No. _____

(Capital Case; Execution Scheduled for June 13, 2025, at 6:00 p.m. EDT)

IN THE

Supreme Court of the United States

STEPHEN C. STANKO, *Applicant/Appellant/Plaintiff*

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS et al.,
Respondents/Appellees/Defendants

EMERGENCY APPLICATION FOR STAY OF EXECUTION TO PRESERVE JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

TO THE HONORABLE JOHN ROBERTS, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit Court of Appeals:

Applicant, Stephen C. Stanko respectfully requests a stay of his execution, which is scheduled for June 13, 2025, at 6:00 pm EDT. Mr. Stanko asks this Court to stay his execution to preserve its jurisdiction to consider a petition for writ of certiorari following final adjudication of his Complaint for Injunctive and Declaratory Relief Filed Pursuant to 42 U.S.C. § 1983 (ECF No. 1)

I. PARTIES TO THE PROCEEDING

- Stephen C. Stanko, Plaintiff
- South Carolina Department of Corrections (SCDC), Defendant
- JOEL E. ANDERSON, Interim Director, SCDC, Defendant
- COLIE RUSHTON, Director of Security & Emergency Operations, SCDC, Defendant
- STEPHEN DUNCAN, Warden, Broad River Correctional Institution, Defendant
- LYDELL CHESTNUT, Deputy Warden, Broad River Correctional Institution, Defendant
- HENRY DARGAN MCMASTER, Governor, State of South Carolina, *Intervenor-Defendant*

II. PROCEDURAL POSTURE

Mr. Stanko's motions for stay of his execution to permit this litigation were denied in both the District Court (ECF No. 28) and in the Court of Appeals (Doc. No. 22).

III. STATEMENT OF THE CASE

Because the District Court failed to terminate Mr. Stanko's § 1983 litigation and appears to have deemed it cannot issue a final judgment, jurisdiction remains in the District Court, and there is no final order from which Mr. Stanko may petition this Court for writ of certiorari. Given the tacitly conceded viability of Mr. Stanko's litigation and the lower court's frustration of his present need to seek a stay from this Court in tandem with presentation of a petition for a writ of certiorari, Mr. Stanko hereby seeks injunctive relief for the sake of preserving jurisdiction in this important, meritorious, and capital case. *See New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J.).

A. Stanko Attacks the Constitutionality of South Carolina's Retrograde Execution Statute for Designating, in 2021, Electrocution after Relegating the Electric Chair to an Alternative Method in 1995.

On June 6, 2025,[1] Mr. Stanko filed his § 1983 Complaint, challenging South Carolina's new methods of execution statute, section 24-3-530 of the South Carolina Code, which deprives prisoners of their Eighth Amendment right not to be subject to cruel and unusual punishment as well as their Fourteenth Amendment due process rights to vindicate the Eighth Amendment right. ECF No. 1.

The Complaint alleges these constitutional violations stemming from South Carolina's new methods of execution statute, section 24-3-530 of the South Carolina

[1] This litigation followed state court warrant litigation initiated on May 16, 2025, the same day the state supreme court issued its notice of execution, setting the date, as per the statute, for the fourth following Friday, June 13, 2025. That state litigation is discussed *infra*.

Code, which exploits this Court's decision in *Stewart v. LaGrand*, 526 U.S. 115, 117–18 (1999) (holding that the prisoner's choice of an authorized method of execution of the state's default method waives any constitutional challenge to either method). South Carolina has reversed its own legislative course which had been consistent with all other capital states, to abandon execution by electrocution, at least as the default method, which effectively shields South Carolina from any judicial review of the constitutionality of any of its methods. Under the new statute, the default method is electrocution, unless the prisoner elects one of the other two authorized methods, lethal injection or firing squad (a method never previously authorized for civilian executions in the state's history), as long as those methods are certified by the Director[2] of South Carolina Department of Corrections (SCDC) to be "available." S.C. Code Ann. § 24-3-530. This scheme effectively prohibits any judicial review of how the State carries out executions.

This problem is exacerbated, in Mr. Stanko's case, by the recent history of significant problems requiring judicial review in the last five executions: including three lethal injection executions "by a single dose of pentobarbital" (*see* ECF Nos. 1-11, 1-12, & 1-13) that *needed* a second 5-gram dose of pentobarbital, and one of two firing squad executions that was severely botched, in that only two of three expected bullets struck the condemned, and those two bullets left the heart's ability to pump blood and sustain consciousness of "maximum pain" as the condemned died a slow painful death from exsanguination. ECF No. 1 at ¶¶ 11–37. Mr. Stanko's due process

[2] Or, as in Mr. Stanko's case, the Interim Director.

rights are further burdened because all of this transpires in the context of an extreme outlier shield statute blocking his access to necessary information—including even the execution protocols—a context that means no court is willing or able to engage meaningfully with any of the available evidence, relying instead on bald, unsupported averments of the Defendants. *Owens v. Stirling*, 904 S.E. 2d 580, 587 (S.C. 2024) (discussing the amendment to S.C. Code Ann. § 24-3-580).

South Carolina, like all other capital states,[3] long ago moved on from the electric chair as its default method of execution.[4] The new statute uses it as a cynical way of preventing constitutional review. "South Carolina's 113-year-old electric chair is not an alternative method for Plaintiff to plead." ECF No. 25 at 5. This Court's

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[3] The most recent electrocutions, in Tennessee, came from a scheme that made a three-drug lethal injection method the default. *See infra* n.11. Owing to serious concerns about the ability of the first drug to prevent pain, especially in light of the paralytic effect of the second drug which would mask even severe pain, two prisoners opted for electrocution. *See, e.g.*, Rick Roja, *Why This Inmate Chose the Electric Chair Over Lethal Injection*, NY TIMES (Feb. 19, 2020), https://www.nytimes.com/ 2020/02/19/us/electric-chair-tennessee.html.

Texas, the state to have conducted the most executions in the modern era, has not conducted an electrocution execution since July 30, 1964, despite having conducted more than 500 executions in that span. Paul M. Lucko, *The History of Capital Punishment in Texas*, TEX. STATE HISTORICAL ASS'N (Nov. 26, 2024), https://www.tshaonline.org/ handbook/ entries/capital-punishment-in-texas.

[4] Since at least 1960 through 1995, electrocution was South Carolina's sole, mandatory method. S.C. Laws 1960 (51) 1917 (amending § 24-3-530); *accord State v. Shaw*, 255 S.E.2d 799, 805 (S.C. 1979) ("Section 24-3-530, 1976 Code, provides that all persons who are convicted of a capital crime and receive a sentence of death 'shall suffer such penalty by electrocution."), overruled on other grounds by *State v. Torrence*, 406 S.E.2d 315 (S.C. 1991). In 1995, the statute made the default method, lethal injection, with electrocution available only upon election, prospectively. S.C. Laws 1995 Act 108 (H.B. 3703) (same). The latest amendment regressed to making electrocution the default method, unless the person elects execution by lethal injection or firing squad. S.C. Laws 2021 Act 43 (S.200) (same).

holdings from 135 and 78 years that electrocution comports with the Eighth Amendment (*In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)) are suspect in that neither actually applies the Eighth Amendment.[5] *Compare Francis*, 329 U.S. at 463–64 (plurality opinion wherein justices contended that a second electrocution could be attempted *even if* the Eighth Amendment applied to the states), *with Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878) (holding, "authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in [the cruel and unusual punishments] category, within the meaning of the eighth amendment."). Scientific evidence suggests that electrocution does not work, as thought, by causing ventricular fibrillation and thereby instantly stopping the heart's pumping function, but by forcing current to cross the high resistance brain tissue generating intense heat, literally cooking the brain. ECF No. 1-3 at ¶¶ 48–51; accord *State v. Mata*, 745 N.W.2d 229, 271, 278 (Neb. 2008) (finding electrocution cruel and unusual under the state constitution because, inter alia, "current flowing through the body will cause thermal heating, known as joule heating," and "it is impossible to predict heating in any particular part of the body because of wide variations in the current flow"); *Dawson v. State*, 554 S.E.2d 137, 143 (Ga. 2001) (finding it violates the state constitution in part because, "the State's experts concur that the brains of the condemned prisoners are destroyed in a process

[5] Over a century ago this Court found that South Carolina's transition from hanging to electrocution did not violate the *ex post* facto clause per U.S. Const. art. 1, § 10, cl. 1. *Malloy v. South Carolina*, 237 U.S. 180 (1915).

that cooks them at temperatures between 135 and 145 degrees Fahrenheit"). Further, use of the electric chair is rife with racial bias and is inextricably tied to Jim Crow justice. ECF No. 25 at 6 n.6.

B. The District Court Avoided the Argument and Evidence Establishing Grave Failings in South Carolina's Performance of the Statutory Alternative Methods.

The District Court scheduled a status conference on the morning of June 11, 2025. Permitting no argument of the actual claim, the District Court mischaracterized the claim as asserting that South Carolina's lethal injection protocol is per se cruel and unusual. Tr.[6] at 9 ("I think the issue here is does lethal injection meet constitutional standards? Is there evidence that the state, the practices and procedures, the protocol does not meet constitutional standards? I think that's the question."). It declined to address the forced choice problem, and any evidence related to the firing squad or electrocution to be irrelevant, because Mr. Stanko does not face these methods on June 13. *Id*. at 9–10 ("I don't think they're relevant to the case. And frankly, I'm not going to chase that rabbit. I mean, I'm not going to do that.").

C. The District Court Effectively Terminated the Litigation Without Issuing a Final Order.

On June 11, 2025, the District Court denied Mr. Stanko's motion for a stay (ECF No. 17) of his June 13, 2025, execution to permit litigation (ECF No. 1). ECF No. 28.

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[6] The transcript is filed in the District Court. ECF No. 29 (text entry noticing the filing of the transcript).

In its disposition of the case, the District Court relied primarily on its mischaracterization of the constitutional violations the Complaint alleges. ECF No. 28 at 5. It reasoned pursuant to *LaGrand*, 526 U.S. at 117–18, that by electing lethal injection, Mr. Stanko waived any constitutional challenge to lethal injection, and that he lacks any standing to challenge the methods he did not elect. *Id*. at 10, 12.

Although this reasoning would clearly support granting the Defendants' motion to dismiss pursuant to Rule 12(b)(6)[7] of the Federal Rules of Civil Procedure (ECF No. 21), the District Court's ruling only addressed the stay motion. Although denial of the stay effectively terminates the lawsuit, it does not do so formally, presenting a jurisdictional problem: there is no final disposition from which to seek writ of certiorari in this Court.

D. The Fourth Circuit Also Denied a Stay of Execution.

On June 12, 2025, the Fourth Circuit summarily denied Mr. Stanko's motion for a stay pending the appeal. Doc. 22. There was no discussion in the filings of the Court's jurisdiction. Although Mr. Stanko contemplated raising issues on appeal related to the District Court's refusal to engage with clear controversies of fact, including, for example, the abundant evidence in the Complaint that only two of the

[7] Notwithstanding the District Court's suggestion that it was in fact assessing credibility and weighing evidence. For instance, with respect to lethal injection, the District Court's ad hominem approach to Dr. Jonathan Groner based on a point not in evidence—that he "has become a regular 'go to' expert for the capital defense bar"—distracts from the Order's failure to identify any basis to contradict, among other points, the doctor's unassailable medical opinion that a single 5-gram dose of pentobarbital is a massive overdose which would certainly cause nearly instantaneous loss of consciousness and a quick death (ECF No. 1-3 at ¶ 13). ECF No. 28 at 7.

three bullets struck Mr. Mahdi and that the firing squad failed to immediately disrupt the heart's ability to sustain blood pressure to the brain against the Defendants' bare assertions that all three bullets struck Mahdi's heart. ECF No. 20-1 at 2 (Defendant Anderson's affidavit). *See* discussion at ECF No.25 at 12–13.

Accordingly, in the absence of a final judgment, the Court of Appeals would only have interlocutory judgment over the disposition of the motion to stay execution submitted to the District Court. 28 U.S.C. §§ 1291 & 1292; *see also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (establishing the conditions when appellate courts have interlocutory jurisdiction over collateral orders).

The Fourth Circuit's Order was filed in the District Court where the case remains open, and where jurisdiction remains. ECF No. 33.

IV. REASONS TO STAY THE EXECUTION

The standard for issuing a stay is an equitable one. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("We state again, as we did in *Nelson* [*v. Campbell*, 541 U.S. 637 (2004)], that a stay of execution is an equitable remedy."). To be entitled to a stay, the movant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ramirez v. Collier*, 595 U.S. 411, 421 (2022) (quotation omitted).

Further, the posture of this case calls for direct consideration of the constitutional significance of the litigation and the importance of this Court

preserving its ability to later accept jurisdiction in this matter to consider the questions manifest in Mr. Stanko's cause. *See Kleppe*, 429 U.S. at 1310.

A. Prospective Questions for the Court

The District Court action challenges South Carolina's 2021-revised execution statute, which designates electrocution as the state's method. S.C. Code Ann. § 24-3-530(A). As noted, to avoid the electric chair, the condemned may elect one of two statutory alternatives, lethal injection or firing squad. *Id.*

This Court has never applied the Cruel and Unusual Punishments Clause of the Eighth Amendment to the electric chair, having upheld its constitutionality as a general matter of due process 135 years ago in *In re Kemmler*, 136 U.S. at 446, and 78 years ago having held, in Louisiana's deplorable handling of the teenager Willie Francis in *Francis*, 329 U.S. 459, that attempting two electrocutions was not unconstitutional. Of course, it was not until 17 years after the Francis execution that this Court held that the Fourteenth Amendment incorporated the Eighth Amendment in the states. *Robinson v. California*, 370 U.S. 660, 666 (1962). Forty years ago, Justice Brennan dissented from the denial of certiorari of a petition questioning whether Louisiana's electric chair constituted cruel and unusual punishment. *Glass v. Louisiana*, 471 U.S. 1080 (1985)

Over the course of the 20th Century, legislatures have either rid their states of the chair or relegated it to an alternative method. Texas, for instance, last conducted an electric chair execution in 1964. *Supra* note 3. South Carolina's iteration of section 24-3-530 of its code enacted sixty-five years ago, in 1960, provided

that those sentenced to death "shall suffer such penalty by electrocution." *Supra* note 4. It was not until 1995 that the legislature amended this section to replace electrocution with lethal injection. *Id*.

Twenty-six years after replacing electrocution with lethal injection, the South Carolina legislature took a step backward, unlike the other capital jurisdictions, by restoring the electric chair as the state's method. In 1912, the General Assembly of South Carolina enacted a change from hanging to electrocution, reorienting the state's capital punishment from jailhouse hangings to executions in the state prison by the chair. *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). This legislation was in keeping with the fundamental movement of execution techniques toward less inhumane methods. *Bucklew v. Precythe*, 587 U.S. 119, 133; *Glossip v. Gross*, 576 U.S. 863, 867–68 (2015); *Malloy*, 237 U.S. at 185 (assigning to General Assembly the "belief that electrocution is less painful and more humane than hanging."). Today, South Carolina is the only jurisdiction that dictates electrocution, unless an alternative election is made.

By reestablishing this atavistic technique as the state's primary method, South Carolina has cynically fashioned a framework that leverages *LaGrand*, 526 U.S. at 119, to foreclose constitutional scrutiny.[8] Mr. Stanko is poised to be the sixth

[8] *LaGrand* holds that a condemned's election of a method eliminates any standing to challenge that method. *Id.* Previously in Mr. LaGrand's case, the Ninth Circuit ruled that his claim that Arizona's statutory alternative of cyanide gas, the method the Third Reich used in exterminating many millions in the Holocaust, was an unconstitutional execution method was unripe. *Id*. at 117 (citing *LaGrand v. Stewart*, 113 F.3d 1253, 1264 (9th Cir. 1998) (citing *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997)). Based on that determination, Mr. LaGrand chose the statutory

execution under this scheme. Each of these six persons have elected either lethal injection or firing squad. Under *LaGrand*, these ostensible choices eliminate any standing to challenge the given method. 526 U.S. at 119.

In these proceedings, Mr. Stanko has not questioned the constitutionality, per se, of either lethal injection or firing squad. After the first firing squad, of Mr. Brad Sigmon, Mr. Stanko expected to elect that method. But by the fifth execution, the botched judicial homicide of Mr. Mahdi on April 11, 2025, the Respondents in this application (Defendants below), established a performance record that rendered each of these methods unconstitutional as applied to Mr. Stanko, or anyone else who would have found himself in this position. The General Assembly, by designing a scheme that places electrocution as its default, forces a selection of an alternative to avoid the awful fate of the electric chair,[9] even—as is the case here—when the alternatives are carried out in grossly inhumane, let alone unconstitutional ways.

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option of cyanide gas to challenge its constitutionality, at which point the Supreme Court established this rule on standing. Thus, the South Carolina General Assembly, by designing a scheme that places electrocution as its default, forces a selection of an alternative to avoid the awful fate of the electric chair, even—as is the case here against the Defendants—when the alternatives are carried out in grossly inhumane, let alone unconstitutional, ways.

[9] The annals of extremely disturbing electric chair executions are voluminous. To focus on one important jurisdiction, Florida, in this regard, various opinions chronicle ghastly events. *See, e.g.*, *Jones v. State*, 701 So. 2d 76, 77–78 (Fla. 1997) (upholding state and federal constitutionality of Florida's electrocution method based on challenge following botched execution of Mr. Pedro Medina on March 25, 1997) ("The flame and smoke observed during Medina's execution were caused by insufficient saline solution on the sponge in the headpiece of the electric chair."); *Provenzano v. Moore*, 744 So. 2d 413, 434 (Fla. 1999) (upholding constitutionality of electrocution method) (quoting deposition of medical examiner). Justice Shaw, dissenting in *Provenzano*, described the available photographic evidence:

This track record places into relief the grave failings of the South Carolina General Assembly's scheme. If Mr. Stanko is permitted to continue his pending litigation in the lower federal courts, this case would present the following critical question: Does the designation of the electrocution method, with statutory alternatives, violate due process and the prohibition against cruel and unusual punishments under the Fourteenth and Eighth Amendments? Subsumed in this question is the matter of the electric chair itself, a bygone method that, as noted above, this Court has never squarely examined under the Eighth Amendment.[10] Constitutional courts that have examined electrocution in this century have reached the obvious conclusion that this 19th century apparatus is more than just antiquated,

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> The color photos taken by DOC show a ghastly post-execution scene: Davis is wearing a white shirt and dark pants and is restrained in the wooden chair by thick leather straps placed across his arms, legs, torso, and mouth; the electrical head-piece is attached to the top of his head with a leather strap that runs under his chin; a sponge placed under the head-piece obscures the entire top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is barely visible above the mouth-strap; although the exterior openings of Davis' nostrils are partially visible, it appears as though the interior openings may be covered by the mouth-strap; a stream of blood pours from his nostrils, flows over the wide leather mouth-strap, runs down his neck and chest, and forms a bright red pool (approximately eight by twelve inches) on his white shirt. The scene is unquestionably violent.

Provenzano, 744 So. 2d at 434–35. Pictures are available online: https://deathpenaltyinfo.org/stories/allen-davis.

[10] This Court has, in dictum, suggested the acceptance of the chair as compliant with the Eighth Amendment. *McCleskey v. Kemp,* 481 U.S. 279 (1987), *Ingraham v. Wright,* 430 U.S. 651 (1977), and *Estelle v. Gamble,* 429 U.S. 97 (1976); *see also Rummell v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

its persistence would demonstrate an intention to mutilate and inflict severe pain. *Mata*, 745 N.W.2d at 257; *Dawson*, 554 S.E.2d at 139.

A secondary question that emerges from South Carolina's conduct and legislative scheme is the tenability of *LaGrand*. A problematic decision since it was handed down, it has always lacked constitutional coherence. While it may be presumed that one facing execution and some semblance of choice in the method will opt for a comparatively less inhumane choice, this plainly does not ensure that that lesser of the two or more evils itself passes constitutional muster. Just because one avoids a less acceptable, and at least potentially unconstitutional method, the relatively better method is far from assured to be constitutional. A scheme of this nature intrinsically fosters a low floor of conduct because it is immune to adequate examination.[11] What this authority has achieved is a sub-constitutional lowest

[11] Amid four electrocutions by Tennessee between 2018 and 2020 under that state's three-drug midazolam protocol, Justice Sotomayor placed into relief the untenable rationale of *LaGrand*, which had been presented in the petitioner's stay application and cert. petition: "Three weeks ago, I expressed my concerns with the Tennessee Supreme Court's rejection of petitioner Edmund Zagorski's challenge to the lethal-injection protocol that the State previously planned to use to execute him." *Zagorski v. Haslam*, 586 U.S. 981, 981–83 (2018) (Sotomayor, J., dissenting from denial of cert.) (citing *Zagorski v. Parker*, 586 U.S. 938, 939 (2018) ("opinion dissenting from denial of application for stay and denial of certiorari"). Justice Sotomayor continued:

> In the wake of that ruling, Zagorski sought instead to be executed by the electric chair. He did so not because he thought that it was a humane way to die, but because he thought that the three-drug cocktail that Tennessee had planned to use was even worse. Given what most people think of the electric chair, it is hard to imagine a more striking testament—from a person with more at stake—to the legitimate fears raised by the lethal-injection drugs that Tennessee uses.

Zagorski, 586 U.S. at 983; *see Zagorski*, 586 U.S. at 939 (noting "mounting evidence that the sedative to be used, midazolam, will not prevent the prisoner from feeling as

common denominator in the execution practices of capital jurisdictions with one or more statutory methods.

B. This Case Meets the Equitable Standard Governing Stay Applications.

1. Likely Success on the Merits Below.

Conspicuously, the District Court failed to dismiss or otherwise adjudicate Stanko's complaint, tacitly recognizing its viability. Whether by prevailing in the District Court or on merits review in the Court of Appeals, this civil rights action is meritorious and should ultimately succeed.

Here, Mr. Stanko has demonstrated a likelihood of success on the merits of his § 1983 Complaint, filed in response to extraordinary developments in the wake of the first five executions after South Carolina resumed conducting them in Fall 2024, and the state supreme court's failure to provide any weighing of the compelling evidence that Mr. Stanko raises, instead relying on the unsupported pronouncements of the Defendants. ECF No. 1-27.

Lethal injection executions were carried out on September 20, 2024, November 1, 2024, and January 31, 2024, each requiring a second dose of pentobarbital rather than the certified "lethal injection . . . by single dose of pentobarbital." ECF Nos. 1-11, 1-12, & 1-13.

With this information suggesting something went wrong with each of the initial doses—a massive overdose of a powerful barbiturate that should be capable of

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if he is 'drowning, suffocating, and being burned alive from the inside out' during a process that could last as long as 18 minutes").

causing immediate unconsciousness and death—the next two elected firing squad, and those executions were carried out on March 7, 2025, and April 11, 2025. Neutral media witness, Jeffrey Collins, reported that the latter execution, unlike the first, did not immediately render the condemned unconscious. Instead, Mr. Mikal Mahdi:

> Mahdi, 42, cried out as the bullets hit him, and his arms flexed. A white target with the red bull's-eye over his heart was pushed into the wound in his chest.
>
> Mahdi groaned two more times about 45 seconds after that. His breaths continued for about 80 seconds before he appeared to take one final gasp.[12]

Expert review of available evidence in the second of the two firing squads (the first such civilian executions in South Carolina history), shows that one of three highly skilled marksmen, positioned *five* yards from Mr. Mahdi, failed to strike his body at all, while the two bullets that did hit him failed to directly strike the heart, instead merely wounding the pericardium and right ventricle with small fragments and leaving Mahdi to blead to death, conscious and enduring the most extreme pain a human can experience until his death.

The Complaint relies primarily on expert opinion evidence from Chris Coleman, an expert marksman and ballistics forensics scientist, Terri Haddix, M.D., a forensic pathologist, and Jonathan I. Groner, M.D., a trauma surgeon, to establish,

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[12] Jeffrey Collins, *South Carolina Executes Second Man by Firing Squad in 5 Weeks*, AP (April 11, 2025), https://apnews.com/article/firing-squad-execution-south-carolina-mikal-mahdi-254669633508120803855524ccc3a9298; cited in ECF No. 1 at ¶ 33.

from all available evidence, that questions of the utmost seriousness cloud the performance of SCDC. ECF Nos. 1-1, 1-2, & 1-3.

This available evidence reflects that those responsible for conducting the Mahdi firing squad intended to miss the direct target and, unlike in the prior firing squad, for Mr. Sigmon, skirt an instantaneous death to instead cause Mahdi's extreme suffering. Contrary to SCDC's unsubstantiated assertion, overwhelming evidence shows only two bullets struck Mr. Mahdi, and owing to location and pathway as well as the nature of the ammunition used, failed to cause massive and instantaneous disruption of the heart's ability to continue pumping blood to the body, thereby continuing to supply the brain with oxygen, sustaining conscious sensation of maximum pain.

Both Dr. Haddix and forensic pathologist Dr. Jonathan Arden (Mahdi's counsel's pathologist) agree that the autopsy, contracted by SCDC, was outside the professional norms under the circumstances especially by failing to take any x-rays, and by taking only one photograph of the body (depicting the two external bullet wounds).

To date, SCDC denies without providing any evidence of its own, expert opinion or otherwise, that it has superadded severe pain, in violation of the Eighth Amendment and state constitution analogue. *E.g.*, ECF No. 20-1. What has transpired over the course of these five executions has undone the core rationale dictating the state supreme court's affirmance of a scheme imposing compulsory election of execution method. Namely, it was the role of the condemned's choice of

constitutional methods that sustained the scheme against the state constitutional challenges in *Owens* and that court ruled, as it had to, without the benefit of any track record of implementation. ECF No. 1 at ¶¶ 93–97.

As for the certified "single-dose pentobarbital" executions, because 5 grams of compounded pentobarbital is a massive overdose, and the protocol calls for second or subsequent doses only if "needed," the first-doses must be understood to have failed one way or another. Dr. Groner details that most botched lethal injection executions are the result of improper establishment or subsequent failure of the intravenous (IV) line, something much more likely to occur in states, like South Carolina, where the IV site is draped and therefore not subject to visual monitoring. Infusion of pentobarbital into the tissue rather than directly into the bloodstream leads to prolonged and painful death and that will not be readily identifiable when the limb is shrouded.

The other reason for a failure can be degradation of the compounded pentobarbital owing to improper storage temperature and humidity and/or use after its safe beyond use date as per U.S. Pharmacopoeia standards for compounded drugs.[13] This problem is exacerbated by reliance on improper stability testing inadequate to show the drug to be used has not degraded. Degraded pentobarbital, in

[13] The United States Pharmacopeia and the National Formulary comprise the scientific authority for pharmaceutical practices. Its Chapter <797> explicitly sets forth controlling criteria with respect to the compounding of pentobarbital, which is defined as a high-risk sterile preparation. *See* ECF 1-5 at ¶¶ 2, 15.

addition to effectively delivering a dose that is not immediately lethal, can also cause extreme pain at the infusion site owing to solids or precipitates in the solution.

Under the new provision to the secrecy or "shield" statute, South Carolina permits no public disclosure of information about efforts to obtain drugs in addition to its extant provisions prohibiting disclosure of any identifying information. S.C. Code Ann. § 24-3-580. The District Court recently upheld the broad construction of this provision—upholding the shielding of information about testing dates and methods, storage information, inventory information, and so on—holding that the shield law does not cause a due process violation. Opinion and Order, *Bixby v. Stirling*, No. 3:24-cv-05072, Doc. 31 at 8, 10, 28–29 n.13, 32 (D.S.C. Oct. 30, 2024)). *Bixby* endorsed the *Owens* rationale that if the prisoner chooses one method, that method is somehow guaranteed to be "less inhumane than other options," foreclosing any Eighth Amendment challenge. *Id.* Accordingly, these important fact questions are unverifiable at this point.

On May 28, 2025, the state supreme court denied Mr. Stanko's Motion to Exercise Certification Oversight, ignoring Dr. Arden's expert opinion and other evidence consistent with that presented in the Complaint, and instead relying on SCDC's unsupported assertions that these five executions were unremarkable, they were conducted in compliance with the secret protocols and, specifically, that all three bullets struck Mahdi and his heart was shot. ECF No. 1-27.

Reliance on these unsupported assertions, especially with no formal findings of fact, violates Mr. Stanko's Fourteenth Amendment due process rights. The

strength of the evidence presented in the Complaint undermines the theory that the State's scheme offering a choice complies with the Eighth Amendment.

These due process violations are exacerbated and nested within the jurisdictional problem caused by the District Court's order, which fails to terminate the litigation without a final, appealable judgment—because it cannot properly do so under civil procedure—but places the cases where it will be rendered moot by Mr. Stanko's execution unless this Court preserves its jurisdiction.

2. The Harm Absent a Stay Could Not be More Irreparable

As Mr. Stanko faces execution within a matter of hours, the harm of a cruel and unusual execution without at least appropriate process to assess the credibility and weight of the evidence Mr. Stanko here marshals against the bare unsupported statements of SCDC personnel, presents a harm that is undeniably irreparable. The Supreme Court has recognized that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases."). Moreover, there is no remedy after the fact to an execution carried out in a cruel and unusual manner by infliction of "maximum pain" that is superadded compared to an execution properly performed.

Finally, absent a stay of the June 13, 2025, execution, Mr. Stanko will be irreparably denied his Fourteenth Amendment due process rights requiring a hearing of evidence and fact finding related to the manner SCDC carries out executions.

3. Balancing of Equities and Interests Favors a Stay

When the Government or, as here, the State, are the opposing party, assessing that party's prospective harm from a stay merges into the weighing of the public interest called for under *Hill*, 547 U.S. at 584. *Nken v. Holder*, 556 U.S. 418, 435 (2009). South Carolina has no legitimate interest in carrying out a cruel and unusual capital punishment. U.S. Const. amend. VIII; S.C. Const, art. I, § 15.

Here, a stay of reasonably limited duration imposes little burden on the State. For a span that would ultimately stretch to more than 13 years, South Carolina did not seek to conduct a single execution.[14] The State has attributed this de facto moratorium to its inability to secure execution drugs under its previous statutory scheme which made lethal injection the default method, with the electric chair as a method only upon election:

> The inability to obtain the drugs brought capital punishment to a halt in South Carolina because the 1995 version of section 24-3-530 made lethal injection the default method of execution. This allowed an inmate effectively to prevent his execution by electing lethal injection, or by simply declining to elect, because the unavailability of the necessary drugs rendered it impossible for the State to carry out the inmate's sentence of death.

Owens, 904 S.E.2d at 586.

[14] Jeffrey Motts was executed on May 6, 2011, and Freddie Owens was executed on September 20, 2024, the bookends of the de facto moratorium.

When the General Assembly, in 2021, amended the scheme to make the electric chair the default if the inmate declined the firing squad or lethal injection if the drugs were available, the *Owens* litigation challenged the constitutionality of the firing squad and electrocution. *Owens v. Stirling*, 882 S.E.2d 858, 859–60 (S.C. 2023). The inmates prevailed, but on the initial appeal, the state court focused on the question of whether lethal injection is "available" under the statute and remanded for discovery on the State's efforts to obtain lethal injection drugs. *Id*. at 861–62. While the remand was pending, the General Assembly amended the secrecy provision in section 24-3-580 to "forbid the disclosure of any information regarding the State's acquisition of drugs for use in carrying out an execution by lethal injection." *Owens*, 904 S.E.2d at 587. Soon thereafter, the State announced that it had obtained lethal injection drugs. *Id*.

These steps taken to end the moratorium were all exclusively within the State's authority. It follows that the State must have deemed its interest in opacity[15]

[15] To be clear, the hypothetical state interest in protecting the security of individual members of anyone associated with executions was already protected under the secrecy statute; the amendment prohibits any information about efforts to obtain lethal injection drugs, regardless of whether any identifying information is at stake. *Owens*, 443 S.C. at 260 (construing section 24-3-580 to "forbid the disclosure of any information regarding the State's acquisition of drugs for use in carrying out an execution by lethal injection").

The State's interest in secrecy is also flatly at odds with the strong policy statement in the Freedom of Information Act. S.C. Code Ann. § 30-4-15 ("The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.").

to be greater than public interests service by carrying out the executions. In light of the effectively voluntary pause on executions, any burden on the State at this point of a stay of reasonable duration to permit an evidentiary hearing and fact finding on the extraordinary circumstances following the first five executions is of relatively little weight.

After executions re-started, the first five had already been out of court for spans of time before their executions ranging from a span of eight months to four years and two months.[16] By contrast, Mr. Stanko's petition for writ of certiorari from denial of federal habeas corpus was denied on May 5, 2025 (*Stanko v. Stirling*, No. 24-6420, 2025 WL 1287095 (U.S. May 5, 2025)), and following a one week delay owing to Confederate Memorial Day, his execution is set for June 13, 2025, just under six weeks later. By the State's own conduct in executing the first five after long delays (at least compared to the probably duration of the stay Mr. Stanko seeks) demonstrates that the State does not deem its legitimate interest diminished by the pause.

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[16] Owens's Petition for Writ of Certiorari ("Cert") was denied on April 19, 2021 (*Owens v. Stirling*, 141 S. Ct. 2513 (2021)), and he was executed September 20, 2024, three years and five months later.

Moore's Cert was denied on November 2, 2020 (*Moore v. Stirling*, 141 S. Ct. 680 (2020)), and he was executed on November 1, 2024, almost exactly four years later.

Bowman's Cert was denied on May 22, 2024 (*Bowman v. Stirling*, 143 S. Ct. 2498 (2023)), and he was executed on January 31, 2025, eight months later.

Sigmon's Cert was denied on January 11, 2021 (*Sigmon v. Stirling*, 141 S. Ct. 1094 (2021)), and he was executed on March 7, 2025, over four years later.

Mahdi's Cert was denied on January 9, 2023 (U.S. No. 22-5536), and he was executed on April 11, 2025, over two years later.

Weighed against the State's attenuated interest in swiftly executing Mr. Stanko is Mr. Stanko's interests in fundamental fairness in protecting his constitutional rights.

C. Mr. Stanko's Counsel Have Pressed this Matter into Court Under an Extremely Narrow Window of Time.

As pleaded (ECF No. 1 at ¶¶ 22–30), on May 16, 2025, the day the South Carolina Supreme Court issued its execution notice for June 13, 2025, Mr. Stanko moved the state supreme court for oversight of the statutory scheme's methods certification procedures, faulting the Defendants in this action for their grossly lacking disclosures in relation to the election of method Mr. Stanko was required to make by May 30, 2025. Defendant Interim Director Anderson complied with the requirement to issue certification of the State's methods by May 21, 2025, which was done by a certification reiterating the averments comprising the prior five executions. On May 23, 2025, the State filed a response to the motion, as the state court had ordered, wherein it relied upon, inter alia, unsupported and unsubstantiable characterizations surrounding both the Defendants' performance of lethal injections and, critically, their firing squad for the late Mr. Mahdi. On May 27, 2025, Mr. Stanko's counsel replied, pointing out these major, persistent deficits in the disclosure of basic information.

On May 28, 2025, the Supreme Court of South Carolina denied Mr. Stanko's motion, wanly accepting the State's bald assertions at face value, notwithstanding any meaningful disclosure, let alone evidence, supporting key claims: *e.g.*, that Mr. Mahdi was struck by three bullets, notwithstanding the presence, as Defendant

SCDC's own autopsist immediately alerted them, of only two bullet holes; that in each of the three lethal injections a second massive overdose of 5 grams of pentobarbital was, pursuant to the purported execution protocol, "needed," in order to extinguish the condemned's life—a need that is unprecedented in the annals of pentobarbital executions in this country and betrays a major failing of the protocol.

In the wake of this state litigation concluding the afternoon of May 28, 2025,[17] Plaintiff's current counsel accepted responsibility for his further litigation and finalized the range of exacting scrutiny, in the form of expert declarations,[18] of the Defendants' performance of South Carolina's methods under this scheme. Crucially, this scrutiny examines the two elective methods as the Defendants have carried them out between September 2024 and April 2025, as opposed to those methods as creatures of "legislative facts."[19] With this expert evidence and analysis, these issues

[17] The state court not only denied the motion but construed a request in a reply filing as invocation of the statutory ability to seek a stay of execution, which the court thereby denied, thus effectively compromising further state litigation.

[18] ECF No. 1-1 (Declaration of Chris Coleman, June 2, 2025); ECF No. 1-2 (Declaration of Terri L. Haddix, M.D., June 2, 2025); ECF No. 1-3 (Declaration of Jonathan I. Groner, M.D., June 3, 2025).

[19] *Owens* considered findings about the execution methods as "legislative facts," viz., "facts—primarily medical and scientific in nature—that are universally true or untrue." 904 S.E.2d at 589. In a footnote to "legislative facts," the Court explained the distinction between that form and "adjudicative facts, which are facts about the particular event which gave rise to the lawsuit and help explain who did what, when, where, how and with what motive and intent." *Id*. at 589 n.4 (cleaned up) (quotations omitted). As *Owens* continued, "In a challenge to the constitutionality of a statute, it is legislative findings—to the extent they are expressed or may be fairly presumed—to which the law requires we defer, not circuit court findings."" *Id*. (citing *Richards v. City of Columbia*, 88 S.E.2d 683, 694 (S.C. 1955)). *Owens* then clarifies the standard for the review of such facts. No court, to date, has considered what the state supreme

reached the District Court the morning of June 6, 2024, and call for meaningful process to consider the constitutional matters in this pleading. ECF No. 1.

The present Complaint sets forth the gravest of concerns and necessitates a stay of execution to permit constitutional assessment of the Defendants performance of the South Carolina scheme's elective methods and, just as important, the constitutionality of the scheme itself, with its default method of electrocution effectively forcing the condemned to make a Hobson's choice between methods carried out with striking indicia of constitutional failings cloaked from scrutiny by a regime of opacity to a degree no other jurisdiction in this country reaches.[20]

V. CONCLUSION

For the foregoing reasons, Applicant Mr. Stanko, through undersigned counsel, respectfully requests that this Court grant an order staying the execution scheduled for June 13, 2025, at 6:00 p.m.

Respectfully submitted,

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court would entertain as "adjudicative facts," in how the Defendants perform these methods.

[20] For example, Texas's secrecy provision protects only "the name, address, and other identifying information" of persons or entities involved in the execution or procurement of lethal injection drugs. Tex. Code Crim. P. Art. 43.14. In the context of requests under the Texas Public Information Act, the state's attorney general has construed this narrowly, and has required public disclosure of documents redacting only such identifying information. *See, e.g.*, Open Records Letter Rulings: OR2024-006179 (Feb. 22, 2024), OR2023-041114 (Dec. 4, 2023), OR2023-11577 (Mar. 31, 2023), OR2018-20957 (Aug. 23, 2018), OR2016-00038 (Jan. 4, 2016), available at, https://www2.texasattorneygeneral.gov/open/index_orl.php.

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