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 REPLY BRIEF OF APPELLANTS-RESPONDENTS

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

Counsel for Director Stirling and SCDC

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

Counsel for Governor McMaster

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Lesgislative Act

Other Authorities

INTRODUCTION

Appellants' opening brief highlighted the significant flaws in the circuit court's order. First, the circuit court's order applied the wrong legal standard to the article I, section 15 claim, substituting its belief of what constitutes cruel, unusual, or corporal punishment for objective evidence of what the framers and people who ratified article I, section 15 understood those terms to prohibit. Second, the circuit court's order shifted the burden from Respondents having to prove Act 43's alleged unconstitutionality beyond a reasonable doubt, *see Powell v. Keel*, 433 S.C. 457, 461, 860 S.E.2d 344, 346 (2021), to Appellants having to prove that electrocution and the firing squad do not cause an unconstitutionally painful death. In fact, the circuit court not only shifted the burden, but it also elevated the burden, forcing Appellants to prove that the challenged methods of execution were *painless* and involved *no risk of pain*, something no other court has done. And third, the circuit court's order misapplied the rules of statutory construction to find vagueness and nondelegation problems in an Act that, as the circuit court previously recognized, has a clear and unambiguous meaning and provides proper direction to SCDC.

Respondents' brief doubles down on these reversible errors. As for the legal standard for their article I, section 15 claim, Respondents not only cast aside this Court's repeated instruction that the Constitution must be interpreted "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), but they also ignore similar language about the importance of historical context in their lead case about constitutional interpretation, *see Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963). On top of this, they give scant attention to what they contend *cruel*, *unusual*, or *corporal* actually means, failing to offer the Court clear definitions of these critical terms.

As for burden shifting, Respondents are quick to selectively rehash or reframe the

testimony, but they never respond to—much less rebut—the multiple errors in the circuit court's analysis of that testimony, as identified and explained by Appellants. No amount of amplifying what the experts said can change the fact that Respondents' experts openly acknowledged that they did not know what actually happens to a person during a judicial electrocution, which means Respondents failed to carry their burden of proof.

Given these admissions from their experts, it's perhaps no surprise that the closest Respondents ever get to carrying their burden is when they mischaracterize the testimony in their brief. As one prominent example, Respondents claim that Arden "opined . . . that death in the electric chair is 'painful and excruciating.'" Resps.' Br. 33 (citing Tr. 516:3–4). But that is not what Arden said. Arden actually stated that "*as long as the person is still conscious*, then that person would be perceiving the passage of high volts of electricity through his or her body. That would—itself would be painful and excruciating." R. p. 1352 (Tr. 516:1–4) (emphasis added). In other words, Respondents have taken a qualified, conditional statement from Arden's testimony and transmogrified it into an unequivocal declaration on the ultimate question in this case.

And as for Act 43, the circuit court was correct in June 2021 when it said the Act "on its face can be clearly understood." R. p. 46 (June 11, 2021 Order 7). But if more were needed about what "available" means, there is plenty. Most significantly, there are the statements from the floor debates that support Appellants' interpretation of Act 43. *See Powell*, 433 S.C. at 470, 860 S.E.2d at 351. Based on this legislative history, Act 43 has a meaning that any reasonable person can understand, and Act 43 provides clear direction to SCDC, letting SCDC "fill up the details" to implement the General Assembly's decisions about methods of execution. *Hampton v. Haley*, 403 S.C. 395, 407, 743 S.E.2d 258, 264 (2013).

ARGUMENT

I. Electrocution and the firing squad are constitutional.

A. Appellants outlined the correct approach to interpreting the Constitution.

Nothing Respondents argue disproves Appellants' explanation of how the South Carolina Constitution is interpreted. Indeed, Respondents' arguments are nothing more than an attack on a caricature of Appellants' argument and the product of misread precedent.

As for misconstruing Appellants' position, Respondents claim that Appellants argue that the "sole source" for determining the meaning of constitutional terms is Samuel Johnson's dictionary. Resps.' Br. 14. Not at all. Indeed, far from it. In addition to this dictionary (which the United States Supreme Court has repeatedly cited when analyzing constitutional terms, *see, e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570, 581 (2008)), Appellants also cited previous South Carolina statutes; South Carolina Supreme Court decisions; United States Supreme Court decisions; judicial decisions from the 1800s; primary sources like Anti-Federalist writings, Patrick Henry's speeches, and Justice Story's treatise; and books and law review articles by modern academics. *See* Apps.' Br. 17–23. Such a detailed historical analysis is precisely how this Court determines what the framers and people intended a constitutional term to mean. *See, e.g.*, *State v. Dykes*, 403 S.C. 499, 514–20, 744 S.E.2d 505, 513–17 (2013) (relying on Blackstone, a law review article from Louis Brandeis, and the Founding Fathers).

In contrast with Appellants, who cited cases ranging from 1836 to 2014 consistently providing that the Constitution is interpreted in light of the intent of its framers and the people who adopted it, *see* Apps.' Br. 13, Respondents offer this Court primarily a single case: *Knight v. Hollings*, *see* Resps.' Br. 14. But even with their focus on this one case, Respondents conveniently omit key parts of the very paragraph they quote. To be sure, *Knight* explained that the Constitution

should not be interpreted "to obstruct the progress of the state" so that the State Constitution may deal with "new conditions and circumstances as they may arise." 242 S.C. at 4, 129 S.E.2d at 747. Yet Respondents ignore the language surrounding this instruction that says when "seeking to ascertain [the Constitution's] meaning," the Court must "look to [the Constitution's] historical background," so "consideration of the history of the times in which it was framed and adopted, and of the object sought to be accomplished by it, is an appropriate inquiry in the judicial effort to determine the intent of its framers and of the people who adopted it." *Id.*

In other words, a constitution must be interpreted so that it can apply to modern conditions. So, the First Amendment applies to the Internet, even though the First Congress had no idea what a computer was. *See Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). And the Fourth Amendment applies to cars, despite the fact that combustible engines didn't exist in 1791. *See Kansas v. Glover*, 140 S. Ct. 1183 (2020). The same is true for the South Carolina Constitution.

Ultimately, *Knight* simply stands for the unobjectionable proposition that constitutional provisions must apply to changing circumstances. *Knight* did not hold that the *meaning* of constitutional terms changes over time. The Constitution means what it means. How it applies in a given situation is what courts must deal with in every case. But if the meaning of the Constitution is going to change, the people have the sole power to amend it. *See* S.C. Const. art. I, § 1; *id.* art. XVI, § 1. Thus, the people of South Carolina are not, contrary to Respondents' contention, *see* Resps.' Br. 23, stuck with a constitution that cannot change. Rather, it's just the people—not the courts, the executive, or the legislature (on its own)—that have the prerogative to change it.

Respondents similarly fail on their reading of caselaw about words being given their plain and ordinary meaning. *See* Resps.' Br. 14. What Respondents miss is the fact that the meaning of words can change over time. Thus, there must be some point in time at which the meaning of a

word is determined. The most logical point to pick is the time at which the word was enacted into law because, in our system of government, the law is what "the citizenry and the General Assembly have worked to create." *Long*, 406 S.C. at 514, 753 S.E.2d at 426. It's also what this Court has consistently done, including in cases that Respondents cite about giving words their plain and ordinary meaning. *See Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294–95, 566 S.E.2d 523, 525 (2002) (citing dictionaries from 1974, 1979, and 1991 to determine the meaning of a word in a 1988 constitutional amendment) (case cited at Resps.' Br. 14).

The alternative time (that is, today, when a court is considering the term, which is what the circuit court did by simply looking up words on Merriam-Webster's website, *see* R. p. 23 (Order 23)) makes no sense. It lets a dictionary's publisher implicitly amend the Constitution.

B. Respondents cannot rebut Appellants' explanation of article I, section 15's meaning.

Respondents spill much ink talking about the differences in article I, section 15 and the Eighth Amendment. *See* Resps.' Br. 15–19. The former has "nor," while the latter uses "and." The former includes "corporal," but the latter does not. Respondents even retread some of the same historical ground Appellants discussed about the changes to South Carolina's constitutions. *See* Apps.' Br. 15–16. No one here disputes these differences between article I, section 15 and the Eighth Amendment exist, or that a state constitution may sometimes provide greater protection than the federal constitution. That is why Appellants carefully analyzed electrocution and the firing squad under all three terms in article I, section 15. *See* Apps.' Br. 24–37.

What Respondents' historical argument completely omits is what *cruel*, *unusual*, or *corporal* were understood to mean when those terms were added to the State Constitution. Nowhere do they delve into how the framers or the people understood these terms, either in 1790, 1861, 1865, 1868, 1895, or 1971. All Respondents note is that the framers adopted the language

we have now, but they cite nothing that discusses the meaning of the constitutional language. *See* Resps.' Br. 17–18. Instead, they spend their time pointing to cases and sources from other States.[1] *See id.* at 16–17, 22–23. But even then, Respondents still offer nothing about what *cruel*, *unusual*, or *corporal* means. All Respondents say is that other States interpret constitutional provisions that use "or" or include "corporal" to sweep more broadly than the Eighth Amendment. That point alone does nothing to help Respondents here. Their failure to develop any meaning for *cruel*, *unusual*, or *corporal* is dispositive. Put differently, Respondents can repeatedly advocate for a "broad reading of article I, section 15," *id.* at 20, but they still have to actually ascribe a defensible definition to its terms and identify an interpretive framework.

Respondents only briefly address this issue when they get to discussing the firing squad near the end of their brief. *See id.* at 44–45. (It's curious that they bury this threshold matter near the end of their brief.) As for *unusual*, Respondents merely parrot back what the circuit court said. *Compare id.* at 44, *with* R. pp. 21–22 (Order 21–22). Nowhere, however, do they respond to Appellants' detailed explanation of how unusual means contrary to the common law or to the South Carolina statutes and judicial decisions to that effect. *See* Apps.' Br. 19–21.

For *cruel*, Respondents again mimic the circuit court, looking to *In re Kemmler*, 136 U.S. 436 (1890), for the meaning of the term. *Compare* Resps.' Br. 45, *with* R. p. 22 (Order 22). And again, Respondents never engage with any of Appellants' historical analysis or other United States

[1] Respondents insist that *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001), established some overarching framework for constitutional interpretation. *See* Resps.' Br. 15, 23. It did not. *Forrester* simply recognizes that cases from other jurisdictions might, in some instances, be persuasive authority, but this Court has never held that cases from other States can displace this Court's ultimate aim to interpret the Constitution in light of the intent of its framers and the people who adopted it. That said, to the extent the Court does look to other States here, Respondents never mention that Arkansas (which uses "or" in its prohibition on cruel or unusual punishments, *see* Ark. Const. art. II, § 9) has adopted *Glossip* when analyzing a methods of execution challenge under its state constitution. *See Kelley v. Johnson*, 496 S.W.3d 346, 356 (Ark. 2016).

Supreme Court decisions that explain in more detail what this term does—and does not—mean. *See* Apps.' Br. 16–19. What's more, when the circuit court and Respondents start analyzing whether electrocution or the firing squad are cruel, their definition shifts to require a painless death, something that is inconsistent with *Kemmler* and the overwhelming weight of caselaw.

Finally, for *corporal*, the pattern continues, with Respondents again looking only to the circuit court's order. *Compare* Resps.' Br. 45, *with* R. p. 22 (Order 23). Respondents' failure to engage with any of Appellants' arguments on this term is particularly egregious, given that the circuit court relied exclusively on Merriam-Webster's current online definition. Yet even Merriam-Webster's distinguishes corporal from capital punishment, which Respondents (like the circuit court) either conveniently set aside or did not scroll down to see. *See* Apps.' Br. 23.

Without any real argument of their own about the original understanding of these terms, Respondents lodge a few objections to Appellants' explanation of the meanings of this constitutional language. None of Respondents' arguments, however, is compelling. In the first place, they try to downplay the fact that electrocution was South Carolina's only authorized method of execution in the 1960s and 1970s. *See* Resps.' Br. 19 & n.14. Whatever debates were taking place nationally about the death penalty (and Respondents ask this Court to treat the West Committee and the voters in 1970 as almost clairvoyant in predicting that *Furman v. Georgia*, 408 U.S. 238 (1972), would temporarily impose a moratorium on executions), four things were true when the Constitution was amended in 1971: (1) Electrocution was the State's only method of execution, *see* S.C. Code § 55-373 (1962); (2) the existing constitution already prohibited cruel, unusual, or corporal punishments, *see* S.C. Const. art. I, § 19 (1895); (3) the West Committee was merely "moderniz[ing] the language," *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895* 19 (1969) ("*West Report*"); and (4) the Constitution provided that

"[a]ll 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," S.C. Const. art. XVII, § 10. In the face of these truths, Respondents' attempt to minimize the fact that electrocution was the only form of execution in 1971 falls flat. If the framers and people had thought electrocution violated article I, section 15 as enacted in 1971, it is inconceivable that electrocution would have remained the State's sole method of execution for another 24 years. *Cf.* Resps.' Br. 20 n.15 (recognizing that the original understanding is easier to obtain for more recent provisions because the drafters are "still active in government and politics").

In the second, Respondents insist that society knows more about electrocution now than it did in the 1970s. *See id.* Br. 19–20. Putting aside that the experts at trial disagreed about parts of judicial electrocutions,[2] this argument is representative of Respondents' evolving standards of decency approach, which amounts to nothing more than "we know better now than previous generations did." At bottom, Respondents' position is a policy argument properly directed at the General Assembly, not the courts. *See Hampton*, 403 S.C. at 403, 743 S.E.2d at 262 (the General Assembly enjoys "the sole prerogative to make policy decisions").

In the third, Respondents get no mileage out of *State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985). *See* Resps.' Br. 20–21 & n.17. Contrary to their contention, Appellants' argument about *Brown* is perfectly consistent with the state and federal constitutions and Appellants' argument about the meaning of article I, section 15. The defendant there was given a choice of 30 years in prison or castration. This Court held that the defendant could not have that option because castration was a prohibited form of "mutilation." 284 S.C. at 411, 326 S.E.2d at 412. *Brown*

[2] Thus, this issue is not as settled as Respondents suggest. In fact, their own expert talked about his "theory" and what cannot be predicted or tested about it. R. p. 1241 (Tr. 405:16).

confirms that corporal punishment is a distinct form of punishment that the State could not impose because article I, section 15 forbids it. The Federal Constitution does not prohibit it because the Eighth Amendment does not forbid corporal punishments. None of that is relevant to whether methods of execution are cruel, unusual, or corporal.

In the fourth, Respondents relatedly claim that Appellants' definitions would render *corporal* superfluous. *See* Resps.' Br. 24 n. 19. Not so. Corporal punishments might not be cruel. As just one example, sitting in the stocks is not savage, barbarous, or unrelenting, such that it is unconstitutionally cruel. *See* Apps.' Br. 17. But sitting in the stocks is a corporal punishment that article I, section 15 forbids. So is castration. *See Brown*, 284 S.C. at 411, 326 S.E.2d at 412.

Respondents fare no better by trying to say a punishment can be corporal and capital. Corporal punishment is a different type of punishment than capital punishment. *See, e.g.*, *North Carolina v. Lumbrick*, 4 N.C. 156, 157 (1814) (a person who "thought capital punishment and corporal punishment were the same" was "totally ignorant of technical terms."). Indeed, the same constitutional provision expressly contemplates (and treats as distinct) "capital offenses." S.C. Const. art. I, § 15 ("All persons shall be, before conviction, bailable by sufficient sureties, *but bail may be denied to persons charged with capital offenses* . . . ." (emphasis added)). And at no point do Respondents even attempt to offer any argument against, or authority contrary to, the cases that Appellants cited on this point. *See* Apps.' Br. 22–23.

Finally, in the fifth, Respondents take issue with how far back Appellants' historical analysis of *cruel*, *unusual*, and *corporal* goes, insisting that the terms' meaning in the 1970s, not in colonial times, controls. *See* Resps.' Br. 24–25 n.20. Two points in response. First, at no point do Respondents actually argue that the framers and people in the 1970s thought these terms meant something other than how Appellants have defined them. Second, Respondents overlook the fact

that the West Committee merely "modernized the language," *West Report*, at 19, so the historical meaning of these terms still applies. That is why Appellants went back to when each term became part of South Carolina's constitutional lexicon to determine its meaning. *See* Apps' Br. 16–23. Nothing that Respondents offer contradicts Appellants' explanation of the meaning of these terms.

C. The record does not support the circuit court's conclusion that electrocution and the firing squad are unconstitutional.

One of the themes of Appellants' opening brief was the circuit court's burden shifting. *See, e.g.*, Apps.' Br. 3, 26, 27. Yet Respondents apparently do not wish to draw further attention to this flaw, relegating their discussion of the error to a single footnote. *See* Resps.' Br. 27 n.24. That footnote, however, misses the point of Appellants' position. Appellants never claimed Respondents had to prove their case with direct evidence. Instead, what Appellants have consistently maintained is that Respondents *had to prove their case*. They didn't do that. Instead, they used hedged testimony from their experts like "[t]here is no evidence in my mind" to support the conclusion that electrocution renders a condemned inmate immediately insensate to argue that electrocution is unconstitutional beyond a reasonable doubt. R. p. 1240 (Tr. 404:21) (Wikswo); *see also* R. pp. 1329–30 (Tr. 493:25–494:3) (Arden: "I don't think it's possible to determine with any kind of medical certainty whether those people were sensate during the application of current or not . . . ."). But the lack of evidence to prove one thing is not evidence to prove something else. And the absence of evidence certainly is not sufficient to overcome a presumption of constitutionality. That is the fundamental flaw with the circuit court's analysis of the evidence (and corresponding conclusions)—and it's a flaw that nothing Respondents argue at this stage can fix.

Driving this point home is Respondents' claim that "this is precisely the sort of situation in which expert testimony is necessary," and those experts can testify "to a reasonable degree of scientific certainty" about the issues here. Resps.' Br. 27 n.24. That seems like a fair point on its

face. The problem for Respondents is that neither of their two experts ever said he held his opinions to a "reasonable degree" of anything. *See* R. pp. 1141–1408 (Tr. 305:1–572:17) (Wikswo and Arden). They may have been qualified as experts in their fields, but an expert does not necessarily hold every opinion to a reasonable degree of scientific certainty. For instance, and dooming to Respondents' contention, Arden acknowledged that he did not "think there's any way to determine with any kind of scientific certainty" which mechanism of death (interruption of brain function, interruption of heart function, or heat) "happens first" in electrocution. R. p. 1326 (Tr. 490:22–24). Wikswo was full of the same kind of testimony. *See, e.g.*, R. pp. 1168–69 (Tr. 332:24–323:1); 1233 (Tr. 397:4–9); 1240 (Tr. 404:12–13); 1268 (Tr. 432:1–4). Thus, even by Respondents' self-imposed standard for what the testimony could be, the testimony is insufficient to carry their burden.

Respondents even continue pushing their burden shifting in this Court. For instance, they argue at one point that Appellants' electrocution expert did not "offer any affirmative proof to support" his theories, as if Appellants had an obligation to do so. Resps.' Br. 33.

1. Electrocution is constitutional.

i. Respondents fail to respond to Appellants' key points about the testimony and misrepresent other parts of the testimony.

Respondents spend pages selectively referencing testimony from the experts, but there are critical issues with the testimony that they do not or cannot respond effectively to. *First*, Respondents never actually claim they proved at trial that an inmate is not rendered immediately insensate by the first high-voltage phase. Instead, they talk about the resistance of the skull, *see* Resps.' Br. 33 n.30, and make conditional statements like "*if* an insufficient portion of the current enters then brain," then the inmate would feel pain, *id.* 29 (emphasis added). What they cannot rebut is the fact that their own electrocution expert (Wikswo) tried to prove that an inmate is not rendered immediately insensate, but his work on this subject was rejected by the leading journal

in his field or the fact that the descriptive term Wikswo used in his affidavit ("vast") about current not entering the brain originated with, and was inserted by, Respondents' counsel, with Wikswo questioning the basis for including it at the time and still unable to identify any source to justify (or quantify) it. *See* Apps.' Br. 28–29. Additionally, Respondents don't acknowledge that even Wikswo admitted that at least "some" of the high-voltage current immediately enters the brain, R. p. 1196 (Tr. 360:13), but "the great question is what fraction of the current goes into the brain," R. p. 1266 (Tr. 430:14–16)—for which Wikswo had no answer.

This issue is critical because it was a primary point of contention between the experts. If, as Appellants' expert testified, an inmate is rendered immediately insensate (as the first high-voltage phase is designed to do), the inmate will feel nothing during the execution. Respondents, as the plaintiffs, bore the burden of proof to show that electrocution superadds pain. All they could muster was testimony that said, essentially, "we don't know if an inmate is immediately insensate or not, and defendants cannot prove that a condemned inmate is rendered immediately insensate." That is not enough to carry their burden and is nothing more than an attempt to shift that burden.

Second, the only premortem injury Respondents point to from any autopsy is bruising around the wrists. *See* Resps.' Br. 32. Thus, that bruising must be the "severe" "pre-mortem" injury the circuit court pointed to. R. p. 26 (Order 26). Appellants already explained that the first phase of the electrocution protocol renders an inmate insensate and then the final phase stops the heart, so even if such bruising could happen, it is only after the inmate is insensate, so the inmate would not feel it.[3] *See* Apps.' Br. 30 n.4. (This underscores how the high- and low-voltage phases serve different functions, so the fact that the first two phases may not cause the heart to fibrillate raises

[3] Or it could have even happened during the fastening of the straps, before the execution began, depending on how much the inmate resisted.

no constitutional problems. *See* Resps.' Br. 28.) Any other marks left on the body to which Respondents' experts pointed are either admittedly postmortem or cannot be determined to be premortem. *See id.* at 31.

Third, Respondents highlight testimony about botched executions in other States. *See id.* at 32. Yet they fail to grapple with the fact that the only evidence in the record is that only 1.92% of electrocutions are botched[4] or that the sole account of an inmate who purportedly "scream[ed]" was a single news report from a Florida execution. *See* Apps.' Br. 30. (Respondents did not offer the newspaper article on which the testimony about that scream was based as evidence, so we know little about what actually happened in that execution.) Nor do they respond to the fact that in Florida, all four forensic pathologists who studied Pedro Medina's body concluded he died instantaneously upon the first application of the electric current, in contrast with Respondents' experts' claims about Medina's death. *See* Apps.' Br. 31–32. The report from those pathologists (*see* R. p. 1648 (Defs.' Ex. 1)) also shows that the circuit court was incorrect when it said "there is no evidence to support the idea that electrocution produces an instantaneous or painless death." R. p. 26 (Order 26).

Fourth, Respondents make much of the fact that Wikswo testified that the animal-husbandry community does not use this method of electrocution. *See* Resps.' Br. 32–33. *But see* Humane Slaughter Ass'n, *Electrical Stunning of Red Meat Animals*, at 2 (2016), https://tinyurl.com/msw78vt8. The Court need not recognize or engage with this red herring. Respondents omit the fact that the United States Supreme Court (like other courts presented with similar arguments) has repudiated the notion of comparing judicial executions with veterinary

[4] The circuit court said this risk was "intolerably high," R. p.27 (Order 27), but the circuit court never explained how the 7.12% botch rate for lethal injection is acceptable, *see* R. p. 1274–75 (Tr. 438:25–439:14).

practices, because "veterinary practice for animals is not an appropriate guide to humane practices for humans."[5] *Baze v. Rees*, 553 U.S. 35, 58 (2008) (plurality) (rejecting "[w]hatever rhetorical force the argument carries" and emphasizing that "it overlooks the States' legitimate interest in providing for a quick, certain death").

Fifth, it's curious that Respondents use the phrase "some period of time" when describing how long their experts said an inmate might remain sensate during a judicial electrocution. Resps.' Br. 29. A point that Appellants made in their opening brief was how Respondents could not identify how long an inmate supposedly remains sensate, given Wikswo's admitted inability to do so. *See* Apps.' Br. 27. By using "some period of time" now, Respondents implicitly concede this point.

Sixth, Respondents take liberties with their characterization of the testimony. In addition to the example in the Introduction,[6] *see supra* p. 2, Respondents claim Arden said "all of the autopsies" he reviewed had "severe" burning and charring. Resps.' Br. 31. In the testimony Respondents cite, Arden expressly said he was referring to "some of the examples" he reviewed. R. p. 1347 (Tr. 511:7). Another time, Respondents claim Arden said he saw "severe injuries" on 80 autopsies from around the country, citing page 496 of the transcript. Resps.' Br. 31. But "severe" appears nowhere on that page, nor does any similar adjective. *See* R. p. 1332 (Tr. 496:1–25). As a third example (and one similar to the one in the Introduction), Respondents write, "Dr. Arden testified that the experience of electricity passing through the body 'itself would be painful and excruciating.'" Resps.' Br. 30 (citing Tr. 516:4–5). Arden's statement, however, was conditioned

[5] Ironically, anti-death penalty advocates have raised substantially similar arguments in challenging lethal injection. *See, e.g.*, *Workman v. Bredesen*, 486 F.3d 896, 909 (6th Cir. 2007).

[6] Along with that (mis)quote to Arden, Respondents also quoted Wikswo in this sentence. They accurately quote Wikswo as saying "there is no proof that a judicial electrocution, whether botched or not, is instantaneous or painless." Resps.' Br. 33 (quoting Tr. 446:21–23). That line, however, only underscores how Respondents have failed to carry their burden of proof.

on "as long as the person is still conscious." R. p. 1352 (Tr. 516:1). (This is why, again, the dispute over whether electrocution renders the condemned inmate immediately insensate is so important.)

Seventh, and harkening back to the burden-shifting problem, Respondents do not even try to explain the damning statements from their own experts, such as Wikswo openly conceding that he was not "arguing for" or "against" the assertion that "judicial electrocution is instantaneous," but he was simply claiming that he did not "support the fact that anyone without the appropriate instrumentation can claim" electrocution is "instantaneous." R. p. 1240 (Tr. 404:9–19). Or Arden admitting that "we don't really know how [electrocution] effects people," R. p. 1330 (Tr. 494:11–12), and that "there's no way to predict does the current immediately render you unconscious or not," R. p. 1327 (Tr. 491:20–22). For a party that has the burden of proof, statements like this are devastating as they readily show Respondents cannot prove anything, much less prove that electrocution is unconstitutional.

All of this undermines the circuit court's conclusions. Respondents are (understandably) eager to quote and defend the circuit court's order. *See* Resps.' Br. 34–35. But those findings fall apart under scrutiny, as they all rest on the same misreading or misconstruing of the testimony reflected in Respondents' brief.

ii. Respondents provide no compelling legal argument that electrocution is unconstitutional.

Turning to the legal arguments Respondents offer on electrocution, they rely heavily on *Dawson v. Georgia*, 554 S.E.2d 137 (Ga. 2001), and *Nebraska v. Mata*, 745 N.W.2d 229 (Neb. 2008). *See* Resps.' Br. 36–38. To be sure, the Georgia and Nebraska courts there held that electrocution violated those States' constitutions. But what Respondents have no answer for is any of the critical points that Appellants raised in their opening brief: (1) Those courts applied an evolving standards of decency test, which is not the law in South Carolina, (2) those courts

analyzed the question with the assumption that lethal injection is less painful, which is now a hotly debated question, and (3) those courts analyzed the issues during a time when lethal injection drugs were readily available and accessible. *See* Apps.' Br. 26. As an additional flaw in their reliance on these out-of-state cases, despite talking at length about what the *Mata* court considered, Respondents didn't offer any of the evidence there as evidence here, so the Nebraska court's evaluation of the evidence there is of little help in reviewing the evidence in this case. What matters here is what the evidence in this trial did—or did not—prove.

Respondents also invoke *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999), a Florida case that they admit upheld the constitutionality of electrocution. *See* Resps.' Br. 36. The United States Supreme Court actually denied certiorari in *Provenzano* after Florida changed its method of execution to lethal injection. *See Provenzano v. Moore*, 528 U.S. 1182 (2000). What Respondents seem to want this Court to assume is that the United States Supreme Court would have reversed the Florida Supreme Court and held electrocution was unconstitutional, despite the fact the United States Supreme Court "has never held a method of execution unconstitutional." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1135 (2019) (Thomas, J., concurring). No one, however, knows what the United States Supreme Court would have done. After all, it affirms in plenty of cases after granting cert. And in any event, a denial of certiorari has no precedential value, so there is nothing that can be read into a denial. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 n.56 (2020).

Other than these three out-of-state cases, all Respondents put forward is a short summary of the circuit court's analysis. *See* Resps.' Br. 35. Respondents therefore make the same mistakes the circuit court did in applying the wrong definitions for *cruel*, *unusual*, and *corporal*. Briefly, electrocution is not corporal because corporal is a different category of punishment. *See* Apps.' Br. 25. It is not unusual because it's long been used in this State and in the nation. *See id.* at 25–

26. And it is not cruel because Respondents could not prove (as was their burden) that electrocution "superadd[s] terror, pain, or disgrace," rather than simply results in "the mere extinguishment of life." *Bucklew*, 139 S. Ct. at 1124–25 (majority opinion); *see* Apps.' Br. 26–32.

One final note on electrocution (and yet another thing Respondents never rebut): Inmates in other States are *choosing* electrocution over lethal injection. *See* Apps.' Br. 32. If the execution of the first of those inmates appeared painful, why would the lawyers for the next four condemned inmates not have strongly counseled those inmates not to elect electrocution?

2. The firing squad is constitutional.

The expert testimony on the firing squad involved less disagreement than the expert testimony on electrocution.[7] The experts generally agreed about how a condemned inmate would die[8] and that he wouldn't feel any pain after losing consciousness. The biggest point of disagreement on the firing squad was how long an inmate remained conscious after the three bullets struck him in the chest. Respondents' expert said it was 15 seconds, merely claiming this time was "well recognized in the medical literature." R. p. 1324 (Tr. 488:13–14) (Arden). But Arden admitted he had not reviewed studies that consciousness is actually lost in four to ten seconds. R. p. 1393 (Tr. 557:2–11). One of Appellants' experts explained, based on his work as a cardiologist with patients, that consciousness is lost in "less than ten seconds" once the heart stops

[7] Respondents cast aspersions on the process SCDC used to create the firing squad protocol, *see* Resps.' Br. 39, but that process is irrelevant. What matters here is what the policy is.

This is similar to the way Respondents take irrelevant jabs at Director Stirling about his knowledge of the minutiae of execution procedures and reliance on subject-matter experts. *See* Resps.' Br. 49 n.35. They also, like the circuit court, try to discredit DuPre by saying she assumed the firing squad would be carried out according to the protocol, *see* Resps.' Br. 43, but because Respondents asserted a facial challenge to the firing squad, DuPre was entitled to make that assumption. And so is this Court.

[8] At the same time, Respondents' characterization of the testimony isn't always precise. The frangible rounds, for example, are designed to cause greater damage to the heart, not the chest wall. *Compare* Resps.' Br. 40, *with* R. p. 1111–12 (Tr. 270:17–271:5).

beating. R. p. 1420 (Tr. 584:1–2) (Alvarez). Appellants' other expert testified the inmate would "become immediately unconscious." R. p. 1478 (Tr. 642:2–3). This time period, of course, matters only to the extent the inmate can process in his shock any pain, and there is evidence that a person being shot initially feels like he was "punched," with "pain com[ing] later if [he] survives long enough to feel it." R. p. 1396 (Tr. 560:17–18).

Ultimately, the question on the firing squad comes down to whether, if an inmate remains conscious for a "brief period" (to use the words of Respondents' own expert), R. p. 1365 (Tr. 529:18), that amounts to a violation of article I, section 15. Faced with this question, Respondents have still not provided any answer (just as the circuit court didn't provide any answer) to questions like "how much pain is too much pain" or "how many seconds may a condemned inmate remain conscious" before a method of execution "becomes" unconstitutional under article I, section 15. There is nothing in the history of South Carolina law or the use of the terms *cruel*, *unusual*, or *corporal* to suggest that, contrary to the Eighth Amendment, article I, section 15 "guarantee[s] a prisoner a painless death." *Bucklew*, 139 S. Ct. at 1124. Without an answer to these questions, the circuit court's order and Respondents' contentions amount to nothing more than a backdoor attack on capital punishment itself, which must necessarily fail because the South Carolina Constitution permits capital punishment. *See* S.C. Const. art. I, § 15; *id.* art. IV, § 14; *State v. Allen*, 266 S.C. 175, 186–87, 222 S.E.2d 287, 292 (1976).

As for Respondents' legal arguments about the constitutionality of the firing squad, they once again follow the circuit court's lead and apply the wrong definitions of the constitutional terms. *See* Resps.' Br. 44–46. Nowhere do Respondents ever engage with any of Appellants' specific arguments about the firing squad that explained the flaws in the circuit court's reasoning. *See* Apps.' Br. 33–37. Nor do Respondents acknowledge, much less discuss, the fact that other

condemned inmates, experts, and courts across the country are raising the firing squad as a constitutional alternative method to lethal injection. *See* Apps.' Br. 36–37.

D. Respondents make no argument on the *Glossip* test.

Respondents put all of their proverbially eggs in the basket of the circuit court's reasoning, for they never respond to Appellants' alternative argument that the federal *Glossip* test is a better alternative than the evolving standards of decency test. *See* Apps.' Br. 37–41. There is no need for Appellants to rehash this argument from their opening brief. It suffices here to point out that Respondents' silence in the face of this alternative argument speaks volumes.

II. None of Respondents' other claims has merit.

As Appellants explained in their opening brief, the article I, section 15 claim is the focus of this case. That is confirmed by the fact that Respondents' arguments on everything else combine to less than ten pages. Even if Respondents had devoted more ink to these claims, nothing they argued could provide a basis for affirming the circuit court's order.

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

Respondents spend the first part of their ex post facto argument contending that a change in the method of execution can violate both the South Carolina and United States Constitutions and that a comparison of methods is necessary. *See* Resps.' Br. 47–48. As for a comparison, Appellants have already explained this claim involves a comparative analysis. *See* Apps.' Br. 42.

But to give rise to an ex post facto violation, a change must necessarily involve a change to an unconstitutional method. Courts have consistently held that a change alone is not sufficient for an ex post facto violation. *See, e.g.*, *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997). Otherwise (and another point to which Respondents offer no response), 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.

As for the comparison, Respondents give three reasons why they supposedly did not have to offer any evidence about lethal injection at trial for that method of execution to be compared to electrocution and the firing squad. Their first two arguments are of the same stripe: Federal courts have already said lethal injection is less painful. *See* Resps.' Br. 48–49. They invoke *Baze*, but they cannot (and do not try to) rebut the fact that *Baze* is 14 years old and, since then, there have been multiple lawsuits from condemned inmates challenging lethal injection, Supreme Court Justices questioning lethal injection, and federal circuit judges speaking favorably of the firing squad as an alternative. *See* Apps.' Br. 39–40. While on the subject of *Baze*, and despite Appellants' explanation that the *Baze* Court was simply describing that Kentucky "believed" lethal injection was the most humane method, 553 U.S. at 62, Respondents continue to take that language out of context and treat it as the Court's holding, *see* Resps.' Br. 8.

Respondents also invoke *Barr v. Lee*. Though more recent, that case still does not help Respondents, for at least two reasons. One, Respondents cannot refute the point that the federal district judge did enjoin the use of pentobarbital, and that if pentobarbital was so much less painful than electrocution or the firing squad, then it is inconceivable such an injunction would have ever been issued. Two, the line from *Barr* that Respondents quote is a quote from Justice Sotomayor's dissent from the denial of certiorari in *Zagorski v. Parker*, 139 S. Ct. 11 (2018), which in turn cited *Glossip*. The rush to challenge pentobarbital was just coming when *Glossip* was decided.

Respondents' third argument is that the circuit court "limit[ed] discovery on that issue that prevented them from putting forward any evidence other than what has already been established in the Supreme Court's precedents." Resps.' Br. 49. This is not true—in the slightest. The circuit

court limited discovery of SCDC's efforts to obtain the drugs in SCDC's lethal injection protocol. *See* R. p. 56 (July 5, 2022 Order). The circuit court never limited Respondents' ability to investigate how lethal injection under South Carolina's existing protocol causes death. Or Respondents' ability to call an expert witness to testify about lethal injection. Indeed, Respondents were free to offer whatever evidence they wanted about lethal injection, including whether it is less painful. For whatever reason, Respondents offered none.

This is a problem for Respondents because they bore the burden of proving their ex post facto claim and proving the change in methods increased their punishment. They failed to offer any evidence about the old method. Therefore, a comparison is impossible, and their claim fails. *See State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("given that Jones has offered no evidence in support of his claim, he has utterly failed in his burden").

One last point before leaving Respondents' ex post facto claim: Like the circuit court, they never try to explain what changed between June 2021 and September 2022. In denying Respondents' motion for a preliminary injunction, the circuit court astutely 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). The circuit court was right the first time it analyzed this issue.

B. Act 43's use of "available" is constitutional.

1. Act 43 is not unconstitutionally vague.

The circuit court initially held that Act 43 "on its face can be clearly understood." R. p. 46 (June 11, 2021 Order 7). Yet again, the circuit court was correct the first time, and nothing Respondents put forth (or didn't) justifies the circuit court's about-face.

As a threshold matter, Respondents appear to confuse vagueness and ambiguity. Ambiguity

is when a statute has two potential meanings, while vagueness is when a statute is simply unclear. *See* Antonin Scalia & Bryan Garner, *Reading Law* 31–33 (2012). Respondents want to proffer two conflicting readings of the Act and have the Court conclude that Act 43 must therefore be unconstitutional. *See* Resps.' Br. 50. But that is not the law. At most here, Respondents have put forward an ambiguity argument. When a statute is ambiguous, a court may—indeed, must—analyze the competing readings and give the statute a constitutional construction if at all possible.

The fact that opposing litigants read a statute differently does not even mean that a statute is ambiguous. For example, in *State v. Hercheck*, the court of appeals had held a statute's "plain language" meant one thing, but the State argued the statutory language was "clear and unambiguous" in the "exact opposite" way. 403 S.C. 597, 602, 743 S.E.2d 798, 800 (2013). This Court agreed with the State and reversed the court of appeals. *See id.* at 606, 743 S.E.2d at 802.

Here, Appellants have explained why the statute is not ambiguous and, as the circuit court initially said, clear on its face. *See* Apps.' Br. 44–45. Indeed, myriad statutes in the South Carolina Code use "if available," and none of them are vague or ambiguous. For example, section 44-13-05 allows a law enforcement officer to "take the person into protective custody and transport the person to the local mental health center or a crisis stabilization program, *if available* in their jurisdictions, for examination and pre-admission screening and evaluation of psychiatric and chemical dependency emergencies." S.C. Code Ann. § 44-13-05(A) (emphasis added). Or consider section 35-11-205, which requires a corporate applicant to provide "audited financial statements for the most recent fiscal year and, *if available*, for the two-year period next preceding the submission of the application." *Id.* § 35-11-205(C)(6) (emphasis added); *see also, e.g.*, *id.* §§ 2-15-64; 11-46-50; 44-93-50(4); 56-5-1250; *Brannon v. McMaster*, 434 S.C. 386, 864 S.E.2d 548 (2021). The fact that "if available" appears more than 50 times in the Code strongly suggests this

language is used to "fill up the details," to include providing for future contingencies, rather than improperly delegate legislative.

Still, if this Court has to look beyond the statutory text to determine the meaning of *available*, there is a clear answer from the legislative history. (For good reason, Respondents never dispute that this Court may consider legislative history to interpret an ambiguous statute. *See Powell*, 433 S.C. at 470, 860 S.E.2d at 351.) Although Respondents may not accept the fact that SCDC has not been able to obtain lethal injection drugs, *see* Resps.' Br. 51, the General Assembly did. It heard testimony from Director Stirling, and legislators relied on this testimony on the floor in explaining the need for this legislation so that executions could be carried out, *see* S.C. House, Video of Judiciary Subcommittee on Constitutional Laws, 1:45 (Apr. 21, 2021), https://tinyurl.com/4czcc4yc; 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. In light of these statements, and in the absence of any such requirement, Respondents' argument that Act 43 does not have a "purpose section" is much ado about nothing. *See* Resps.' Br. 51.

Just as this legislative history clarifies any ambiguity about *available*, the legislative history refutes Respondents' suggestion that it's not clear why the General Assembly left lethal injection as an authorized method of execution if it simply intended to restart executions. *See* Resps.' Br. 52. The debate in the Senate makes clear that the firing squad was added because some legislators believed that was a more humane method than electrocution, so a condemned inmate could have that option as well. And leaving lethal injection in section 24-3-530 makes perfect sense. One day, SCDC might be able to obtain the necessary drugs, and at that time—but only at that time—a condemned inmate could elect lethal injection. In short, Act 43 ensures the State can carry out

death sentences while giving condemned inmates a choice if multiple methods are available. (For the foreseeable future, both electrocution and the firing squad should be available, so condemned inmates will have that election.)

Respondents strain to read this Court's June 2021 orders staying the executions of Sigmon and Owens as helping their case because the firing squad was "currently unavailable," as SCDC had not yet "complete[d] its development and implementation of necessary protocols and policies." Order, *State v. Sigmon*, No. 2002-024388 (June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). This misses two critical things about the orders. First, it ignores the fact that SCDC could not possibly have implemented the firing squad in the month since Act 43 became law. Second, it tries to push aside the fact that this Court (like the General Assembly) did not take issue with Director Stirling's explanation of why lethal injection was unavailable.

2. Act 43 does not delegate legislative power.

At the outset, it's important to note what Respondents never address in their nondelegation argument: The circuit court's holding would mandate that the General Assembly give condemned inmates the right to challenge the Director's certification, no matter the definition of *available*. *See* Apps.' Br. 48–49. As explained in Appellant's opening brief, there is no way the General Assembly intended Act 43 to create additional stages of capital litigation.

Respondents try to make much of the fact that *available* does not have a statutory definition, which means (they say) the Director can decide what efforts, if any, to take to make methods available. *See* Resps.' Br. 53–54. Respondents' argument is premised on the idea that the Director (or a future director) might choose not to try to make a method available. That concern is, to put it mildly, misplaced. The General Assembly has spoken clearly about which methods are to be used, while at the same time recognizing every method might not always be available. *See*

State v. Woomer, 278 S.C. 468, 473, 299 S.E.2d 317, 320 (1982) ("the method of execution" is a "matter[] of legislative determination"). The Director is entitled to a presumption of good faith that he will try to make each method available for every execution. *See, e.g.*, *S.C. Nat'l Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110, 115–16, 127 S.E.2d 199, 202 (1962). Respondents and the circuit court have wrongly denied the Director of that presumption.

Further, Respondents, like the circuit court, continue to discount the role that this Court plays in carrying out a death sentence. This Court has shown that it is capable of overseeing this solemn process and ensuring to its satisfaction that SCDC is complying with section 24-3-530.

C. Respondents' statutory claim fails.

Respondents' argument on their final claim (that they must have a choice between two constitutional methods of execution) fails for two independent reasons. *See* Resps.' Br. 55. In the first place, Act 43 does not require a choice. It provides the right to elect only if the firing squad or lethal injection is "available" as an alternative to electrocution. A condemned inmate "shall suffer the penalty by electrocution" unless he elects the "firing squad or lethal injection, if it is available at the time of election." 2021 S.C. Acts No. 43, § 1 (amending S.C. Code Ann. § 24-3-530(A) (Supp. 2022)). *If* is a conditional word. *See, e.g.*, Merriam-Webster (2022), https://tinyurl.com/4tb2e5nx (defining "if" to mean "on the condition that"). Thus, a condemned inmate is not guaranteed a choice of methods. In the second, Respondents' entire argument here is premised on their assertion that electrocution and the firing squad are unconstitutional. As explained already, both methods are constitutional. *See supra* Part I.C.

CONCLUSION

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

Respectfully submitted,

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

Counsel for Governor McMaster

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

Counsel for Director Stirling and SCDC

October 27, 2022
Columbia, South Carolina

RECEIVED
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.

CERTIFICATE OF COMPLIANCE

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

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