

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

PETITION FOR REHEARING

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INTRODUCTION

This case involves death row inmates’ challenges to 2021 S.C. Acts No. 43. The Court’s opinion addressed none of the claims that Respondents asserted. *See Owens v. Stirling*, ___ S.C.

___, ___ S.E.2d ___, No. 2022-001280, 2023 WL 415586 (S.C. Jan. 26, 2023). Instead, the Court held the challenges Respondents raised “in abeyance” while remanding a narrow portion of the case back to circuit court for discovery “regarding the State’s efforts to procure the drugs for lethal injection and the process it undertook to determine the drugs were not ‘available’ in South Carolina.” *Id.* at *5.

Appellants, under Rule 221(a), SCACR, petition for rehearing because the Court’s decision overlooks and misapprehends the legal questions presented by the claims in this case. Not a single claim that Respondents have pursued in this Court requires the Court to know why or even whether lethal injection drugs are available in South Carolina. In other words, a remand is not necessary to decide any “of the issues in this matter.” *Id.* at *4. Those issues all can—and should—be decided now.

To the extent this Court believes the judiciary has the obligation or authority to “test” the Director’s certification, litigation in circuit court is not the proper or practical way to do so. Between the lack of legislative intent for creating this additional “level” of litigation in capital cases (and the clear legislative intent to the contrary) and the logistical nightmare of litigating the Director’s certification in a matter of days following receipt of a notice of execution, any “testing” of the Director’s certification belongs in this Court, and at this Court’s discretion.

Yet if the Court is going to insist on a remand for discovery about “the State’s efforts to procure the drugs for lethal injection and the process it undertook to determine the drugs were not ‘available’ in South Carolina,” *id.* at *5, the Court needs to address Respondents’ vagueness claim now, given that the circuit court has already held that the statute is too vague for the circuit court to understand what it means. *See R.* pp. 32–33. What the statute means “is a question of law” that can and should be resolved now. *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 252 (2014).

Otherwise, Respondents will seek to stretch discovery on remand far beyond the specific question of “the availability of lethal injection in South Carolina.” *Owens*, 2023 WL 415586, at *5.

This isn’t speculation. Despite this Court’s instruction for the parties to address “the specific discovery responses that remain outstanding,” *id.*, Respondents do not intend simply to have Appellants respond to the discovery requests they have already served that are relevant to the narrow issue on remand. Instead, Respondents have already served new discovery requests since this Court issued its opinion. True, some of the written requests mirror what they served before (including those that go beyond the scope of the remand), but they have also noticed another round of depositions for Director Stirling and Colie Rushton and—most sweepingly—have noticed a Rule 30(b)(6) deposition of SCDC that seeks to depose a witness about everything that SCDC has ever done related to lethal injection, going all the way back to 1995. *See* Ex. 1 (Respondents’ new discovery requests and deposition notices). Allowing such overbroad discovery cannot be what the Court envisioned in remanding this case on a narrow issue. And it certainly is not what the General Assembly intended in passing the Act.

The Petition for Rehearing should be granted, and this case should be brought to swift and rightful conclusion that allows the State to carry out duly imposed sentences for heinous crimes. Respondents have been on death row for decades, and they do not challenge their convictions or sentences. “The people of [the State], the surviving victims of [condemned inmates’] crimes, and others like them deserve better” than more delay. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

STANDARD OF REVIEW

A petition for rehearing should be granted whenever it shows that the Court has “overlooked” or “misapprehended” a point of fact or law. Rule 221(a), SCACR; *see also*

Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church, No. 2020-000986, 2022 WL 3560664, at *1 (S.C. Aug. 17, 2022) (granting petition for rehearing in part); *S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.*, 432 S.C. 217, 219, 851 S.E.2d 699, 700 (2020) (granting petition for rehearing).

ARGUMENT

I. SCDC’s efforts to obtain lethal injection drugs are irrelevant to the legal questions in this case.

The Court held that Respondents’ discovery requests about lethal injection “are relevant and necessary for proper adjudication of the issues in this matter.” *Owens*, 2023 WL 415586, at *4. But the Court never explains how or why information about whether or why the State has not been able to obtain lethal injection drugs is relevant to resolve *any* of the claims Respondents have raised in this Court. Here, Appellants won’t reargue the merits of each claim. Instead, Appellants simply explain how each of those claims can and should be resolved on the record that is already before the Court.

Start with the article I, section 15 claim that has been the primary focus of this litigation. Unless this Court is going to adopt the novel theory of living constitutionalism from the lead opinion in *Planned Parenthood South Atlantic v. State* (“PPSA”) that did not command a majority of this Court, *see* ___ S.C. ___, ___ S.E.2d ___, No. 2022-001062, 2023 WL 107972, at *5 (S.C. Jan. 5, 2023), or unless the Court is going to adopt the federal *Glossip* test that requires a plaintiff (who is necessarily a death row inmate) to prove that there exists a readily implemented, less painful alternative, *see Bucklew*, 139 S. Ct. at 1125, whether and why SCDC can (or cannot) obtain lethal injection drugs has no bearing here. If the Court is going to introduce such a significant shift into South Carolina law and adopt one of these tests, the Court should say so. But if the Court isn’t changing state law, then our Constitution is still “construed 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). This well-established law does not require a comparison of electrocution or the firing squad to any other method of execution or protocol. Rather, it demands that electrocution and the firing squad be analyzed under what the framers and people understood the prohibition on “cruel,” “unusual,” and “corporal” punishments to mean in 1971, when article I, section 15 was enacted. *See* Appellants’ Br. 15–23 (discussing the original understanding of these terms); *id.* at 24–37 (analyzing the constitutionality of electrocution and the firing squad under this framework).

Next comes Respondents’ *ex post facto* claim. The inquiry there is whether the change in the default method of execution “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.). As an initial matter, this claim is easy to resolve: A change in the method of execution does “not change the penalty” for murder. *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). The penalty remains “death.” *Id.*

The fact that the United States Supreme Court observed that electrocution “abated” “some of the odious features” of hanging does not compel a different result. *Id.* That was only part of what the Court said, and a minor part at that. The entire paragraph reads:

The statute under consideration did not change the penalty—death—for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings. The punishment was not increased, and some of the odious features incident to the old method were abated.

Id. The Court therefore started with the critical fact that the punishment had “not change[d]” but remained “death.” *Id.* All that changed was “the mode of producing” the condemned inmate’s death. Thus, the Court continued, “[t]he punishment was not *increased*.” *Id.* (emphasis added).

That is the key language because an “increased” punishment is what the Constitution prohibits. *See Calder*, 3 U.S. (3 Dall.) at 390–92.

Only then did the Court note that electrocution happened to “abate” issues with hanging as a method of execution. But this observation cannot be taken as part of the standard for evaluating an ex post facto challenge for two reasons. First, as a structural matter, its location and context as a passing observation at the end of a paragraph focused on the fact that the punishment (death) remained constant belies an intent from the Court to elevate this to a constitutional test. Second, as a logical matter, it does not make sense for this to be part of a framework for interpreting the Constitution. If (somehow) it could be proven that a new method of execution caused the exact same amount of pain for the exact same amount of time as the earlier method, nothing would be abated, but a condemned inmate could not credibly argue that his punishment was increased.

All that said, if the Court still thinks the ex post facto claim demands more factual development, then the only possible question could be whether the new default method (electrocution) amounts to an increased punishment (however the Court is going to measure that) as opposed to the old default method (lethal injection). To answer this question, the Court would need evidence about whether or to what extent electrocution is painful. The Record on Appeal here, of course, includes testimony from three experts on this question, who offered conflicting opinions. *See* R. pp. 1141–304 (Wikswow); R. pp. 1314–408 (Arden); R. pp. 1437–72 (Wright). As a comparison, the Court would also need evidence about whether and to what extent lethal injection is painful. But the Court can scour the Record on Appeal in vain for such evidence. (Arguably such testimony could have come from the right type of medical doctor, and Respondents could have called a witness to testify on this issue. Certainly they cannot credibly claim that the circuit

court's discovery order precluded *that*, particularly given that this order came after Respondents had identified their expert witnesses.)

None of this requires any evidence about “the State’s efforts to obtain the drugs for lethal injection” or “the process [the State] took to determine the drugs were not ‘available’ in South Carolina.” *Owens*, 2023 WL 415586, at *4. A remand, additional discovery, and an order from the circuit court are therefore not necessary for the Court to resolve the *ex post facto* claim. *Cf.* Appellants’ Br. 41–43 (analyzing the *ex post facto* claim)

Respondents’ third claim is their vagueness one. “Available” is a statutory term, *see* S.C. Code Ann. § 24-3-530(A), (B), (C), and (E), and “[d]etermining the proper interpretation of a statute is a *question of law*” that should need no factual development. *Perry*, 409 S.C. at 140, 761 S.E.2d at 252 (emphasis added). This is a frequent judicial exercise, and this Court has explained that “[w]hen faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning.” *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409–10, 532 S.E.2d 289, 292 (2000). In undertaking that effort, the Court “should consider not merely the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.” *Id.* at 410, 532 S.E.2d at 292. Appellants explained in their merits briefing how Respondents’ vagueness argument is, in reality, an ambiguity one, *see* Appellants’ Reply Br. 21–22, and how reading the Act as a whole makes plain the General Assembly’s intent that “available” means “present or ready for immediate use,” *see* Appellants’ Br. 44–46. Discovery, much less additional discovery, will not inform this analysis.

The fourth claim, on nondelegation, is likewise a question of law. *See Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) (“whether the Legislature had power to delegate

the authority exercised” is a question of law). The Court must decide whether the General Assembly “enact[ed] a law complete in itself,” *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978), and simply left it to SCDC and the Director to “fill up the details” of how the General Assembly’s expressed purpose will be carried out, *Hampton v. Haley*, 403 S.C. 395, 407, 743 S.E.2d 258, 264 (2013). The Court can read and interpret Act 43 and determine whether the General Assembly has complied with the nondelegation doctrine. Put another way, evidence for the Court to “know exactly what steps the State has taken to procure the drugs for lethal injection and to evaluate the State’s assessment that such drugs are not ‘available’ in South Carolina” is not relevant to determining whether Act 43 complies with the nondelegation doctrine. *Owens*, 2023 WL 415586, at *4; *see also* Appellants’ Br. 47–49 (analyzing the nondelegation claim).

The final claim on which the circuit court ruled and Respondents pushed in this Court is their assertion that Act 43 requires that they be given an election between two constitutional methods of execution. There are, at most, two general analytical steps on this claim. The first is to determine whether Act 43, in fact, grants such an absolute right. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (the “cardinal rule” of statutory interpretation is to give effect to legislative intent); *cf. Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496, 508 (4th Cir. 2011) (discussing the last-antecedent rule). That’s another question of statutory interpretation—and hence a question of law. The second, assuming for sake of argument that the answer to the first is in the affirmative, is whether there are two constitutional methods of execution under Act 43. As discussed already in the context of the article I, section 15 claim, evidence about lethal injection’s availability is irrelevant to that inquiry.

The only conceivable claim to which lethal injection information could be relevant was Respondents’ “statutory claim” that “whatever ‘available’ means,” SCDC has not fulfilled its obligations under section 24-3-530. R. p. 123. Aside from the fact that this claim was implausible from the start (and premised on the forbidden assumption that the General Assembly intended a futile act when it passed Act 43), the circuit court did not rule on this claim, *see* R. pp. 34–35, and Respondents did not pursue that claim in this Court, *see generally* Respondents’ Br. That means Respondents have now abandoned it. *See I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (“a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief”). This Court should not create a special class of cases in which the normal rules of litigation do not apply. Such an approach is antithetical to a “government of laws.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Ultimately, the Court’s decision to remand the case for discovery on lethal injection appears to reflect one of two things. First, it might reveal an interest in a timely and high-profile policy issue and desire to understand more about it. Of course, that is unlikely. Every member of this Court has emphatically declared that policy questions belong to the General Assembly, not the judiciary. *See PPSA*, 2023 WL 107972, at *12 (Beatty, C.J.); *Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 213, 863 S.E.2d 456, 459 (2021) (Kittredge, J.); *Hampton*, 403 S.C. at 398, 743 S.E.2d at 259 (Hearn, J.); *PPSA*, 2023 WL 107972, at *34 (S.C. Jan. 5, 2023) (Few, J.); *Wilson ex rel. State*, 434 S.C. at 219–20, 863 S.E.2d at 463 (James, J.).

That means the second thing is presumably doing the work here (particularly given many of the Court’s questions during oral argument), which is that the Court believes the judiciary has an obligation to “test” the Director’s certification under section 24-3-530(B). *Cf. Owens*, 2023 WL 415586, at *4 (“it is impossible . . . to evaluate the State’s assessment that such drugs are not

‘available’ in South Carolina” without additional information). On its face, the statute requires only that the Director “determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.” S.C. Code Ann. § 24-3-530(B). It says nothing about that certification being subject to review by anyone, much less open to self-interested second guessing by Respondents.

That said, if the Court does hold that the judicial branch has the authority or obligation to satisfy itself that the Director’s certification is well grounded in fact, litigation in circuit court—whether on remand or in any new lawsuit—is never the proper or best forum for any “testing” of the Director’s certification. In the first place, nothing in Act 43 mentions condemned inmates having a right to challenge the Director’s certification. This omission is significant because a plaintiff has a private right of action under a statute only if the General Assembly intends to create such a right. *See Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011). When the General Assembly does not expressly create a private right of action, an implied private right of action exists only “if the legislation was enacted for the special benefit of the private party.” *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). Here, Act 43 was not enacted for the benefit of condemned inmates (surely, they benefited under the old version of section 24-3-530 and the State’s inability to obtain lethal injection drugs). Instead, Act 43 was enacted so that the State could carry out duly imposed death sentences and victims’ families would not have to continue to wait for justice to be done. *Cf. Bucklew*, 139 S. Ct. at 1134 (“The people of [the State], the surviving victims of [condemned inmates’] crimes, and others like them deserve better.”).

In the second, it is inconceivable that the General Assembly intended to create yet another round of litigation before a death sentence could be carried out. Capital litigation is already

characterized by “seemingly endless proceedings” that keep the State from carrying out a death sentence. *Baze v. Rees*, 553 U.S. 35, 69 (2008) (Alito, J., concurring). There’s no reason the General Assembly would have sought to extend those proceedings, and the floor statements during the debate over Act 43 confirm as much. *See* S.C. Senate, Video of Floor Proceedings, 1:09:28 (Mar. 2, 2021), <https://tinyurl.com/4czcc4yc>; S.C. House of Reps., Video of Floor Proceedings, 1:08:40 (May 5, 2021), <https://tinyurl.com/4czcc4yc>.

In the third, there is realistically no way for litigation in circuit court and then an appeal to this Court to be condensed into the timeframe of an execution. An execution must be carried out “on the fourth Friday” after the clerk of this Court issues an execution notice. S.C. Code Ann. § 17-25-370. And an inmate’s election of a method (if multiple methods are available) “must be made in writing fourteen days before” that fourth Friday. *Id.* § 24-3-530(A). That leaves at most 13 days for litigation in circuit court, if a notice of execution was issued as early as possible (i.e., on a Saturday) and the condemned inmate filed a complaint that same day. Even expedited proceedings rarely make it through the trial and appellate courts in less than two weeks, and such a hurried judicial process is even less plausible in a circumstance like this that will necessarily require discovery from SCDC (as Respondents have already proven by serving discovery after this Court’s opinion was issued last week). *See* Ex. 1. Of course, staying the execution for such litigation to proceed makes no sense, as that only opens the door for another challenge when a new execution notice is issued—and for this cycle to start all over. Nevertheless, if a temporary reprieve were warranted, the Constitution entrusts that decision to the Governor. *See* S.C. Const. art. IV, § 14.

In the fourth, having a circuit court oversee discovery on SCDC’s efforts to obtain lethal injection drugs risks publicly identifying members of the execution team or potential sources for

those drugs. No one can credibly deny that there is “a guerilla war against the death penalty which consists of efforts to make it impossible for the States to obtain drugs that could be used to carry out capital punishment with little, if any, pain.” Oral Argument Tr. 14:21–25, *Glossip v. Gross*, No. 14-7955 (U.S.); *see, e.g.*, John H. Blume & Brendan Van Winkle, *Death Penalty: Determine if Capital Punishment Has Outlived its Use* 3, American Constitution Society (2020), <https://tinyurl.com/ym2vcbdr> (calling on the incoming Biden Administration to “heavily regulate lethal injection drugs and seek to prevent their importation and travel through interstate commerce”). No matter what steps are taken to protect this information in discovery, leaks happen, and confidential information is misplaced. *See, e.g.*, Jill Colvin, *Classified Documents Found at Pence’s Home, too, his lawyer Says*, Associated Press (Jan. 24, 2023); Annie Linksey, et al., *More Classified Documents Found at President Biden’s Delaware Home*, Wall St. J. (Jan. 21, 2023).

In the fifth, there is no principled way to permit *these* condemned inmates to “test” the Director’s certification but to preclude future condemned inmates from doing so. *See* Oral Argument Video 2:09:55–2:11:10, *Owens v. Stirling*, No. 2022-001280 (S.C.) (Blume: “This is the first time this Act has been challenged. The statute is new. . . . I don’t think it’s problematic [to have Respondents conduct discovery in circuit court] at least for the first time this Act is being challenged.”). Either the statute gives every inmate the right to bring such a lawsuit, or it gives no inmate the right to bring such a lawsuit. Put another way, there is no “‘one-shot’ proposition” for challenging legislation like Act 43 the way there was for home-rule-related legislation. *Horry Cnty. v. Cooke*, 275 S.C. 19, 23, 267 S.E.2d 82, 84 (1980). Additionally, “there’s going to be a period of time in which things could have changed,” so logically, it makes no sense to permit only these condemned inmates to challenge the certification. Oral Argument Video 2:10:27–2:10:31, *Owens*

v. Stirling, No. 2022-001280 (S.C.) (Few, J.). But allowing every inmate to challenge the Director's certification runs into the myriad other problems discussed here.

And in the sixth, sending this inquiry to circuit court discounts the role that this Court can play and has played in overseeing the carrying out of death sentences. *See, e.g., In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996); Order, *State v. Sigmon*, No. 2002-024388 (June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). This Court is perfectly positioned to ask for additional facts and information that would support the Director's certification. *See, e.g., Letter to B. Stirling, State v. Sigmon*, No. 2002-024388 (June 4, 2021) ("You are requested to provide an explanation as to why two methods of execution under the statute, lethal injection and firing squad, are currently unavailable."). And this Court can do so quickly and confidentially, alleviating the timing and disclosure concerns that arise in circuit court. Plus, no one should be able to question this Court's ability or willingness to ensure that SCDC and the Director have made good-faith attempts to comply with the law while simultaneously ensuring that a duly imposed death sentence is timely carried out. *Cf. State v. Miller*, 122 S.C. 468, 115 S.E. 742, 744 (1923) ("But a court having jurisdiction to render a judgment has inherent authority to carry such judgment into effect. Hence the jurisdiction of the court of general sessions to enforce or carry into effect a suspended judgment or sentence of such court is in no wise dependent upon the form of the process that brings the party subject to such outstanding sentence before the court.").

Whatever that process looks like (whether the Court issues an order similar to *In re Stays* setting forth what information the Director must include in the certification and what of that is under seal or whether the Court takes a more ad hoc approach), establishing that process will not be overly challenging or complicated, and it can be one that the Director can follow for subsequent

executions. In addition to being feasible, such a process is also more faithful to the text of and legislative intent behind section 24-3-530(B) than sending this issue to circuit court.

II. At the very least, the Court needs to address the vagueness claim before remanding the case.

Appellants have already explained that the Court is able to resolve the vagueness claim now, without any remand. Not only can the Court do this, but the Court should do this before any remand, for at least three reasons.

First, Respondents have implicitly admitted as much. They cross-moved for summary judgment on this claim below, which necessarily means they agree this claim raises a question of law that doesn't need discovery. *See S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021) (“When the parties file cross-motions for summary judgment, the issue becomes a question of law for the Court . . .”).

Second, the circuit court needs guidance to “oversee the completion of discovery” and “conduct any hearing it deems appropriate” before “present[ing] an order to this Court regarding its factual findings and determination as to the *availability* of lethal injection drugs in South Carolina.” *Owens*, 2023 WL 415586, at *5 (emphasis added). The circuit court held that Act 43’s use of “available” was unconstitutionally vague and that the term is “so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” R. pp. 32–33 (quoting *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001)). That necessarily means that the circuit court does not know what “available” means. This is an insurmountable problem both for overseeing discovery and determining which of Respondents’ outstanding (but previously objected to) discovery requests are relevant, *see* Rule 26(b), SCRCPP; Rule 401, SCRE, and for analyzing the “availability of lethal injection drugs” in this State. *Owens*,

2023 WL 415586, at *5. For the circuit court to do the analysis this Court has ordered, the circuit court needs to know what the law is.

Third, resolving this claim will ensure Respondents don't run wild with discovery on remand. To be sure, this check is needed: Respondents have already done so. Less than 24 hours after the Court issued its opinion, Respondents served new, written discovery on all Appellants, re-noticed the depositions of two witnesses, and issued a Rule 30(b)(6) deposition notice on SCDC. *See Ex. 1*. Putting aside the issue of whether the remand even permits new discovery requests to be served, *see Owens*, 2023 WL 415586, at *5 (instructing the parties to address “the specific discovery responses that remain outstanding”), the written discovery largely tracked what Respondents served before, seeking information and documents about SCDC’s efforts to obtain lethal injection drugs, people involved with those efforts, the current lethal injection protocol and its creation, and selection and training of execution team members.* The 30(b)(6) notice goes far beyond what Respondents had previously sought and now seek in their written discovery. The second topic of the 30(b)(6) notice, with its five subparts, essentially demands that SCDC produce a person with the most knowledge (i.e., a member of the execution team) to testify about everything SCDC has ever done involving lethal injection, going all the way back to lethal injection’s adoption in 1995. The Court should not allow a fishing expedition of any kind, but it certainly should not force Appellants to take anti-death-penalty advocates on a deep-sea adventure. *See Biltrite Bldg. Co. v. Adams*, 193 S.C. 142, 7 S.E.2d 857, 859 (1940) (“[T]he Courts do not look with favor upon a proceeding in the nature of ‘discovery’ which is shown to be merely a ‘fishing expedition.’”).

* Appellants have objections to the scope, relevance, and lack of time limitation on some of these requests in light of the Court’s initial opinion, but this Petition is not the place to litigate those issues.

Such sweeping discovery goes far beyond the narrow scope of the Court’s remand. The sole purpose of the remand is for the circuit court to present “factual findings and [a] determination as to the availability of lethal injection in South Carolina.” *Owens*, 2023 WL 415586, at *5. Nothing more. Presumably, that means as to the availability of lethal injection drugs *now*, not a 28-year history of lethal injection as a method of execution in South Carolina. Thus, any discovery about previous executions carried out by lethal injection is irrelevant. *See* Ex. 1 (Rule 30(b)(6) Notice 4 (Topic 2(b))). So too is any discovery about the selection, qualifications, and training of the execution team. *See id.* (Topic 2(c)). Or the assembly, maintenance, and testing of the equipment used in executions by lethal injection. *See id.* (Topic 2(d)). Or SCDC’s purchase of drugs in the past. *See id.* (Topic 2(e)). Or even the details of the protocol. How the drugs are administered doesn’t matter; all that (arguably) matters is whether SCDC can get the drugs, which it can’t. *See id.* (Topic 2(a)). Without addressing the vagueness claim and reaching the purported ambiguity regarding “available,” the remand risks becoming a free-for-all on anything about lethal injection.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition, vacate the Court’s initial opinion, reverse the circuit court’s order, and remand the case with instructions to enter judgment for Appellants. Alternatively, the Court should address the vagueness claim now and provide additional guidance as to the scope of the remand.

Respectfully submitted,

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