

EX A – SC CODE § 24-3-530

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May 28 2021

S.C. SUPREME COURT

South Carolina General Assembly
124th Session, 2021-2022

R56, S200

STATUS INFORMATION

General Bill

Sponsors: Senators Hembree, Martin, Kimbrell, Shealy, Gustafson and Turner

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Companion/Similar bill(s): 3755

Introduced in the Senate on January 12, 2021

Introduced in the House on March 4, 2021

Last Amended on May 5, 2021

Passed by the General Assembly on May 12, 2021

Governor's Action: May 14, 2021, Signed

Summary: Executions

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
12/9/2020	Senate	Prefiled
12/9/2020	Senate	Referred to Committee on Corrections and Penology
1/12/2021	Senate	Introduced and read first time (Senate Journal-page 214)
1/12/2021	Senate	Referred to Committee on Corrections and Penology (Senate Journal-page 214)
2/2/2021	Senate	Polled out of committee Corrections and Penology (Senate Journal-page 5)
2/2/2021	Senate	Committee report: Favorable Corrections and Penology (Senate Journal-page 5)
2/3/2021		Scrivener's error corrected
3/2/2021	Senate	Amended (Senate Journal-page 59)
3/2/2021	Senate	Read second time (Senate Journal-page 59)
3/2/2021	Senate	Roll call Ayes-32 Nays-11 (Senate Journal-page 59)
3/3/2021		Scrivener's error corrected
3/3/2021	Senate	Read third time and sent to House (Senate Journal-page 168)
3/4/2021	House	Introduced and read first time (House Journal-page 4)
3/4/2021	House	Referred to Committee on Judiciary (House Journal-page 4)
4/28/2021	House	Committee report: Favorable with amendment Judiciary (House Journal-page 64)
5/4/2021	House	Requests for debate-Rep(s). Murphy, Gatch, Finlay, Wetmore, Weeks, Rose, Garvin, Teeder, Fry, Hart, S Williams, Hosey, Jefferson, Forrest, Murray, Gilliard, Bamberg, McDaniel, Collins, Henderson-Myeres, Anderson, Ott, Pope, Taylor, Hixon, Dilliard, Robinson, McGarry (House Journal-page 14)
5/5/2021	House	Amended (House Journal-page 35)
5/5/2021	House	Read second time (House Journal-page 35)
5/5/2021	House	Roll call Yeas-66 Nays-43 (House Journal-page 61)
5/6/2021	House	Read third time and sent to Senate (House Journal-page 30)
5/6/2021	House	Roll call Yeas-65 Nays-43 (House Journal-page 31)
5/12/2021	Senate	Concurred in House amendment and enrolled (Senate Journal-page 51)
5/12/2021	Senate	Roll call Ayes-32 Nays-11 (Senate Journal-page 51)
5/13/2021		Ratified R 56
5/14/2021		Signed By Governor

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VERSIONS OF THIS BILL

[12/9/2020](#)

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NOTE: THIS IS A TEMPORARY VERSION. THIS DOCUMENT WILL REMAIN IN THIS VERSION UNTIL FINAL APPROVAL BY THE LEGISLATIVE COUNCIL.

(R56, S200)

AN ACT TO AMEND SECTION 24-3-530, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO DEATH BY ELECTROCUTION OR LETHAL INJECTION, SO AS TO PROVIDE THAT A PERSON SENTENCED TO DEATH SHALL SUFFER THE PENALTY BY ELECTROCUTION OR BY FIRING SQUAD OR LETHAL INJECTION, IF LETHAL INJECTION IS AVAILABLE AT THE TIME OF ELECTION, TO PROVIDE THAT AN ELECTION EXPIRES AND MUST BE RENEWED IN WRITING IF THE CONVICTED PERSON RECEIVES A STAY OF EXECUTION OR THE EXECUTION DATE HAS PASSED, TO PROVIDE THAT A PENALTY MUST BE ADMINISTERED BY ELECTROCUTION FOR A PERSON WHO WAIVES HIS RIGHT OF ELECTION, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS SHALL DETERMINE AND CERTIFY TO THE SUPREME COURT WHETHER THE METHOD SELECTED IS AVAILABLE, AND TO PROVIDE THAT THE MANNER OF INFLECTING A DEATH SENTENCE MUST BE ELECTROCUTION, UNLESS THE PERSON ELECTS DEATH BY FIRING SQUAD, IF EXECUTION BY LETHAL INJECTION IS UNAVAILABLE OR IS HELD TO BE UNCONSTITUTIONAL BY AN APPELLATE COURT OF COMPETENT JURISDICTION.

Be it enacted by the General Assembly of the State of South Carolina:

Death penalty, methods of execution

SECTION 1. Section 24-3-530 of the 1976 Code is amended to read:

“Section 24-3-530. (A) 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, under the direction of the Director of the Department of Corrections. The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date or it is

waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution.

(B) Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.

(C) A person convicted of a capital crime and sentenced to death by electrocution prior to the effective date of this section must be administered death by electrocution unless the person elects death by firing squad or lethal injection, if it is available, in writing fourteen days before the execution date.

(D) If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable by the Director of the Department of Corrections or is held to be unconstitutional by an appellate court of competent jurisdiction, then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.

(E) The Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods.

(F) The Department of Corrections shall establish protocols and procedures for carrying out executions pursuant to this section.”

Severability clause

SECTION 2. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

SECTION 3. This act takes effect upon approval by the Governor and applies to persons sentenced to death as provided by law prior to and after the effective date of this act.

Ratified the 13th day of May, 2021.

President of the Senate

Speaker of the House of Representatives

Approved the _____ day of _____ 2021.

Governor

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EX B –
STATE COURT COMPLAINT AND MOTION FOR
PRELIMINARY INJUNCTION

STATE OF SOUTH CAROLINA,)
)
COUNTY OF RICHLAND)
)
FREDDIE EUGENE OWENS)
and)
BRAD KEITH SIGMON)

IN THE COURT OF COMMON PLEAS

SUMMONS

Plaintiff,)

vs.)

FILE NO.

BRYAN P. STIRLING, in his official)
capacity as the Director of the South)
Carolina Department of Corrections)

and

SOUTH CAROLINA DEPARTMENT OF)
CORRECTIONS,)
Defendant.)

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina



Plaintiff/Attorney for Plaintiff

Dated: May 17, 2021

Address: Lindsey S. Vann
Justice 360
900 Elmwood Ave, Suite 200
Columbia, SC 29201

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

FREDDIE EUGENE OWENS,

and

BRAD KEITH SIGMON,

Plaintiffs,

v.

BRYAN P. STIRLING, in his official
capacity as the Director of the South
Carolina Department of Corrections,

and,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS,**

Defendants.

Civil Action No. _____

**COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE
RELIEF AND FOR A DECLARATORY JUDGMENT**

Plaintiffs Freddie E. Owens (i.e., Khalil Divine Black Sun Allah)¹ and Brad Keith Sigmon,
by their undersigned counsel, bring this action against Defendants and allege as follows:

I.

NATURE OF ACTION

1. This is a civil action for declaratory and injunctive relief brought by Plaintiffs Owens and Sigmon for violations and threatened violations of their rights pursuant to (i) the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and

¹ In 2015, by order of the Dorchester County Family Court, Mr. Owens's legal name was changed to Khalil Divine Black Sun Allah. However, because all of his prior proceedings before the South Carolina state courts and federal courts have been filed under the name Freddie Owens, this complaint primarily uses the name Owens for purposes of clarity.

Article I, Section 3 of the South Carolina Constitution; (ii) the prohibitions on ex post facto punishment in Article I, Section 9, Clause 3 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution; and, (iii) the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution.

2. Plaintiffs are death-sentenced inmates whose crimes occurred and whose sentences were imposed under a pre-amendment version of the current execution law. *See* App. at 2097, 2385, ECF Nos. 33-3, 33-5, *Sigmon v. Stirling*, No. 8:13-cv-01399-RBH, 2018 WL 4691197 (D.S.C. Sept. 30, 2018) (attached to this Complaint as Exhibit A); App. at 1681–82, ECF No. 16-4, *Owens v. Stirling*, No. 0:16-cv-02512-TLW, 2018 WL 2410641 (D.S.C. May 29, 2018) (attached to this Complaint as Exhibit B). Defendants are the individuals charged by state law with carrying out Plaintiffs’ death sentences.
3. At the time of Plaintiffs’ crimes and sentencing hearings, South Carolina law provided that their death sentences would be carried out by lethal injection, unless Plaintiffs selected electrocution or lethal injection was found by a court to be unconstitutional. *See* S.C. Code Ann. § 24-3-530 (1995).
4. In early 2021, Plaintiffs exhausted the ordinary appeals process and received warrants for their executions pursuant to *In Re Stays*, 521 S.C. 544, 471 S.E. 2d 140 (1996). Neither Plaintiff selected electrocution, and no court has found lethal injection unconstitutional. The South Carolina Supreme Court stayed Plaintiffs’ execution dates, scheduled for February 12, 2021 (Sigmon) and May 14, 2021 (Owens), after the South Carolina Department of Corrections (SCDC) informed the Court that it could not carry out an execution by lethal injection.

5. On May 14, 2021, South Carolina amended the statutory provision that governs executions in an effort to execute Plaintiffs by electrocution or, depending on the circumstances, firing squad, based upon SCDC's mere certification that lethal injection is "unavailable." *See* S.C. Code Ann. § 24-3-530 (2021).
6. As alleged in greater detail below, the amended execution statute violates Plaintiffs' constitutional rights. Plaintiffs therefore seek preliminary and permanent injunctions preventing Defendants from enforcing the 2021 amendments; an order declaring the amended execution law *ex post facto* legislation; an order declaring that the 2021 amendments violate the South Carolina and/or United States Constitutions; and any other equitable relief as the Court deems just and proper.
7. The amended statute violates due process because it attempts to repeal Plaintiffs' vested right to be executed by lethal injection, unless they choose death by electrocution. Plaintiffs' right to have their sentences carried out pursuant to the pre-amendment statute—and to not be executed by electrocution unless they opt for that method—vested at the time they were sentenced and was relied on when they made their statutory elections pursuant to the pre-amendment statute, and the Legislature cannot now retroactively revoke that right without violating due process. The amended statute also violates due process because it is so vague that the process and consequences of the election decision are unclear to a person of ordinary intelligence.
8. The 2021 amendments are *ex post facto* legislation, in violation of the State and Federal Constitutions, because they aggravate Plaintiffs' punishment, to their detriment, by seeking to impose a less humane punishment than the one to which they were sentenced.

9. The amended statute impermissibly delegates legislative authority to the Director of the SCDC to decide what method of execution his agency will carry out against death-sentenced prisoners, with no judicial remedy.

II.
PARTIES

10. Plaintiffs Owens and Sigmon are citizens of South Carolina under sentences of death in the custody of Defendants and under the control and supervision of Defendant SCDC, a state agency. Plaintiffs are incarcerated at the Edisto Unit of Broad River Correctional Institution (BRCI) in Columbia, South Carolina.
11. Defendant SCDC is the state agency in South Carolina charged with overseeing the custody and care of people incarcerated in South Carolina.
12. Defendant Bryan P. Stirling is the Director of SCDC and is a citizen and resident of South Carolina. He is charged under Sections 24-3-510, 24-3-530, and 24-3-550 of the South Carolina Code with overseeing and carrying out executions in South Carolina. He is the final executive authority responsible for carrying out sentences of death against South Carolina prisoners. Stirling is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.
13. Defendants are acting, and each of them at all times relevant hereto were acting, in their respective official capacities with respect to all acts described herein, and were in each instance acting under the color and authority of the laws of South Carolina. Upon information and belief, unless preliminarily and permanently enjoined, each of the Defendants intends to act in his or her official capacity and under the authority of law in executing Plaintiffs in the electric chair or by firing squad, in violation of Plaintiffs' constitutional and statutory rights.

III.
FACTS

Plaintiffs' Death Sentences and Relevant Legal History

14. Plaintiffs were each sentenced to death prior to the 2021 amendments that are the subject of this complaint.
15. Plaintiff Brad Sigmon was sentenced to death in Greenville County in 2002 for a crime that occurred in 2001.
- a. At Sigmon's sentencing, his jury was instructed that one of the two verdicts they were to consider was "the death penalty, which in the State of South Carolina is by electrocution or by lethal injection." Ex. A. After Sigmon's jury sentenced him to death, the trial judge confirmed that his sentence would be carried out "by electrocution or by lethal injection in the manner provided by law." Ex. A.
 - b. Sigmon completed the ordinary course of his state and federal post-conviction proceedings on January 11, 2021. Ten days later, the Clerk of the South Carolina Supreme Court, pursuant to statute, scheduled Sigmon's execution for February 12, 2021. Two weeks before his execution date, SCDC employees asked Sigmon to select between lethal injection and electrocution per the pre-amendment statute. Because he did not have enough information about SCDC's execution procedures to select a method by which to die, Sigmon declined to make a choice. Pursuant to the statute at the time, when an inmate did not select a method, the default method of execution defaulted to lethal injection. Sigmon's selection papers are attached to this Complaint as Exhibit C.

- c. The State then informed the Court that it did not possess lethal injection drugs and would not be able to obtain them before the execution date. On February 4, the Court issued an order staying Sigmon's execution until the State informs the Court that it "has the ability to carry out an execution by lethal injection, that the petitioner has made an election to be electrocuted, or that there has been some change in law that will allow the execution to take place." Order, *State v. Sigmon*, No. 2002-024388 (Feb. 4, 2021) (attached to this Complaint as Exhibit D).

16. Plaintiff Freddie Owens was sentenced to death in Greenville County in 2006 for a 1997 crime.

- a. Owens completed the ordinary course of his state and federal post-conviction proceedings on April 19, 2021. On April 23, 2021, Owens elected the execution method of lethal injection in writing in accordance with S.C. Code Ann. § 24-3-530 (1995). Owens's selection papers are attached to this Complaint as Exhibit E.
- b. About two weeks later, the Supreme Court of South Carolina stayed his execution because "the South Carolina Department of Corrections (SCDC) lack[ed] the means to conduct an execution by lethal injection at [that] time." Order, *State v. Owens*, No. 2006-038802 (May 4, 2021) (attached to this Complaint as Exhibit F). The Court stayed Owens's execution "until SCDC advises the Court it has the ability to perform the execution as required by the law." *Id.*

17. In the decades since their crimes and convictions, Plaintiffs have prepared for executions by lethal injection, consistent with the law and their sentences.

Amendments to the Execution Law

18. Electrocutation was South Carolina's sole method of execution from 1912, when it was first used, through the 1950s and 1960s. In that time, 241 people died in South Carolina's electric chair.

19. Electrocutation remained the only method of execution for almost two decades after the State enacted a new death penalty law in 1977, following the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that all American capital sentencing schemes violated the Eighth Amendment). Between 1977 and 1995, four people died in South Carolina's electric chair.

20. As is described in greater detail below, there is strong evidence that many of the individuals executed by electrocution in this State died excruciating, painful, torturous deaths.

21. By the 1980s, it had become clear that the electric chair could not accomplish the quick or painless death the Supreme Court of the United States anticipated when approving the first electrocution protocol. *See In re Kemmler*, 136 U.S. 436, 443 (1890). As a result, many states enacted new execution laws replacing electrocution with lethal injection.

22. On June 8, 1995, South Carolina became the twenty-fifth state to adopt lethal injection. *See* S.C. Code Ann. § 24-3-530(B) (1995), 1995 Act No. 108 § 1. The new statute permitted a condemned person to "elect" death by lethal injection but retained electrocution as an option. The law provided that persons sentenced to death after the effective date of the statute were subject to death by lethal injection as the default method of execution, unless they elected electrocution. Accordingly, a person sentenced under this statute could

not be executed by electrocution unless they affirmatively elected that method or a court first declared lethal injection unconstitutional. One of the sponsors of the bill, Representative Harry Hallman, explained the switch from electrocution to lethal injection was necessitated by the reality that “lethal injection is more humane than dying in the electric chair.” *Legislative Watch: Death Penalty*, Times & Democrat, Mar. 2, 1955, at 2B.

23. From 1995 until 2021, lethal injection was the primary means of execution in South Carolina, and during that time, 36 men elected to die by lethal injection. Only three men opted for electrocution. On information and belief, two of the three individuals (Larry Gene Bell and James Reed) were severely mentally ill, and their competence at the time of their executions was in question.
24. No person has been executed in South Carolina’s electric chair since James Earl Reed was voluntarily electrocuted in 2008.
25. Starting around 2010, lethal injection drugs became more difficult to procure across the United States. On information and belief, Defendant SCDC has not possessed usable lethal injection drugs since at least 2013. John Monk, *Controversial bill proposed to get stalled SC executions back on track*, The State, Mar. 6, 2016, <https://www.thestate.com/news/local/article64471007.html>.
26. On information and belief, Defendants did not take the steps taken by other death penalty jurisdictions to procure lethal injection drugs. For example:
 - a. Defendants did not ask the Legislature for funding to construct a compounding pharmacy to create the lethal compounds because, as Defendant Stirling explained, “it just didn’t make a lot of sense to use tax dollars to buy something we could get for a lot less on the open market.” *Id.*

- b. Attempts to enact a law that would have shielded the identity of drug manufacturers and compounding pharmacies repeatedly failed in the Legislature. *E.g.*, S. 553, 121st Session (2015-2016); H. 3853 121st Session (2015-2016); S. 871, 122nd Session (2017-2018); H. 4629, 122nd Session (2017-2018); H. 3354, 123rd Session (2019-2020).
27. No person has been executed in South Carolina since Jeffrey Brian Motts waived his remaining appellate relief and died by lethal injection in 2011. Between 2009 and late 2020, no death row inmates in South Carolina exhausted the ordinary course of appellate review proceedings, and during that time the Legislature made no amendments to the execution statute.
28. Then, in late 2020 and early 2021, three individuals (including Plaintiffs) completed the ordinary appellate review of their death sentences and received warrants for their executions from the South Carolina Supreme Court. Although Defendants knew they did not have the drugs necessary to carry out these executions as scheduled, they began the process of preparing Plaintiffs for their executions and asked them to choose between lethal injection and electrocution.
 - a. On January 21, 2021, the Clerk of the Supreme Court of South Carolina issued an execution notice for Plaintiff Sigmon. On February 4, 2021, the Court vacated Sigmon's execution notice and directed the Clerk "not to issue another execution notice until the State notifies this Court that the Department of Corrections has the ability to carry out the execution by lethal injection, that [Sigmon] has made an election to be electrocuted, or that there has been some change in the law which will allow the execution to take place." Ex. D.

b. On April 22, 2021, the Clerk of the Supreme Court of South Carolina issued an execution notice for Plaintiff Owens. Two weeks later, the Supreme Court of South Carolina vacated Owens’s execution notice because “the South Carolina Department of Corrections (SCDC) lack[ed] the means to conduct an execution by lethal injection at [that] time.” Ex. F. The Court stayed his execution “until SCDC advises the Court it has the ability to perform the execution as required by the law.” Ex. F.

29. During its 2021 session, which ran concurrently with the setting and staying of Plaintiffs’ execution dates, the South Carolina General Assembly considered identical bills introduced in the House and the Senate—House Bill 3755 and Senate Bill 200. Defendants provided public testimony in support of the bills, asserting that they could not obtain lethal injection drugs and the legislation would allow them to move forward with Plaintiffs’ executions by electrocution. Senate Bill 200 eventually passed both chambers with amendments that, *inter alia*, added the firing squad as a third authorized method of execution.

30. On May 14, 2021 Governor Henry McMaster signed into law Senate Bill 200, amending the execution statute to make electrocution the default method and adding the firing squad as a third authorized method of execution—although, as discussed *infra*, the statute is unclear on when a death-sentenced inmate may elect death by firing squad and on the consequences of each election. As amended, Section 1 of the statute now provides, in relevant part:

(A) 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, under the direction

of the Director of the Department of Corrections. The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date or it is waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution.

- (B) Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.
- (C) A person convicted of a capital crime and sentenced to death by electrocution prior to the effective date of this section must be administered death by electrocution unless the person elects death by firing squad or lethal injection, if it is available, in writing fourteen days before the execution date.
- (D) If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable by the Director of the Department of Corrections or is held to be unconstitutional by an appellate court of competent jurisdiction, then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.
- (E) The Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods.
- (F) The Department of Corrections shall establish protocols and procedures for carrying out executions pursuant to this section.

S.C. Code Ann. § 24-3-530(1) (2021) (emphasis added to indicate newly enacted language).

31. Section 3 of the new law “applies to persons sentenced to death as provided by law prior to and after the effective date of this act.” *Id.* § 24-3-530(3).
32. During debates over the new amendments, congresspeople in both houses made clear that the changes to the statute were a direct result of the state’s failure to procure lethal injection

drugs. The legislators also recognized that the methods the new law forces upon condemned people—electrocution and firing squad—represent reversions to a previous era and are less humane than lethal injection.

- a. In the Senate, one of the sponsors of the primary amendments to the bill, Richard Harpootlian, characterized electrocution as “not much better” than hanging in light of the risk of disastrous botches: “They are burned to death. There is instance after instance after instance where people are not dead after the first jolt. They’re screaming and on fire. Horrible, horrible thing to do to another human being.” 124th S.C. Gen. Assemb., Senate, Mar. 2, 2021 (statement of Sen. Dick Harpootlian).
- b. During the same debate, another sponsor of the amendments, Senator Greg Hembree, observed that it was “not the government’s place” to “torture anybody needlessly,” and consequently, “[lethal injection] is an option that, in my view, would be more humane than the electric chair.” *Id.* (statement of Sen. Greg Hembree).
- c. In discussing the firing squad, Senator Hembree also acknowledged having “misgivings” about the humanity and viability of the firing squad but explained that his misgivings were ameliorated by a requirement—removed during the House amendments—that Defendant SCDC “promulgate regulations to demonstrate how they would carry [firing squad out].” *Id.* (statement of Sen. Greg Hembree).
- d. In the House, Representative Ivory Thigpen noted the hypocrisy of offering defendants a choice and then removing that choice if an execution option was

not “available:” “[Lethal injection] is not necessarily unavailable, but the state has failed to acquire it. . . . It was nothing done by this inmate, or this person who has been sentenced to death, to not . . . be able to get what they have chosen, so . . . we’re penalizing them for what [the state] did not accomplish.” 124th S.C. Gen. Assemb., H. Comm. on Judiciary, Feb. 23, 2021 (statement of Rep. Ivory Thigpen).

33. The 2021 amendments to the execution statute made South Carolina the first and only jurisdiction in the United States to change its default execution method from what is recognized as a more humane method (lethal injection) to a more barbarous method (electrocution), or to force condemned people to choose between two barbarous methods, electrocution and firing squad.

IV.

CLAIMS FOR RELIEF

Count I: Due Process Violation—Retroactive Legislation

34. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
35. The execution statute, as amended, cannot apply to Plaintiffs because their crimes occurred and sentences were imposed prior to the enactment date, their statutory rights to elect lethal injection have vested, and the statute itself is neither procedural nor remedial.
36. Defendants cannot revoke a vested statutory right without violating due process, and Plaintiffs’ rights under the 1996 method statute vested before enactment of the 2021 statute. A statutory right vests when it creates “legitimate expectations” or establishes legal consequences that invite reliance. *See Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 32, 736 S.E.2d 651, 660 (Beatty, J., concurring in part and dissenting in part) (quoting Barbara

- J. Van Arsdale *et al.*, 16B Am. Jur. Constitutional Law § 735 (2d ed. 2009)); *see also* *Martin v. Hadix*, 527 U.S. 343, 358 (1999) (the question of retroactivity “should be informed and guided by ‘familiar considerations of fair notice, reasonable reliance, and settled expectations’” (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994))).
37. The decisions and arguments Plaintiffs and their attorneys made at trial and throughout the initial appeals process were informed by their reliance upon Plaintiffs’ right to select lethal injection as the method of execution. The risk of being subjected against their will to more severe, inhumane methods of execution may have changed the calculus as to some of those decisions or arguments.
38. When Plaintiffs were sentenced to death, the law gave them the option to choose lethal injection and reject electrocution. Since the Legislature authorized lethal injection in 1995, no person has been executed by electrocution against their will in South Carolina.
39. Accordingly, since the time of their crimes and sentencing, Plaintiffs have had a legitimate, reasonable, and settled expectation that they could select lethal injection as their method of execution. The judges and juries who imposed the death sentences similarly expected the sentence imposed would only be carried out by lethal injection or electrocution. Exs. A & B.
40. Because Plaintiffs prefer death by lethal injection to electrocution, they have been preparing for lethal injection for more than two decades.
- a. Plaintiff Sigmon has prepared for his death by lethal injection by discussing with his attorneys the processes of lethal injection and electrocution, consulting with various religious advisors and mental health professionals about his

impending execution, and informing his loved ones that he will be put to death by lethal injection.

- b. Plaintiff Owens has prepared for his death by lethal injection by explaining to his family members that he will die by lethal injection, discussing the process with his lawyers, and preparing himself mentally and emotionally over the past 22 years with the understanding that he would die by lethal injection.

41. Additionally, the rights of Plaintiffs in particular—as opposed to other condemned people sentenced after 1995—to be executed by lethal injection (as opposed to electrocution) vested when they relied on the 1995 statute to select the method of their executions.

- a. When Defendant SCDC read Plaintiff Sigmon an execution warrant in January 2021 and asked him to select between execution by lethal injection and electrocution, he declined to select because he lacked any information about how Defendants would carry out either method. Ex. C. However, Plaintiff Sigmon made the decision not to elect with the knowledge that he would not be subjected to electrocution because the default method was lethal injection. His statutory right to select lethal injection vested when he relied on the fact that the default method at the time of his sentencing was lethal injection.

When Defendant SCDC read Plaintiff Owens an execution warrant in April 2021 and asked him to select between execution by lethal injection or electrocution, he selected lethal injection. Ex. E. Plaintiff Owens’s statutory right to select lethal injection vested when he relied on the fact that, at the time of his crime, he could not be executed by electrocution without selecting that method.

42. As discussed *infra*, the precise operation of the new law is vague and uncertain, but there is no dispute that it retroactively strips Plaintiffs of their statutory right to be executed by lethal injection, unless they choose otherwise or lethal injection was declared unconstitutional. Indeed, stripping Plaintiffs of that right, and clearing the obstacle it created to Defendants' executing them by less humane methods was the express purpose of the new law and its proponents. The new law thus unsettles the legitimate expectations of Plaintiffs and the judges and juries who sentenced them without the benefit of fair notice. Applying the 2021 amendments to Plaintiffs would bring to bear the precise concern that motivates the presumption against retroactive statutes: the Legislature here has used its "unmatched powers" to "sweep away settled expectations suddenly and without individualized consideration" in response "to political pressures" and in order to get "retribution against [an] unpopular group[s]." *See Landgraf*, 511 U.S. at 266, 270.

Count II: Ex Post Facto Violation

43. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
44. The United States and South Carolina Constitutions forbid ex post facto legislation. U.S. Const. art. I § 10 ("No State shall . . . pass any . . . ex post facto law"); S.C. Const. art. I § 4 ("No . . . ex post facto law . . . shall be passed").
45. The principle that a law has no effect "before it was actually passed" originates in longstanding and "fundamental notions of justice." *Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) (quoting 1 J. Kent, Commentaries on American Law *455).
46. The Ex Post Facto Clauses of the State and Federal Constitutions forbid the Legislature from enacting any "law that changes the punishment, and inflicts a greater punishment,

than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 390 (1798). Put differently, a law is *ex post facto* when it “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or “alters the situation of the party to his disadvantage,” *State v. Malloy*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). *See also Jernigan v. State*, 340 S.C. 256, 264–65, 531 S.E.2d 507, 511–12 (2000).

47. Thus, although “a change in law that merely affects a mode of procedure, but does not alter substantial personal rights is not *ex post facto*,” a law that “poses a sufficient risk of increasing the measure of punishment” affect a prisoner’s substantial personal rights and are not merely procedural. *Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 403, 413, 745 S.E.2d 110, 114, 120 (2013).
48. This standard and the United States Supreme Court opinions applying it “set[] the floor for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001). South Carolina, therefore, “is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982). The Supreme Court of South Carolina has read the state *Ex Post Facto* clause to sweep more broadly than the federal *Ex Post Facto* clause. *See Jernigan*, 340 S.C. at 263–65.
49. The South Carolina Supreme Court has also recognized that certain methods of execution are more onerous than others, and this qualitative distinction has implications for determining whether a law changing the method of execution is *ex post facto*. For example,

in the course of rejecting an ex post facto challenge, the South Carolina Supreme Court explained that a shift from hanging to electrocution was not ex post facto because the Court was “satisfied that electrocution is a more humane method of execution than hanging.” *Malloy*, 95 S.C. at 441, 78 S.E. at 99.

50. It follows that a retroactive law that changes the method of punishment to one that is less humane is more onerous than the prior law and therefore is impermissibly ex post facto.
51. The 2021 amendments to the execution statute are retroactive. S.C. Code Ann. § 24-3-530(3) (2021). The only question, then, is whether the law “increases the punishment” or whether “its consequences alter[] the situation of a party, to his disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted).
52. The change from lethal injection as the default method of execution unless Plaintiffs chose otherwise to a default method of execution by electrocution (or firing squad if chosen) alters Plaintiffs’ situation to their disadvantage. Lethal injection is the least severe of all three punishments, and the 2021 amendments effectively revokes that lesser punishment. *See Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding unconstitutional a retroactive law that removed lesser punishments and made the maximum punishment mandatory).
53. When Plaintiffs committed their crimes and received their death sentences, the default method of execution was lethal injection, which is according to the United States Supreme Court “the most humane [execution method] available.” *Baze*, 553 U.S. at 62. When carried out properly, it can largely eliminate the risk of pain that comes with other methods of execution. *Id.* at 49 (noting that the first drug of the three-drug protocol “eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections”);

Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (observing that a single-drug protocol is “widely conceded to be able to render a person fully insensate and does not carry the risks of pain that some have associated with other lethal injection protocols” (internal quotations omitted)). As a result, there is a “consensus among the States and the Federal Government that lethal injection is the most humane method of execution.” *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

54. In contrast to a properly administered execution by lethal injections, electrocution and firing squad are barbaric; carry a heightened risk of painful death; and desecrate the body of the deceased in a way that can only be considered less humane.

55. Even under “ideal” conditions (when the electrocution is not botched), an electrocution can go horribly wrong. John P. Wikswo, Jr. Aff. ¶ 11–12, 14–15 (April 27, 2021), attached as Exhibit G. An electrocuted person will likely experience a slow, painful death by suffocation as his internal organs are slowly cooked. *State v. Mata*, 745 N.W.2d 229, 269–78 (2008); *Dawson v. State*, 554 S.E.2d 137, 142, 143 (2001). Their organs can boil, their head catch fire, their eyes pop out, and their body blister, giving off the nauseating odor of burning flesh. *Glass v. Louisiana*, 471 U.S. 1080, 1087–88 (1985) (Brennen, J., dissenting from denial of certiorari); *see also Dawson*, 554 S.E.2d at 144; Jonathan L. Arden Aff. ¶¶ 9–10 (May 14, 2021), attached as Exhibit H.

- a. Electrocution is considered so torturous and outmoded that the last two state courts to consider it have found that killing a death sentenced inmate in the electric chair violates their state constitutions. *Mata*, 745 N.W.2d at 278 (finding that electrocution violated the Nebraska Constitution’s prohibition against cruel and unusual punishment, which mirrors the Eighth Amendment);

Dawson, 554 S.E.2d at 144 (finding that electrocution violated the Georgia Constitution’s prohibition against cruel and unusual punishment).

- b. There is a consensus among medical and physiology experts that death by judicial electrocution is torturous. *See* Ex. G, Wikswo Aff. ¶ 15; Ex. H, Arden Aff. ¶ 17.
- c. South Carolina lawmakers have affirmatively acknowledged that electrocution is more onerous than lethal injection. *See Legislative Watch: Death Penalty*, Times & Democrat, Mar. 2, 1955, at 2B (Representative Harry Hallman, explaining the switch from electrocution to lethal injection was necessitated by the reality that “lethal injection is more humane than dying in the electric chair”).

56. Death by firing squad is more brutal and inhumane than death by lethal injection.

- a. With the 2021 amendments, South Carolina became the fourth state—along with Mississippi, Oklahoma, and Utah—in which firing squad is available as an execution method, and only three people, all in Utah, have been executed in the United States by firing squad since the 1970s. *See* Richard Fausset & Rick Rojas, *After a Decade Without Executions, South Carolina’s Solution: Bring Out the Firing Squad*, N.Y. Times, May 7, 2021, at A20.
- b. Internationally, only eight countries carry out executions by firing squad, putting South Carolina among the ranks of North Korea, China, Iran, and Somalia. *South Carolina moves closer to allowing death by firing squad*, BBC, May 7, 2021, <https://perma.cc/L94D-U6AD>.

- c. Firing squad, like electrocution, carries a serious risk of error and therefore excruciating pain. *See* James R. Acker & Ryan Champagne, *The Execution of Wallace Wilkerson: Precedent and Portent*, 42 Crim. Justice Rev. 349, 354 (2017) (describing the botched firing squad execution of Wallace Wilkerson).
- d. Even when an execution by firing squad goes according to plan, the condemned person’s heart is “ripped to pieces by bullets” and the person is left to bleed to death. *E.g.*, Ed Pilkington, *Utah firing squad executes death row inmate*, *The Guardian*, June 18, 2010, <https://www.theguardian.com/world/2010/jun/18/firing-squad-executes-death-row-inmate>. The prisoner’s body is left with baseball-sized holes and internal tissues splattered on the outside of the corpse. *See* Exhibit I (photographs of Ronnie Gardner after his execution by firing squad); *Should Firing Squads Replace Lethal Injections?*, VICE News (Mar. 21, 2017), <https://www.youtube.com/watch?v=BOKYCqee2YY>.

57. Electrocution and firing squad violate “[b]asic notions of human dignity [which] command that the State minimize mutilation and distortion of the condemned prisoner’s body, irrespective of the pain that such violence might inflict.” *Mata*, 745 N.W.2d at 264 (cleaned up).

58. Electrocution and firing squad are less humane punishments than lethal injection. Stripping Plaintiffs of their right to be executed by lethal injection and forcing their execution by either electrocution or firing squad “increases the punishment” and “alters the situation” of a condemned person “to his disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted). The 2021 amendments do not produce “mere

alterations in conditions deemed necessary for the orderly infliction of humane punishment,” such as changes to the location of the execution or the number of witnesses allowed. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Instead, the law as amended violates Plaintiffs’ right to receive the punishment mandated by the law in effect at the time of their crimes and increases the likelihood that they will suffer pain and mutilation during their executions.

59. Enforcing the 2021 statute and electrocuting or shooting Plaintiffs would contravene the explicit purpose of the Ex Post Facto Clause: “to secure substantial personal rights against arbitrary and oppressive legislative action.” *Malloy*, 237 U.S. at 183.

Count III: Due Process Violation—Void for Vagueness

60. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
61. Procedural due process, which requires fair notice and proper standards for adjudication, prohibits the state from enforcing a statute that is impermissibly vague. *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007).
62. “[T]he constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies.” *In re Amir X.S.*, 371 S.C. 380, 391–92, 639 S.E.2d, 144, 150 (2006).
63. Specifically, a statute is unconstitutionally vague “if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).
64. The execution statute, as amended, is unconstitutionally vague because a person of average intelligence must guess as to its meaning. Specifically, the law provides that a condemned

person “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.*” S.C. Code Ann. § 24-3-530(A) (2021) (emphasis added). A similar phrase is repeated in subsection C: a person sentenced to die must be executed by electrocution “unless the person elects death by firing squad or lethal injection, if it is available.” *Id.* § 24-3-530(C). It is unclear what the phrase “if it is available” modifies: both lethal injection *and* firing squad or lethal injection alone.

65. In general, pursuant to the grammatical rule of the last antecedent, “a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Paroline v. United States*, 572 U.S. 434, 447 (2014) (ellipsis omitted) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Applying that rule here, the limiting clause—“if it is available at the time of election”—should modify only the noun that immediately precedes it—“lethal injection.” Reading the statute that way, however, is inconsistent with subsection B, which provides that Defendant Stirling or his successor “shall determine and certify . . . whether the methods provided in subsection (A) are available.” Subsection B, in other words, appears to contemplate that it will apply to *both* lethal injection *and* firing squad; otherwise, the statute would specify which method was subject to certification, rather than make certification apply to “the method selected.”
66. On the other hand, subsection (D) clearly makes subsection B’s certification process applicable *only* to lethal injection: “If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable . . . then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.” This specific instance of the certification process renders the overall

statute vague because “[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning.” *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). This is because “reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.” *Utility Air Reg. Group v. Eenvtl. Prot. Agency*, 573 U.S. 302, 321 (2014) (cleaned up) (quotation marks omitted).

67. Moreover, the last antecedent rule does not apply when a comma separates the modifying phrase from the preceding noun. In those circumstances, “[t]he presence of a comma separating a modifying clause in a statute from the clause immediately preceding it is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one.” *Comm’rs of Public Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219–20, 833 S.E.2d 834, 839 (2019) (Few, J., concurring) (quoting 82 C.J.S. Statutes § 443 (2009)). Applying that interpretive principle here would lead to the conclusion that the modifying clause—“if it is available at the time of election”—applies to both preceding nouns, meaning lethal injection *and* firing squad. But for the reasons explained above, that reading is inconsistent with the overall statutory construction, which plainly contemplates that subsection (B) applies only to lethal injection.
68. The consequences of this ambiguity are significant. If, for example, a condemned person prefers lethal injection to firing squad but firing squad to electrocution, they cannot know for certain that they will not be subjected to electrocution if they select firing squad. Similarly, if a condemned person prefers firing squad to lethal injection but lethal injection to electrocution, that person does not know the consequences of selecting firing squad.

Simply put, the statute is ambiguous in any situation where a condemned person prefers either firing squad or lethal injection to electrocution.

69. The amended statute is also unconstitutionally vague because it fails to define key terminology so persons governed by the statute may determine they are violating the statute. *See Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 274 (4th Cir. 2019) (holding that “the lack of any guidelines or standards regarding” the key term of the statute “compell[ed] the conclusion that use of the term in the challenged scheme is unconstitutionally vague”).

- a. The undefined terms “available” and “unavailable,” as used in subsections B and D, are ambiguous on their face because the statute, as amended, offers no guidance for how Defendant Stirling or his successor is to make such an assessment.
- b. The statute as amended fails to define the manner by which Defendant Stirling or his successor must “determine and certify by affidavit” that the “method selected” is “available” in subsection B, nor does it define the manner by which the Director must “determine” that lethal injection is “unavailable” in subsection D. Certification of “availability” versus “unavailability” could very well require separate affirmative tasks; the absence of an affidavit certifying “availability” does not necessarily render a method “unavailable” at that time.
- c. The statute’s silence with respect to when certification must happen means Defendant Stirling could initiate the certification process at any point between the issuance of an execution warrant and the moment of execution. This ambiguity could conceivably prevent an inmate from making an election with

any understanding of the methods from which he may choose (and the consequences of that choice), and prevent him from raising a constitutional challenge to the secondary method of execution.

Count IV: Violation of South Carolina Constitution, art. I,
§ 8—Non-Delegation Doctrine Violation

70. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

71. In *Federalist No. 47*, James Madison insisted that tyranny could be prevented only by separating legislative, executive, and judicial powers. 113 James Madison, *The Federalist No. 47*, in Alexander Hamilton, James Madison, & John Jay, *The Federalist Papers* 245 (Ian Shapiro ed. 2009). John Locke, a main influence on the Framers' endorsement of the separation of powers, thought the legislature "cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." Locke, *Second Treatise* § 141, at 71. Simply put, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." Madison, *The Federalist No. 47*.

72. Article I, section 8 of the South Carolina Constitution recognizes so much, providing that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other."

73. Thus, "the Legislature may not delegate its powers to make laws." *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978). Specifically, although the Legislature "may authorize an administrative agency or board 'to fill in up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose," the Legislature may not vest "unbridled, uncontrolled, or

arbitrary power” in another branch of government. *Id.* at 232–33, 246 S.E.2d at 876 (quoting *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 593, 86 S.E.2d 466, 470 (1955)).

74. Although “there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated,” the basic guiding principle is that a delegation must not create an area of judicially unreviewable executive action, in light of the statutory purpose. *Id.* at 233, 86 S.E.2d at 876–77. Thus, “a statutory delegation is constitutional as long as [the Legislature] ‘lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.’” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (cleaned up) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

75. The 2021 amendments violate the non-delegation principle because they vest Defendant Stirling or his successor with unbridled discretion and unfettered discretion to determine whether a method is “available,” and therefore by which method a condemned person will die. As South Carolina Senator Karl Allen explained, “The director of SCDC gets to sign off on whether [a method is considered unavailable]—what is available and what is not? . . . [T]he South Carolina Department of Corrections indicates as of [March 2, 2021] they have no definition and no policy relating to unavailability.” 124th Gen. Assemb., Senate, Mar. 2, 2021 (statement of Sen. Allen). Because there is absolutely no guidance as to what “available” means, the Electrocutation Law grants unqualified power to Defendant Stirling or his successor to create that definition and policy himself.

76. The purpose of the 2021 amendments is to prescribe methods of execution and to define the process by which a condemned person makes an election between the various

authorized methods. Consistent with this purpose, the statute requires Defendant SCDC to “establish protocols and procedures for carrying out executions pursuant to this section.”

S.C. Code Ann. § 24-3-530(F) (2021).

77. However, subsection (B), the certification provision, is inconsistent with the statutory purpose: it makes the effectiveness of a condemned person’s election, and therefore the method of their execution, hinge on an assessment by Defendant Stirling that the method is “unavailable.” Subsection (B) gives the SCDC Director the power to decide not only how to carry the law out, but to decide what law applies. If Defendant Stirling wanted to carry out Plaintiffs’ executions by electrocution rather than establish a new set of protocols for executions by firing squad, the statute grants him that power; all he need do is certify that firing squad and lethal injection are unavailable and Plaintiffs will be forced to select electrocution or to waive their choice and be subjected to electrocution anyway. “The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if [the Legislature] gave the same power [to determine availability] . . . to members of its staff.” *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting).

78. The practical consequences of the legislative delegation here are substantial. Under the statute as written, the Director’s determination of whether any given method is available is judicially unreviewable. *See Bauer*, 271 S.C. at 233, 246 S.E.2d at 876 (explaining that a delegation is unconstitutional where “the courts, when presented with a challenge of the agency’s actions, would, there being no limitations on the agency’s authority, be unable to judicially review its actions”).

79. For example, if a condemned person elects death by lethal injection and the Director certifies that lethal injection is unavailable, the statute provides no mechanism by which the condemned person can challenge that assessment. Because the statute is silent as to the meaning of “available,” “there is an absence of standards for guidance of the [Director’s] action,” making it “impossible in a proper proceeding to ascertain whether the will of [the Legislature] has been obeyed.” *Mistretta*, 488 U.S. at 379; *see also Harbin*, 226 S.C. at 595, 86 S.E.2d at 470–71 (holding that the Legislature effectuated an unconstitutional delegation of power when it gave the State Highway Department the authority “to suspend or revoke a license for any cause which it deems satisfactory”).
80. Defendant Stirling might determine that a specific method is not “available” for any reason, or for no reason. If Defendant SCDC is unable to obtain the necessary equipment for the selected method in time to meet the date on the execution warrant—e.g., humane lethal injection drugs or appropriate weapons for the firing squad—he could deem it unavailable with no scrutiny or review of what steps he had taken, or foresworn, along the way. A method not being “available” or being “unavailable” could be based on any number of undefined, undisclosed reasons, such as SCDC employees unwillingness to partake in the execution; temporary conditions, such as the COVID-19 pandemic, rendering the method unsafe, expensive, or impractical for SCDC staff; the method’s use exceeding Defendant SCDC’s annual budget for carrying out executions, or simply that SCDC does not desire to present the condemned inmate with that option anymore. If Defendant Stirling made such a determination, Plaintiffs would be powerless under the statute to challenge it.
81. Because the amended statute grants unbridled discretion to Defendant Stirling to determine what the law is, and because it “sets up no standard to guide the Department and contains

no limitations” on what constitutes “available” under the statute, it violates the non-delegation doctrine. *Harbin*, 226 S.C. at 595, 86 S.E.2d at 471.

Count V: Preliminary and Permanent Injunctive Relief
Pursuant to Rule 65 of the South Carolina Rules of Civil Procedure

82. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
83. Plaintiffs have a legal right not to be subjected to retroactive or ex post facto legislation; to certainty with respect to the consequences of their election choices under the statute; and to not be subjected to an unconstitutional exercise of executive authority. Plaintiffs will likely succeed on the merits of these claims.
84. Plaintiffs will suffer irreparable harm in the absence of injunctive relief. Without injunctive relief, Defendants will initiate execution proceedings against Plaintiffs pursuant to a statute that violates the Constitution. When Defendants initiate execution proceedings, they will ask Plaintiffs to decide how they will be executed, but the language of the statute as amended creates so much uncertainty that Plaintiffs and their attorneys will be unable to make an informed assessment about the consequences of any given choice. Asking Plaintiffs to make such a choice will subject them to incredible anxiety, not only from the knowledge of an impending execution date, but also because of the uncertainty and resulting risk of death by a surprise method.
85. There is no countervailing risk of harm to Defendants from issuing a preliminary injunction while the courts sort out the meaning of the statute and the constitutionality of applying it retroactively. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 671 (2004).
86. Plaintiffs have no adequate remedy at law. They have exhausted their state and federal post-conviction remedies. As a result, if Defendants are not enjoined from initiating

execution proceedings and from carrying out executions according to the amended statute, Plaintiffs will be executed pursuant to an unconstitutional statute.

- a. Defendant SCDC should be enjoined from informing the Supreme Court that it is capable of carrying out Plaintiffs' executions lawfully and from attempting to carry out any executions pursuant to the 2021 amendments.
- b. Defendant Stirling should be enjoined from initiating the certification process detailed in the 2021 amendments and from attempting to carry out any executions pursuant to it.

87. Plaintiffs are entitled to preliminary and permanent injunctive relief.

**Count VI: Declaratory Judgment Pursuant to S.C. Code
Section 15-53-30**

88. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

89. Pursuant to S.C. Code § 15-53-30, Plaintiffs' legal rights are affected by the amended execution statute and Plaintiffs have a right to the determination of their rights under the law. This Court has the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20.

90. Plaintiffs seek a declaratory judgment pursuant to S.C. Code Ann. § 15-53-30 that enforcement of the Electrocutation Law would violate Plaintiffs' legal rights not to be subjected to retroactive or ex post facto legislation, not to be subjected to an unconstitutional exercise of executive authority, to certainty of the consequences of their election choice under the statute, to be free from cruel and unusual punishment, and to due process under the state and federal constitutions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Grant a preliminary injunction prohibiting Defendants from carrying out, or attempting to carry out, any executions by electrocution unless a condemned inmate selects electrocution as the method of execution.
2. Grant declaratory relief, as requested in this Complaint, to invalidate the portions of the statute that are impermissibly vague.
3. Grant any further relief as the Court deems just and proper.

Respectfully submitted

Dated: May 17, 2021.

By: s/ Lindsey S. Vann

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

FREDDIE EUGENE OWENS,

and

BRAD KEITH SIGMON,

Plaintiffs,

v.

BRYAN P. STIRLING, in his official
capacity as the Director of the South
Carolina Department of Corrections,

and,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS,**

Defendants.

Civil Action No. 2021-CP-40-02306

**MOTION FOR A PRELIMINARY INJUNCTION AND EXPEDITED
DISCOVERY AND HEARING**

Plaintiffs Freddie Eugene Owens¹ and Brad Keith Sigmon are death-sentenced inmates in the custody of Defendant South Carolina Department of Corrections (SCDC). Defendants are the institution and individual charged with carrying out death sentences. Plaintiffs seek a preliminary injunction and an expedited hearing and discovery schedule to preserve the status quo pending the resolution of Plaintiffs’ action for declaratory and injunctive relief. Specifically, a preliminary injunction is warranted because Plaintiffs are likely to succeed on their claims that South Carolina’s new method of execution law violates: (i) the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina

¹ Freddie Owens’s name is now Khalil Divine Black Sun Allah. Earlier proceedings are captioned under the name Freddie Owens. “Owens” is used here for consistency.

Constitution; (ii) the prohibitions on ex post facto punishment in Article I, Section 9, Clause 3 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution; and, (iii) the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution. Absent a preliminary injunction, Defendants will initiate execution proceedings against Plaintiffs, unsettling the status quo and putting into effect a new statute whose constitutionality has not been tested in the courts.

BACKGROUND

I. Plaintiffs' Sentences Are Governed by the 1995 Version of the Execution Statute

Greenville County juries sentenced Plaintiffs Sigmon and Owens to death in 2002 and 2006, respectively. The crimes for which they were tried and convicted occurred in 2001 and 1997.

At the time of their crimes, South Carolina law provided:

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 person, lethal injection. . . . If the person waives the right of election, then the penalty must be administered by lethal injection.

S.C. Code Ann. § 24-3-530 (1995). Consistent with this law, Sigmon's jury was instructed prior to his sentencing that one of the two verdicts they were to consider was "the death penalty, which in the State of South Carolina is by electrocution or by lethal injection." Ex. A.² After Sigmon's jury sentenced him to death, the trial judge confirmed that his sentence would be carried out "by electrocution or by lethal injection in the manner provided by law." Ex. A. Owens's sentencing judge issued a substantively identical order of judgment. Ex. B.

In the decades since their crimes and convictions, Plaintiffs have prepared for executions by lethal injection, consistent with the law and their sentences. Plaintiff Sigmon has discussed with

² The Exhibits referenced throughout this motion are attached to the Complaint.

his attorneys the processes of lethal injection and electrocution, consulted with various religious advisors and mental health professionals, and informed his loved ones that he will die by lethal injection. Plaintiff Owens has explained to his family members that he will die by lethal injection, discussed the process with his lawyers, and prepared himself mentally and emotionally over the past twenty-two years with the understanding that he would be executed by lethal injection. Additionally, since 2000 Defendants successfully carried out seventeen executions by lethal injection—reinforcing Plaintiffs’ settled expectations that they, like every other condemned person sentenced under the 1995 statute, would be executed by lethal injection unless they affirmatively selected electrocution.

II. Defendants Could Have Obtained Lethal Injection Drugs But the State Did Not Act to Secure Them.

Starting around 2010, lethal injection drugs became more difficult to procure, and some time before 2013, Defendants—like the departments of corrections in many other states—ran out of usable lethal injection drugs. When Defendant Stirling took over as Director of SCDC in October 2013, he announced publicly that when he began his term at SCDC he “was told our drugs had expired, and we were going to have a hard time obtaining the drug [pentobarbital].” John Monk, *Controversial bill proposed to get stalled SC executions back on track*, The State, Mar. 6, 2016, <https://www.thestate.com/news/local/article64471007.html>. Unlike other states, however, South Carolina did not take the necessary steps to obtain lethal injection drugs. Defendants declined to ask the Legislature for funding to construct their own compounding pharmacy to make lethal injection drugs because, as Stirling explained, “it just didn’t make a lot of sense to use tax dollars to buy something we could get for a lot less on the open market.” *Id.* Additionally, attempts to enact a law that would have shielded the identity of drug manufacturers and compounding pharmacies repeatedly failed in the Legislature. *E.g.*, S. 553, 121st Session (2015-2016); H. 3853

121st Session (2015-2016); S. 871, 122nd Session (2017-2018); H. 4629, 122nd Session (2017-2018); H. 3354, 123rd Session (2019-2020).

Meanwhile, other jurisdictions continued to carry out executions by lethal injection without resorting to major legislative overhauls. For example, in October 2013, the same month Defendant Stirling took over at SCDC, Texas carried out its first lethal injection using pentobarbital from a compounding pharmacy. Since then, it has carried out 69 executions by lethal injection. *Execution Database*, Death Penalty Information Center, <https://deathpenaltyinfo.org/executions/execution-database> (last visited May 12, 2021). In addition to Texas, the federal government and at least seven other states—Georgia, Oklahoma, Virginia, Ohio, Mississippi, Louisiana, and Pennsylvania—have purchased lethal injection drugs from compounding or importing pharmacies. Across the country, 13 states and the federal government carried out 206 lethal injection executions since 2013, including thirteen by the federal government in the past twelve months. *Id.* Arizona also recently announced that it was able to secure lethal injection drugs after an extended period with no executions in that state. Jacques Billeaud, *Arizona finds death penalty drug after hiatus in executions*, AP News, March 5, 2021, <https://apnews.com/article/arizona-phoenix-executions-6f0ce846e174119635509e0c16b9ac1d>.

Despite these facts, South Carolina failed to take action to ensure that Defendants would be capable of carrying out executions via the statutory default method of lethal injection when the time was ripe.

III. The 2021 Amendments to the Execution Statute Make South Carolina the Only Jurisdiction in the Country that will Electrocute or Shoot Death Sentenced Inmates Who Select Lethal Injection as their Method of Execution.

Between 2009 and late 2020, no death row inmates in South Carolina exhausted their appellate review proceedings, and during that time the Legislature made no amendments to the

execution statute. Then, in late 2020 and early 2021, three individuals (including Plaintiffs) received warrants for their executions. Although Defendants knew they did not have the drugs necessary to carry out these executions, they began the process of preparing Plaintiffs for their executions and asked them to choose between lethal injection and electrocution. Neither Plaintiff selected electrocution; Sigmon, relying on the statute's assurance that a failure to select defaulted to lethal injection, declined to make a choice because SCDC refused to provide sufficient information regarding their execution protocols from which he could make an informed decision, while Owens affirmatively selected lethal injection. Exs. C & E. Accordingly, the Supreme Court of South Carolina vacated the execution notices and stayed Plaintiffs' executions until Defendant SCDC advises the Court that it can legally perform executions. Exs. D & F.

Although Defendants and the Legislature have known since at least 2013 that SCDC did not have lethal injection drugs and would have trouble obtaining them, Defendants waited until the last minute to act. In May 2021, under pressure from Governor Henry McMaster and Defendant Stirling, the General Assembly amended the statute to make electrocution the default method of execution and added firing squad as a third approved execution method. *See* S.C. Code Ann. § 24-3-530 (2021) (the 2021 amendments). McMaster signed the amended statute into law on May 14, 2021. As amended, Section 1 of the statute provides, in relevant part:

- (A) 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, under the direction of the Director of the Department of Corrections. The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date or it is waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution.

- (B) Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.
- (C) A person convicted of a capital crime and sentenced to death by electrocution prior to the effective date of this section must be administered death by electrocution unless the person elects death by firing squad or lethal injection, if it is available, in writing fourteen days before the execution date.
- (D) If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable by the Director of the Department of Corrections or is held to be unconstitutional by an appellate court of competent jurisdiction, then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.
- (E) The Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods.
- (F) The Department of Corrections shall establish protocols and procedures for carrying out executions pursuant to this section.

S.C. Code Ann. § 24-3-530(1) (2021) (emphasis added to indicate newly enacted language).

Additionally, under Section 3, the new law “applies to persons sentenced to death as provided by law prior to and after the effective date of this act.” *Id.* § 24-3-530(3). With the passage of this law, South Carolina became the first and only jurisdiction in the country to change its default execution method from what is recognized as a more humane method (lethal injection) to a more barbarous method (electrocution), or to force condemned people to choose between two barbarous methods, electrocution and firing squad.

ARGUMENT

The “sole purpose of a temporary injunction is to preserve the status quo, and thus avoid possible irreparable injury to [the] plaintiff, pending the litigation.” *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). To establish entitlement to injunctive relief,

a plaintiff must demonstrate a likelihood of success on the merits, that they will suffer irreparable harm in the absence of an injunction, and that they have no adequate remedy at law. *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). Where a plaintiff makes a strong showing of irreparable harm, however, the need to show a likelihood of success on the merits is lessened. *Rogers v. Comprehensive Rehab. Assocs., Inc.*, 808 F. Supp. 493, 498 (D.S.C. 1992).

When determining whether an injunction should issue, the circuit court examines the “merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief.” *Compton v. S.C. Dep’t of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). The plaintiff “need not prove an absolute legal right.” *Levine v. Spartanburg Reg’l Servs. Dist., Inc.*, 626 S.E.2d 38, 42 (Ct. App. 2005), *abrogated on different grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 694 S.E.2d 15 (2010). Rather, once a “prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

If Defendants are not enjoined from enforcing the amendments, Plaintiffs will suffer irreparable harm: they will be executed pursuant to an unconstitutional and unintelligible statute. Until this Court can hold a hearing on the merits of Plaintiffs’ claims, Defendants should be prevented from altering the status quo. Specifically, Defendant SCDC should be enjoined from informing the Supreme Court or the South Carolina Attorney General that it is capable of carrying out Plaintiffs’ executions lawfully, from initiating the certification process detailed in the 2021 amendment, and from attempting to carry out any executions pursuant to the 2021 amendments.

I. Plaintiffs will likely succeed on the merits of their claims.

A. Count I: Due Process Violation—Retroactive Legislation

The revised statute cannot apply to Plaintiffs because they were sentenced to death before its enactment date; their statutory rights to elect lethal injection have vested; and the statute itself is neither procedural nor remedial. It is axiomatic that the state cannot revoke a vested statutory right without violating due process. A statutory right vests when it creates “legitimate expectations” or establishes legal consequences that invite reliance. *See Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 32, 736 S.E.2d 651, 660 (Beatty, J., concurring in part and dissenting in part) (quoting Barbara J. Van Arsdale *et al.*, 16B Am. Jur. Constitutional Law § 735 (2d ed. 2009)); *see also Martin v. Hadix*, 527 U.S. 343, 358 (1999) (the question of retroactivity “should be informed and guided by ‘familiar considerations of fair notice, reasonable reliance, and settled expectations’” (quoting *Landgraf v. USI Film Products*, 511 U.S. 224, 270 (1994))).

Plaintiffs’ rights under the statute have vested. At the time Plaintiffs were sentenced, the law gave them the option to choose lethal injection and reject electrocution. The decisions and arguments Plaintiffs and their attorneys made at trial and throughout the initial appeals process were informed by their reliance upon this right. And the risk of being subjected against their will to more severe, inhumane methods of execution may have changed the calculus as to some of those decisions or arguments.

Additionally, since the Legislature authorized lethal injection in 1995, no person has been executed by electrocution against their will in South Carolina. So, for over two decades, Plaintiffs have had a legitimate expectation that they would die by lethal injection, and the judges and juries that sentenced Plaintiffs to death did so with the understanding that they could die by what is

“believed to be the most humane [execution method] available.” *See Baze v. Rees*, 553 U.S. 35, 62 (2008) (plurality opinion).

Moreover, because Plaintiffs legitimately expected they would die by lethal injection, they have been preparing for it for more than two decades. Plaintiff Sigmon has prepared by discussing with his attorneys the processes of lethal injection and electrocution, consulting with various religious advisors and mental health professionals about his impending execution, and informing his loved ones that he will be put to death by lethal injection. Plaintiff Owens has prepared for his death by lethal injection by explaining to his family members that he will die by lethal injection, discussing the process with his lawyers, and preparing himself mentally and emotionally over the past 22 years with the understanding that he would die by lethal injection.

Indeed, the rights of Plaintiffs to die by lethal injection fully vested when they relied on the 1995 statute to select the method of their executions. The Supreme Court of South Carolina set an execution date for Plaintiff Sigmon, triggering Defendant SCDC to read his warrant in January 2021 and ask him to select between lethal injection and electrocution. Sigmon declined because he lacked relevant details on how Defendants would carry out either method, such as information about the executioners’ qualifications, the voltage or amperage used during an electrocution, and the source of lethal injection drugs, but he made the decision not to select with the knowledge that the statute required a default to lethal injection for an inmate who does not affirmatively select electrocution. Ex. C. His statutory right to select lethal injection vested when he relied on the fact that the default method at the time of his crime and sentencing was lethal injection. And when Defendant SCDC read Plaintiff Owens his execution warrant in April 2021 and asked him to select between lethal injection and electrocution, he chose lethal injection. Ex. E. Plaintiff Owens’s

statutory right to select lethal injection vested when he relied on the 1995 law which forbade a death by electrocution without him affirmatively selecting this method.

In sum, although the precise operation of the new law is vague and uncertain, there is no dispute that it retroactively strips Plaintiffs of their statutory right to be executed by lethal injection as long as the method remained constitutional. Indeed, stripping Plaintiffs of that right was the purpose of the 2021 law. The new law unsettles the legitimate expectations of Plaintiffs and the judges and juries who sentenced them without the benefit of fair notice. Applying the 2021 amendments to Plaintiffs would bring to bear the precise concern that motivates the presumption against retroactive statutes: the Legislature here has used its “unmatched powers” to “sweep away settled expectations suddenly and without individualized consideration” in response “to political pressures” and in order to get “retribution against [an] unpopular group[s].” *See Landgraf*, 511 U.S. at 266, 270. Plaintiffs are likely to succeed on this claim and will suffer irreparable harm—death pursuant to an unconstitutional statute—if Defendants are permitted to proceed with their executions.

B. Count II: Ex Post Facto Violation

The United States and South Carolina Constitutions forbid ex post facto legislation. U.S. Const. art. I § 10 (“No State shall . . . pass any . . . ex post facto law”); S.C. Const. art. I § 4 (“No . . . ex post facto law . . . shall be passed”). The principle that a law has no effect “before it was actually passed” originates in longstanding and “fundamental notions of justice.” *Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) (quoting 1 J. Kent, Commentaries on American Law *455). This principle and the constitutional provisions derived from it forbid legislatures from enacting any “law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S.

386, 390 (1798). Put differently, a law is ex post facto when it “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or “alters the situation of the party to his disadvantage,” *State v. Malloy*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). See also *Jernigan v. State*, 340 S.C. 256, 264–65, 531 S.E.2d 507, 511–12 (2000). Thus, although “a change in law that merely affects a mode of procedure, but does not alter substantial personal rights is not ex post facto,” a law that “poses a sufficient risk of increasing the measure of punishment” affects a prisoner’s substantial personal rights and is not merely procedural. *Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 403, 413, 745 S.E.2d 110, 114, 120 (2013).

This standard and the United States Supreme Court opinions applying it “set[] the floor for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001). South Carolina “is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982). And it has here. The Supreme Court of South Carolina reads the state Ex Post Facto clause more broadly than the federal Ex Post Facto clause. See *Jernigan*, 340 S.C. at 263–65.

Additionally, the South Carolina Supreme Court has also recognized that certain methods of execution are more onerous than others, and this qualitative distinction has implications for determining whether a law changing the method of execution is ex post facto. For example, in the course of rejecting an ex post facto challenge, the South Carolina Supreme Court explained that a shift from hanging to electrocution was not ex post facto because the Court was “satisfied that electrocution is a more humane method of execution than hanging.” *Malloy*, 95 S.C. at 441, 78

S.E. at 99. It follows that a retroactive law that changes the method of punishment to one that is less humane is more onerous than the prior law and therefore is impermissibly ex post facto.

The 2021 amendments to the execution statute are retroactive. S.C. Code Ann. § 24-3-530(3) (2021). So the only question, then, is whether the law “increases the punishment” or whether “its consequences alter[] the situation of a party, to his disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted). It does. The change from lethal injection as the default method of execution unless Plaintiffs chose otherwise to a default method of execution by electrocution (or firing squad if chosen) alters Plaintiffs’ situation to their disadvantage. Lethal injection is the least severe of the three punishments, and the 2021 amendments effectively revokes that lesser punishment. *See Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding unconstitutional a retroactive law that removed lesser punishments and made the maximum punishment mandatory).

When Plaintiffs committed their crimes and received their death sentences, the default method of execution was lethal injection, which is according to the United States Supreme Court “the most humane [execution method] available.” *Baze*, 553 U.S. at 62. When carried out properly, it can largely eliminate the risk of pain that comes with other methods of execution. *Id.* at 49 (noting that the first drug of the three-drug protocol “eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections”); *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (observing that a single-drug protocol is “widely conceded to be able to render a person fully insensate and does not carry the risks of pain that some have associated with other lethal injection protocols” (internal quotations omitted)). As a result, there is a “consensus among the States and the Federal Government that lethal injection is the most humane method of execution.” *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

In contrast to a properly administered execution by lethal injections, electrocution and firing squad are barbaric; carry a heightened risk of painful death; and desecrate the body of the deceased in a way that can only be considered less humane. Even under “ideal” conditions (when the electrocution is not botched), an electrocution can go horribly wrong. John P. Wikswo, Jr. Aff. ¶¶ 11–12, 14–15 (April 27, 2021), attached as Exhibit G. An electrocuted person will likely experience a slow, painful death by suffocation as his internal organs are slowly cooked. *State v. Mata*, 745 N.W.2d 229, 269–78 (2008); *Dawson v. State*, 554 S.E.2d 137, 142, 143 (2001). Their organs can boil, their head catch fire, their eyes pop out, and their body blister, giving off the nauseating odor of burning flesh. *Glass v. Louisiana*, 471 U.S. 1080, 1087–88 (1985) (Brennen, J., dissenting from denial of certiorari); *see also Dawson*, 554 S.E.2d at 144; Jonathan L. Arden Aff. ¶¶ 9–10 (May 14, 2021), attached as Exhibit H.

Indeed, electrocution is considered so torturous and outmoded that the last two state courts to consider it have found that killing a death sentenced inmate in the electric chair violates their state constitutions. *Mata*, 745 N.W.2d at 278 (finding that electrocution violated the Nebraska Constitution’s prohibition against cruel and unusual punishment, which mirrors the Eighth Amendment); *Dawson*, 554 S.E.2d at 144 (finding that electrocution violated the Georgia Constitution’s prohibition against cruel and unusual punishment). Additionally, there is a consensus among medical and physiology experts that death by judicial electrocution is torturous. *See Ex. G, Wikswo Aff. ¶ 15; Ex. H, Arden Aff. ¶ 17.* And South Carolina lawmakers have affirmatively acknowledged that electrocution is more onerous than lethal injection, acknowledging that “lethal injection is more humane than dying in the electric chair.” *Legislative Watch: Death Penalty*, Times & Democrat, Mar. 2, 1955, at 2B.

Death by firing squad, as well, is more brutal and inhumane than death by lethal injection. With the 2021 amendments, South Carolina became the fourth state—along with Mississippi, Oklahoma, and Utah—in which firing squad is available as an execution method, and only three people, all in Utah, have been executed in the United States by firing squad since the 1970s. *See* Richard Fausset & Rick Rojas, *After a Decade Without Executions, South Carolina’s Solution: Bring Out the Firing Squad*, N.Y. Times, May 7, 2021, at A20. Internationally, only eight countries carry out executions by firing squad, putting South Carolina among the ranks of North Korea, China, Iran, and Somalia. *South Carolina moves closer to allowing death by firing squad*, BBC, May 7, 2021, <https://perma.cc/L94D-U6AD>.

Firing squad, like electrocution, carries a serious risk of error and therefore excruciating pain. *See* James R. Acker & Ryan Champagne, *The Execution of Wallace Wilkerson: Precedent and Portent*, 42 Crim. Justice Rev. 349, 354 (2017) (describing the botched firing squad execution of Wallace Wilkerson). Even when an execution by firing squad goes according to plan, the condemned person’s heart is “ripped to pieces by bullets” and the person is left to bleed to death. *E.g.*, Ed Pilkington, *Utah firing squad executes death row inmate*, The Guardian, June 18, 2010, <https://www.theguardian.com/world/2010/jun/18/firing-squad-executes-death-row-inmate>. The prisoner’s body is left with baseball-sized holes and internal tissues splattered on the outside of the corpse. *See* Exhibit I (photographs of Ronnie Gardner after his execution by firing squad); *Should Firing Squads Replace Lethal Injections?*, VICE News (Mar. 21, 2017), <https://www.youtube.com/watch?v=BOKYCqee2YY>.

Ultimately, electrocution and firing squad are less humane punishments than lethal injection. Stripping Plaintiffs of their right to be executed by lethal injection and forcing their execution by either electrocution or firing squad “increases the punishment” and “alters the

situation” of a condemned person “to his disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted). The 2021 amendments do not produce “mere alterations in conditions deemed necessary for the orderly infliction of humane punishment,” such as changes to the location of the execution or the number of witnesses allowed. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Instead, the law as amended violates Plaintiffs’ right to receive the punishment mandated by the law in effect at the time of their crimes and increases the likelihood that they will suffer pain and mutilation during their executions.

Enforcing the 2021 statute and electrocuting or shooting Plaintiffs would contravene the explicit purpose of the Ex Post Facto Clause: “to secure substantial personal rights against arbitrary and oppressive legislative action.” *Malloy*, 237 U.S. at 183. Plaintiffs are likely to succeed on this claim and will suffer irreparable harm—death pursuant to an unconstitutional statute—if Defendants are permitted to proceed with their executions.

C. Count III: Due Process Violation—Void for Vagueness

Procedural due process, which requires fair notice and proper standards for adjudication, prohibits the state from enforcing a statute that is impermissibly vague. *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). “[T]he constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies.” *In re Amir X.S.*, 371 S.C. 380, 391–92, 639 S.E.2d, 144, 150 (2006). Specifically, a statute is unconstitutionally vague “if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

The execution law, as amended, is unconstitutionally vague because a person of average intelligence must guess as to its meaning. Specifically, the law provides that a condemned person

“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.*” S.C. Code Ann. § 24-3-530(A) (2021) (emphasis added). A similar phrase is repeated in subsection C: a person sentenced to die must be executed by electrocution “unless the person elects death by firing squad or lethal injection, if it is available.” It is unclear what the phrase “if it is available” modifies: both lethal injection *and* firing squad or lethal injection alone.

In general, pursuant to the grammatical rule of the last antecedent, “a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Paroline v. United States*, 572 U.S. 434, 447 (2014) (ellipsis omitted) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Applying that rule here, the limiting clause—“if it is available at the time of election”—should modify only the noun that immediately precedes it—“lethal injection.” Reading the statute that way, however, is inconsistent with subsection B, which provides that Defendant Stirling or his successor “shall determine and certify . . . whether the methods provided in subsection (A) are available.” Subsection B, in other words, appears to contemplate that it will apply to *both* lethal injection *and* firing squad; otherwise, the statute would specify which method was subject to certification, rather than make certification apply to “the method selected.”

On the other hand, subsection (D) clearly makes subsection B’s certification process applicable *only* to lethal injection: “If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable . . . then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.” This specific instance of the certification process renders the overall statute vague because “[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning.” *Cochise*

Consultancy, Inc. v. United States ex rel. Hunt, 139 S. Ct. 1507, 1512 (2019). This is because “reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.” *Utility Air Reg. Group v. Evtl. Prot. Agency*, 573 U.S. 302, 321 (2014) (cleaned up) (quotation marks omitted).

Moreover, the last antecedent rule does not apply when a comma separates the modifying phrase from the preceding noun. In those circumstances, “[t]he presence of a comma separating a modifying clause in a statute from the clause immediately preceding it is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one.” *Comm’rs of Public Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219–20, 833 S.E.2d 834, 839 (2019) (Few, J., concurring) (quoting 82 C.J.S. Statutes § 443 (2009)). Applying that interpretive principle here would lead to the conclusion that the modifying clause—“if it is available at the time of election”—applies to both preceding nouns, meaning lethal injection and firing squad. But for the reasons explained above, that reading is inconsistent with the overall statutory construction, which plainly contemplates that subsection (B) applies only to lethal injection.

The consequences of this ambiguity are significant. If, for example, a condemned person prefers lethal injection to firing squad but firing squad to electrocution, they cannot know for certain that they will not be subjected to electrocution if they select firing squad. Similarly, if a condemned person prefers firing squad to lethal injection but lethal injection to electrocution, that person does not know the consequences of selecting firing squad. Simply put, the statute is ambiguous in any situation where a condemned person prefers either firing squad or lethal injection to electrocution. The amended statute is also unconstitutionally vague because it fails to define key terminology so persons governed by the statute may determine they are violating the

statute. *See Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 274 (4th Cir. 2019) (holding that “the lack of any guidelines or standards regarding” the key term of the statute “compell[ed] the conclusion that use of the term in the challenged scheme is unconstitutionally vague”).

The undefined terms “available” and “unavailable,” as used in subsections B and D, are ambiguous on their face because the statute, as amended, offers no guidance for how Defendant Stirling or his successor is to make such an assessment. The statute as amended further fails to define the manner by which Defendant Stirling or his successor must “determine and certify by affidavit” that the “method selected” is “available” in subsection B, nor does it define the manner by which the Director must “determine” that lethal injection is “unavailable” in subsection D. Certification of “availability” versus “unavailability” could very well require separate affirmative tasks; the absence of an affidavit certifying “availability” does not necessarily render a method “unavailable” at that time. Additionally, the statute’s silence with respect to when certification must happen means Defendant Stirling could initiate the certification process at any point between the issuance of an execution warrant and the moment of execution.

Plaintiffs are likely to succeed on this claim and will suffer irreparable harm—death pursuant to an unconstitutional statute—if Defendants are permitted to proceed with their executions.

D. Count IV: Violation of South Carolina Constitution, art. I, § 8—Non-Delegation Doctrine Violation

In *Federalist No. 47*, James Madison insisted that tyranny could be prevented only by separating legislative, executive, and judicial powers. 113 James Madison, *The Federalist No. 47*, in Alexander Hamilton, James Madison, & John Jay, *The Federalist Papers* 245 (Ian Shapiro ed. 2009). John Locke, a main influence on the Framers’ endorsement of the separation of powers, thought the legislature “cannot transfer the power of making laws to any other hands; for it being

but a delegated power from the people, they who have it cannot pass it over to others.” Locke, *Second Treatise* § 141, at 71. Simply put, “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” Madison, *The Federalist No. 47*.

Article I, section 8 of the South Carolina Constitution recognizes as much, providing that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other.” Thus, “the Legislature may not delegate its powers to make laws.” *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978). Specifically, although the Legislature “may authorize an administrative agency or board ‘to fill in up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose,” the Legislature may not vest “unbridled, uncontrolled, or arbitrary power” in another branch of government. *Id.* at 232–33, 246 S.E.2d at 876 (quoting *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 593, 86 S.E.2d 466, 470 (1955)). Although “there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated,” the basic guiding principle is that a delegation must not create an area of judicially unreviewable executive action, in light of the statutory purpose. *Id.* at 233, 86 S.E.2d at 876–77. Thus, “a statutory delegation is constitutional as long as [the Legislature] ‘lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.’” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (cleaned up) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

The 2021 amendments violate the non-delegation principle because they vest Defendant Stirling or his successor with unbridled discretion and unfettered discretion to determine whether a method is “available,” and therefore by which method a condemned person will die. As South

Carolina Senator Karl Allen explained, “The director of SCDC gets to sign off on whether [a method is considered unavailable]—what is available and what is not? . . . [T]he South Carolina Department of Corrections indicates as of [March 2, 2021] they have no definition and no policy relating to unavailability.” 124th Gen. Assemb., Senate, Mar. 2, 2021 (statement of Sen. Allen). Because there is no guidance as to what “available” means, the statute grants unqualified power to Defendant Stirling or his successor to create that definition and policy himself.

The purpose of the 2021 amendments is to proscribe methods of execution and to define the process by which a condemned person makes an election between the various authorized methods. Consistent with this purpose, the statute requires Defendant SCDC to “establish protocols and procedures for carrying out executions.” S.C. Code Ann. § 24-3-530(F) (2021). However, subsection (B), the certification provision, is inconsistent with the statutory purpose: it makes the effectiveness of a condemned person’s election, and therefore the method of their execution, hinge on an assessment by Defendant Stirling that the method is “available.” Subsection (B) gives the SCDC Director the power to decide not only how to carry the law out, but to decide what law applies. If Defendant Stirling wanted to carry out Plaintiffs’ executions by electrocution rather than establish a new set of protocols for executions by firing squad, the statute grants him that power; all he need do is certify that firing squad and lethal injection are unavailable and Plaintiffs will be forced to select electrocution or to waive their choice and be subjected to electrocution anyway. “The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if [the Legislature] gave the same power [to determine availability] . . . to members of its staff.” *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting).

The practical consequences of the legislative delegation here are substantial. Under the statute as written, the Director’s determination of whether any given method is available is judicially unreviewable. *See Bauer*, 271 S.C. at 233, 246 S.E.2d at 876 (explaining that a delegation is unconstitutional where “the courts, when presented with a challenge of the agency’s actions, would, there being no limitations on the agency’s authority, be unable to judicially review its actions”). For example, if a condemned person elects death by lethal injection and the Director certifies that lethal injection is unavailable, the statute provides no mechanism by which the condemned person can challenge that assessment. Because the statute is silent as to the meaning of “available,” “there is an absence of standards for guidance of the [Director’s] action,” making it “impossible in a proper proceeding to ascertain whether the will of [the Legislature] has been obeyed.” *Mistretta*, 488 U.S. at 379; *see also Harbin*, 226 S.C. at 595, 86 S.E.2d at 470–71 (holding that the Legislature effectuated an unconstitutional delegation of power when it gave the State Highway Department the authority “to suspend or revoke a license for any cause which it deems satisfactory”).

Defendant Stirling might determine that a specific method is not “available” for any reason, or for no reason. If Defendant SCDC is unable to obtain the necessary equipment for the selected method in time to meet the date on the execution warrant—e.g., humane lethal injection drugs or appropriate weapons for the firing squad—he could deem it unavailable with no scrutiny or review of what steps he had taken, or foresworn, along the way. A method not being “available” or being “unavailable” could be based on any number of undefined, undisclosed reasons, such as SCDC employees unwillingness to partake in the execution; temporary conditions, such as the COVID-19 pandemic, rendering the method unsafe, expensive, or impractical for SCDC staff; the method’s use exceeding Defendant SCDC’s annual budget for carrying out executions, or simply that SCDC

does not desire to present the condemned inmate with that option anymore. If Defendant Stirling made such a determination, Plaintiffs would be powerless under the statute to challenge it.

Because the amended law grants unbridled discretion to Defendant Stirling to determine what the law is, and because it “sets up no standard to guide the Department and contains no limitations” on what constitutes “available” under the statute, it violates the non-delegation doctrine. *Harbin*, 226 S.C. at 595, 86 S.E.2d at 471. Plaintiffs are likely to succeed on this claim and will suffer irreparable harm—death pursuant to an unconstitutional statute—if Defendants are permitted to proceed with their executions.

II. Plaintiffs will suffer irreparable harm in the absence of a preliminary injunction.

The “Constitution recognizes higher values than speed and efficiency.” *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). This is especially true with capital punishment. *See Purkey v. United States*, 964 F.3d 603, 618 (7th Cir. 2020) (“Just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so.”). The death penalty is “obviously irreversible.” *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., granting a stay of execution partially based on the finality of an execution).

If the status quo is not preserved pending the resolution of this litigation, Defendants will initiate execution proceedings against Plaintiffs pursuant to a statute that violates the Constitution. When Defendants initiate execution proceedings, they will ask Plaintiffs to decide how they will be executed, but the language of the statute as amended creates so much uncertainty that Plaintiffs and their attorneys will be unable to make an informed assessment about the consequences of any given choice. Asking Plaintiffs to make such a choice will subject them to incredible anxiety, not only from the knowledge of an impending execution date, but also because of the uncertainty and resulting risk of death by a surprise method. There is no countervailing risk of harm to Defendants

from issuing a preliminary injunction while the courts sort out the meaning of the statute and the constitutionality of applying it retroactively. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 671 (2004).

A preliminary injunction and an expedited hearing and discovery schedule are therefore necessary to protect Plaintiffs' rights until this Court can hold a hearing on the merits of Plaintiffs' claims for permanent injunctive relief and declaratory relief. Simply put, without a preliminary injunction to preserve the status quo, Plaintiffs will be executed under an unconstitutional statute. *See Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (Alito, J., respecting denial of stay or vacatur) (opining that it is preferable for death-sentenced prisoners' claims to be heard on the merits "in light of what is at stake"). Plaintiffs will suffer irreparable harm without a preliminary injunction.

III. Plaintiffs have no adequate remedy at law.

A court reserves its injunctive power for "situations when there is no adequate remedy at law." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). An adequate remedy at law is "one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). If this Court does not grant a preliminary injunction long enough to adjudicate Plaintiffs' claims on the merits, they will be executed, and if this Court or an appellate court later determines that the 2021 law is unconstitutional, there will be no adequate remedy at law because Plaintiffs will be dead.

CONCLUSION

Plaintiffs have alleged sufficient facts stating the basis for injunctive relief and demonstrating that relief is necessary to preserve their rights during the litigation of their underlying actions. They are likely to succeed on the merits of each claim, and they will suffer

irreparable harm without an injunction. Plaintiffs have no adequate remedy at law to prevent this harm. Accordingly, this Court should enjoin enforcement of the law so Plaintiffs are not executed before this Court can judge the lawfulness of the 2021 amendments.

Respectfully submitted

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