 92, 93 (Exs. A & B, filed Sept. 28, 2021); *see also Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) ("[T]he sentence was death, and that

[9] As a further flaw in Respondents' case on this point, the alternative method they proposed was a single dose of pentobarbital. R. p. 113 (Compl. 20). But that is not the method of lethal injection South Carolina has previously used. The comparison required for an ex post facto claim must look at the method South Carolina uses for lethal injection, not a new protocol Respondents proposed in this litigation.

sentence remains in place. The change in method does not make the sentence more burdensome and so does not violate the Ex Post Facto Clause."); *Montana v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984) ("Death by lethal injection is not a legislatively created punishment. The punishment is the sentence of death."). As with Respondents' death sentence, nothing has changed about this "well-established law" since June 2021. R. p. 45 (June 11, 2021 Order 6). Yet the circuit court ignored this precedent (indeed, the circuit court never even mentioned it) in granting declaratory and injunctive relief.

Near the end of its analysis on the ex post facto claim, the circuit court rejected the concept that a change in the method of execution does not violate the state or federal constitutions unless the new method is unconstitutional. R. p. 31 (Order 31). The circuit court reached this conclusion by noting that courts have found ex post facto violations in noncapital cases, so an Eighth Amendment violation isn't necessary to find an ex post facto violation. In noncapital cases, this makes sense. Of course something that results in a longer jail sentence would violate ex post facto prohibitions, even though imprisonment is not cruel or unusual punishment.

But in the context of capital cases, there is necessarily overlap between ex post facto claims and cruel or unusual punishment claims. Without requiring some sufficiently significant difference in the pain caused by methods of execution, ex post facto claims would "transform courts into boards of inquiry charged with determining 'best practices' for executions," thereby "embroil[ing] the courts in ongoing scientific controversies beyond their expertise." *Baze*, 553 U.S. at 51.

III. The word "available" has a clear meaning that SCDC can implement.

The circuit court held that Act 43's use of "available" made the act unconstitutionally vague and created a nondelegation violation. *See* R. pp. 32–37 (Order 32–37). Both questions are legal questions on which the circuit court erred.

A. Act 43 is not unconstitutionally vague.

In June 2021, the circuit court denied a motion for preliminary injunction based on Respondents' vagueness challenge, holding that Act 43 "on its face can be clearly understood." R. p. 46 (June 11, 2021 Order 7). Yet now, the circuit court says Act 43 is so vague "a person of average intelligence must guess at its meaning." R. p. 33 (Order 33).

The circuit court never acknowledges, much less explains, its about-face. Understandably so. The circuit court got it right the first time. Act 43 is readily understandable, so it provides the "fair notice" that due process requires. *State v. Green*, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012). A law lacks that fair notice only if it "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." *Id.*

The "cardinal rule" in interpreting a statute is to give effect to the General Assembly's intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Discerning that intent begins with the language of the statute. *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). Words in a statute must be read "in context," *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013), and given their "usual and customary meaning," *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011).

Contrary to the circuit court, these rules give a clear meaning to "available" in Act 43. The Act sets forth the procedure for carrying out an execution in this State. Therefore, the Act provides the steps required for SCDC to fulfill its duty in a particular execution, on a specific date, set by operation of statute after the Clerk of this Court issues an execution notice. The meaning of "available" is accordingly apparent: "present or ready for immediate use." Merriam-Webster Dictionary (Online) (2022), https://tinyurl.com/e7fshz4; *see also* American Heritage Dictionary

(Online) (2022), https://tinyurl.com/b3eddwf4 ("present and ready for use").[10]

The circuit court's contention that "available" has too many definitions to have a clear meaning is belied by this Court's recent decision in *Brannon v. McMaster*, 434 S.C. 386, 864 S.E.2d 548 (2021). Just last year, this Court held that section 41-29-230(1)—which requires DEW to "secure to this State and its citizens all advantages *available* under the provisions of the Social Security Act"—was "unambiguous and clear on its face." *Id.* at 389–90, 864 S.E.2d at 550 (emphasis added). In the same vein, the Fourth Circuit gave "available" in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), "its common meaning" when that term was not statutorily defined and had no trouble concluding the term had a clear meaning, *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008).

Still, if "available" weren't clear from this, the broader context in which Act 43 was passed leaves no doubt as to the term's meaning. As an initial matter, the circuit court was wrong that it could not look to the legislative debate or a broader context. *See* R. pp. 33–34 (Order 33–34). Indeed, this Court has held that a statute must be interpreted "in the light of the circumstances and conditions existing at the time of its enactment." *Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956). If a statute is ambiguous, the Court may "review the legislative history" of the statute "[t]o resolve the ambiguity." *Powell v. Keel*, 433 S.C. 457, 470, 860 S.E.2d 344, 351 (2021). This generally ensures that a statute is given some effect, as "the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) (cleaned up).

When the General Assembly took up what became Act 43, it was well known that SCDC

[10] In this circumstance, a current dictionary is the appropriate source because Act 43 was passed in 2021, so a current dictionary provides the public meaning of "available" at the time the statute was enacted.

did not have and could not obtain lethal injection drugs. *See, e.g.*, R. p. 3 (Order 3) ("For many years, SCDC has been unable to obtain or to compound the drugs necessary to carry out lethal injection."); *Glossip*, 576 U.S. at 870–71; S.C. House, Video of Judiciary Subcommittee on Constitutional Laws, 1:45 (Apr. 21, 2021), https://tinyurl.com/4czcc4yc (testimony from Director Stirling). Legislators were acutely aware of this issue, and it came up in the debates in both the House and Senate. *See* S.C. Senate, Video of Floor Proceedings, 1:09:28 (Mar. 2, 2021), https://tinyurl.com/4czcc4yc; S.C. House, Video of Floor Proceedings, 1:08:40 (May 5, 2021), https://tinyurl.com/4czcc4yc.

None of the circuit court's points about Act 43 as a whole supports its conclusion that the Act is so vague no one can understand it. *See* R. p. 34 (Order 34). In light of this backdrop, the fact that the General Assembly didn't include a specific section on the purpose of the Act is not fatal. Nor does the fact that the General Assembly added the firing squad, rather than solely changing the default method to electrocution, pose a problem. The addition of the firing squad simply reflects an attempt to give condemned inmates some choice, if lethal injection remains unavailable (as it appears will be the case). Both of these points are even weaker when viewed against the rule that courts must "if possible, construe a statute so as to render it constitutional." *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013).

As a final point on vagueness, the circuit court's invocation of this Court's orders from June 2021 staying the Sigmon and Owens executions does not support the conclusion that Act 43 is unconstitutionally vague. *See* R. p. 33 (Order 33). This Court's stay orders clearly state that "electrocution [wa]s the only method of execution available" at that time. Order, *State v. Sigmon*, No. 2002-024388 (June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). In other words, this Court understood what "available" meant and how Director Stirling's affidavit

used that word, and the Court never suggested that this term was confusing. The Court vacated the notices until the firing squad was also available. Nothing in the orders hints that "available" doesn't have a discernable meaning. Plus, the Court used "availability" in those June 2021 stay orders. If Act 43's use of "available" lacks any clear meaning, it is inconceivable that this Court would have used a variation of that word in its orders and injected unnecessary ambiguity or confusion—or, as the circuit court put it, "unconstitutional[] vague[ness]"—into these proceedings.

B. Act 43 does not delegate legislative power.

The circuit court also concluded that the lack of a clear meaning for "available" amounted to an unconstitutional delegation of power to the Director of SCDC to determine whether each method was available for a particular execution. *See* R. pp. 35–37 (Order 35–37).

The nondelegation doctrine "is a component of the separation of powers doctrine and prohibits the delegation of one branch's authority to another branch." *Hampton v. Haley*, 403 S.C. 395, 407, 743 S.E.2d 258, 264 (2013). It requires the General Assembly to "enact[] a law complete in itself," *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978), but the General Assembly may allow an agency to "fill up the details" of how the General Assembly's expressed purpose will be carried out, *Hampton*, 403 S.C. at 407, 743 S.E.2d at 264.

That is exactly what Act 43 does. It establishes what methods of execution may be used, which is the "matter[] of legislative determination." *State v. Woomer*, 278 S.C. 468, 473, 299 S.E.2d 317, 320 (1982). Act 43 then leaves to SCDC and the Director responsibility to set the particular procedures for each method and to determine whether each method can be used at a particular time. *See* S.C. Code Ann. § 24-3-530(A), (F) (Supp. 2021). The Act provides an "intelligible principle" for what SCDC must do. *Bauer*, 271 S.C. at 232, 246 S.E.2d at 876. The Act requires SCDC to take the steps necessary (within South Carolina law, of course) to try to

make each method available for each execution. Still, the General Assembly recognized that each method might not always be available. That's why the Director's certification is required every time an execution notice is issued. *See* S.C. Code Ann. § 24-3-530(B) (Supp. 2021); *cf. Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (a statute should be interpreted so that no part of it is rendered superfluous).

Act 43 does not give SCDC or the Director "unbridled, uncontrolled or arbitrary power" to decide whether a method is available. *Bauer*, 271 S.C. at 233, 246 S.E.2d at 876. Just like the Budget and Control Board and the Housing Authority in *Bauer*, SCDC and the Director "must act within" the "parameters" established by the law and "in accordance with" and "directed toward" "the objectives set out by the Legislature." *Id.* at 235, 246 S.E.2d at 877. And just like the Budget and Control Board and the Housing Authority in *Bauer*, the fact that there is no mechanism in the statute for a person to bring a judicial challenge to an agency's decision does not create a nondelegation problem. *See generally* 1977 S.C. Acts No. 76.

Even if judicial involvement is somehow required, the circuit court's concern about the lack of that review failed to take into account this Court's role in the carrying out of death sentences. This Court has already demonstrated—in Respondents' own cases, no less—that it can and will raise questions about the Director's certification when appropriate. This Court's role distinguishes this case from ones like *S.C. State Highway Department v. Harbin*, in which a government agency's discretion is "absolute" and includes no court involvement whatsoever. 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). Moreover, recognizing this Court's role adheres to the rule that "[a]ll reasonable doubt must be resolved in favor of constitutionality and if a constitutional construction is possible, it should be followed." *Bauer*, 271 S.C. at 233, 246 S.E.2d at 876–77.

More troubling with the circuit court's analysis of Respondents' nondelegation claim are

the legal and practical implications of the circuit court's conclusion. Even with a definition of "available" (whether it is the definition proposed by Appellants or Respondents), the circuit court's ruling would still require any act about methods of execution to provide a condemned inmate with the right to challenge the Director's certification of available methods. After all, according to the circuit court, the flaw in Act 43 is the lack of "reviewability of [the Director's] decisions" about which methods are available. R. p. 37 (Order 37). Not even a statutory definition remedies that supposed defect. But mandating that condemned inmates be able to judicially challenge the Director's certification makes no sense. The methods from which a condemned inmate must choose (if in fact multiple methods are available at that time) are all constitutional. And there are already "seemingly endless proceedings" that keep the State from carrying out a death sentence. *Baze*, 553 U.S. at 69 (Alito, J., concurring). The General Assembly certainly did not intend to create yet another round of litigation before a death sentence could be carried out.

To think about it another way, the General Assembly could simply remove any possibility of election from a condemned inmate and declare, as a matter of "legislative determination," *Woomer*, 278 S.C. at 473, 299 S.E.2d at 320, that South Carolina would use only a single method of execution. Indeed, that was state law until 1995, first with hanging and then with electrocution. If the General Assembly does not have to provide any option for election, it does not have to give condemned inmates the right to judicially challenge what options may be provided.[11]

IV. Respondents' final two statutory claims provide no basis for affirming the circuit court.

Respondents had two additional claims based on the application of Act 43 in their particular

[11] Once again, the circuit court's analysis of this claim contradicted its June 2021 order denying the motion for a preliminary injunction. In the June 2021 order, the circuit court said this claim was "unavailing" and "is lacking in support." R. p. 46 (June 11, 2021 Order 7). The circuit court's order granting permanent relief never explains this flip.

circumstances. Neither provides any basis for affirming the circuit court's order.

The first is a statutory claim that SCDC and the Director have "failed to meet" their obligations under Act 43, "whatever their obligations" were. R. p. 34 (Order 34) (cleaned up). The circuit court determined it "cannot and need not be decided at this time" after finding "available" was unconstitutionally vague, so it granted no relief based on its claim. R. p. 35 (Order 35). Additionally, Respondents offered no evidence at trial about this claim, so there is no basis on which the circuit court could have ruled on this claim.

The second is that Act 43 wrongly makes a condemned inmate elect between unconstitutional methods of execution. The circuit court granted Respondents relief on this claim based on its "findings on the firing squad and electrocution." R. p. 37 (Order 37). As discussed at length already, *see supra* Part I, the circuit court's conclusion that those methods are unconstitutional is wrong. Because both methods are constitutional, requiring a condemned inmate to elect between those methods raises no legal problems.

CONCLUSION

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

Respectfully submitted,

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October 27, 2022
Columbia, South Carolina

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

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

v.

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

CERTIFICATE OF COMPLIANCE

I certify that this *Final Brief of Appellants-Respondents* complies with Rule 211(b), SCACR.

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