IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83181

Zane Michael Floyd

Appellant,

v.

The State of Nevada Department of Corrections, Charles Daniels, Director, Department of Corrections; and Ishan Azzam, Chief Medical Officer of The State of Nevada,

Respondent.

Appeal from Eighth Judicial District Court
Clark County, Nevada
The Honorable Adriana Escobar

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. The Clark County Public Defender's office represented Mr. Floyd in his pretrial, trial, and direct appeal proceedings.
2. David M. Schieck represented Mr. Floyd during his initial state post-conviction proceedings.

3. The Federal Public Defender, District of Nevada, has represented Mr. Floyd in all subsequent proceedings, including the proceedings below.

/s/ David Anthony
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I. JURISDICTIONAL STATEMENT

This is an appeal from the district court's June 17, 2021, order denying Appellant Zane M. Floyd's Motion for Temporary Restraining Order and Preliminary Injunction. 2AA361–73. On July 2, 2021, Floyd filed a timely Notice of Appeal pursuant to NRAP 4. 2AA374–76. The district court's order denying Floyd's motion is appealable under NRAP 3A(b)(3) as it is an order, in a civil action, "refusing to grant an injunction."

II. ROUTING STATEMENT

Although appeals involving the grant or denial of injunctive relief are presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(12), this matter must rightfully remain with the Nevada Supreme Court for several reasons.

First, pursuant to NRAP 17(a)(1), the Nevada Supreme Court retains original jurisdiction over "all death penalty cases." Floyd seeks injunctive relief to prevent the State of Nevada from moving forward with his planned execution pursuant to an unconstitutional statute. Second, the issues raised in this appeal are matters of first impression

within the State of Nevada involving questions of law under the Nevada Constitution and matters of statewide public importance. NRAP 17(a)(12). And finally, because Floyd has multiple pending matters before this Court (Case nos. 83225, 83167, and 83108), judicial economy favors keeping all of the cases before the same forum.

Accordingly, the Nevada Supreme Court is the proper forum for this appeal.

III. STATEMENT OF THE ISSUES

1. Did the district court misapply the standard established in *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985), by finding that NRS 176.355 provides suitable standards to guide the Director of the Department of Corrections in formulating an execution protocol, and therefore determining that Floyd did not have a reasonable likelihood of success on the merits of his separation of powers claim?

2. Did the district court err by failing to weigh Floyd's compelling interest in avoiding irreparable harm when Floyd raised a

substantial issue going to the merits of his claim before denying injunctive relief?

IV. RELEVANT STATUTORY PROVISION

NRS 176.355. Execution of death penalty: Method; time and place; witnesses

1. The judgment of death must be inflicted by an injection of a lethal drug.

2. The Director of the Department of Corrections shall:

(a) Execute a sentence of death within the week, the first day being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.

(b) Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.

(c) Be present at the execution.

(d) Notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.

(e) Invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The Director shall

> determine the maximum number of persons who may be present for the execution. The Director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution.
>
> 3. The execution must take place at the state prison.
>
> 4. A person who has not been invited by the Director may not witness the execution.

V. STATEMENT OF THE CASE

This appeal arises from the district court's denial of Floyd's Motion for Preliminary Injunction and Temporary Restraining Order to prevent the State of Nevada from executing him using a novel, experimental, and untested lethal injection protocol established pursuant to an improper delegation of legislative authority to the Executive under NRS 176.355.

On March 26, 2021, Clark County District Attorney Steve Wolfson announced that his office would be seeking a warrant of execution against Floyd. On April 16, 2021, in addition to other pleadings, Floyd filed a Complaint for Declaratory and Injunctive Relief and a Motion for Temporary Restraining Order with Notice and Preliminary Injunction

in the Eighth Judicial District Court. 1AA001–16; 1AA017–30. On April 30, 2021, the Nevada Department of Corrections (NDOC) Defendants filed an Opposition to Floyd's Motion. 1AA059–69. NDOC Defendants argued that Floyd was not entitled to injunctive relief because he could not establish a likelihood of success on the merits of his claim that NRS 176.355 was unconstitutional.

Floyd filed his Reply to NDOC Defendants' Opposition on May 17, 2021. 1AA070–86 Floyd responded that NRS 176.355 was, in fact, an unconstitutional delegation of legislative authority because it failed to establish sufficient suitable standards to guide the Director of NDOC in carrying out the execution.

On June 17, 2021, the court filed an Order Denying Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction. 2AA361–73. This appeal follows.

VI. STATEMENT OF THE FACTS

On June 8, 2021, the district court held a hearing to allow argument on Floyd's motion.[1] During that hearing, counsel for Floyd referenced testimony from the current Director of the Nevada Department of Corrections Charles Daniels previously taken during a hearing in federal court on May 6, 2021. *See* 2AA320 (referencing the hearing in federal court), *and* 1AA191–234 (Transcript of NDOC Director Daniels' testimony). During the hearing in federal court, Director Daniels acknowledged that he was not medically trained and did not have the ability to form an opinion concerning important questions such as the efficacy of different lethal injection drugs or the appropriate dosages and sequencing.

During the May 6, 2021, hearing, Director Daniels testified that the execution protocol had not yet been finalized.[2] 1AA194. He stated, among other things, that he was still in the process of looking at the

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[1] For the sake of brevity, a detailed statement of the facts of the offenses for which Floyd was convicted and sentenced to death are omitted from this appeal but may be found in the direct appeal opinion of this Court. *See Floyd v. State*, 118 Nev. 156, 42 P.3d 249 (2002).

[2] The execution protocol has since been finalized.

different drugs to be used and that he is not a pharmacist, scientist, or medical professional. *Id*. at 1AA194, 1AA201–02, 1AA230. While Director Daniels had one meeting with Nevada's Chief Medical Officer (CMO), he did not provide details concerning the length of that meeting or how he would consider input, if any, from the CMO. *Id*., at 1AA206–07. While Director Daniels testified that he expected to meet with the CMO again if there were additional pharmaceutical medications available, he did not provide information concerning the nature or depth of the conversations, or whether the conversations centered around specific medical concerns for Floyd. *Id*., at 1AA209–10. At the time that his testimony was taken, there were no plans for additional future meetings with the CMO. *Id*., at 1AA210. And Director Daniels has unilateral authority concerning what drug or drugs to bring to the CMO for the basis of any opinion. *Id*., at 1AA230. Director Daniels also did not provide any information concerning the acquisition of the drugs. *Id*., at 1AA221.

Director Daniels did not provide important details concerning the development of the execution protocol during his testimony but again made clear that he maintains unilateral decision-making authority.

It is clear from Daniels's testimony that these determinations extend beyond mere fact-finding as necessary to constitute a proper delegation of legislative authority.

VII. SUMMARY OF ARGUMENT

To constitutionally delegate authority to an executive agency, this Court has held a statute must include sufficient suitable standards to aid the executive agency in its limited fact-finding determinations. *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 151, 697 P.2d 107, 108-09 (1985). NRS 176.355 impermissibly delegates legislative authority to the Nevada Department of Corrections (NDOC) by improperly permitting the Director to make determinations beyond mere fact-finding. The Director, who is not medically trained or knowledgeable, is given sole authority to select the lethal drug(s) and protocol that will be used to execute Floyd. Nevada's death penalty statute, NRS 176.355, does not provide sufficient suitable standards to guide the Director of

NDOC and leaves many questions open concerning how the drugs are selected, administered, and the extent to which the Director must consult with, consider, and utilize input from medical professionals when making these selections. This is an issue of first impression in Nevada concerning the constitutionality of NRS 176.355.

Floyd requested a temporary restraining order and injunctive relief, which the district court denied. In denying that request, the district court misapplied the standard for reviewing non-delegation claims. By applying the wrong standard, the district court incorrectly determined that Floyd was not entitled to injunctive relief because he could not make a threshold showing of a reasonable likelihood of success on the merits. According to the reasoning of the court and the State, the Legislature must do nothing more than state a means of execution and all the remaining details may be left to the sole discretion of the Director. But the rule the court applied would not necessarily even require a means of execution to be stated to constitute a constitutional delegation of authority. The district court then failed to address the second requirement for injunctive relief: the irreparable harm that will

befall Floyd if the defendants' actions are not enjoined. Here, there can be no question that, if permitted to proceed, Defendants will execute Floyd, an act that cannot be undone.

As the district court incorrectly found that NRS 176.355 was constitutional and used that incorrect finding as the basis for the denial of injunctive relief, this Court must conclude that the district court abused its discretion and reverse the June 17, 2021, order denying Floyd injunctive relief and remand with instructions to grant the motion.

VIII. ARGUMENT

A. STANDARD OF REVIEW

The instant appeal presents a mixed question of law and fact. In such circumstances, this Court must review the district court's findings of historical fact for clear error but review the legal consequences of those factual findings de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157–58 (2008). For this two-step analysis to be effective, district courts must make specific factual findings. *Id.* The issues raised in this appeal relate to how the district court applied the standards

required for a preliminary injunction. Since there was no evidentiary hearing below, there are no factual findings presented here to which deference is owed.

Although the district court has discretion in determining whether to grant a preliminary injunction, its decision will be reversed when an abuse of discretion has occurred, or where it has based its decision on an erroneous legal standard, or on clearly erroneous findings of fact; however, questions of law are still reviewed de novo. *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015).

Here, the district court misapplied the law. In reviewing Floyd's motion, the court was required to consider whether he had: (1) a likelihood of success on the merits of his nondelegation claim; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damages are an inadequate remedy. *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). But the district court erred in its application of each prong. The district court misapplied the underlying law in reaching its conclusion

that Floyd did not demonstrate a likelihood of success on the merits, and further, improperly ignored the second prong of the analysis when it failed to consider the irreparable harm that Floyd will suffer if injunctive relief is not granted. This improper application of law and incorrect legal conclusion of the district court must be reviewed *de novo*. Further, as the district court misapplied the law, it also abused its discretion in denying Floyd's motion for injunctive relief.

B. Nevada caselaw supports Floyd's position that NRS 176.355 unconstitutionally delegates legislative authority.

1. This Court has an established standard for ensuring that a delegation of authority by the Legislature has sufficiently suitable standards to guide an agency's factual determinations.

In *Sheriff, Clark Cty. v. Luqman,* this Court found that the Legislature constitutionally delegated authority to an executive agency. 101 Nev. 149, 151, 697 P.2d 107, 108–09 (1985). In that case, the respondents argued that the Legislature had made an unconstitutional delegation to the State Board of Pharmacy by allowing the Board to categorize "drugs into various schedules according to the drug's propensity for harm and abuse." *Id.* at 153, 697 P.2d at 109–10.

However, this Court found that because the Legislature included both general and specific guidelines detailing numerous factors for the Board to consider when scheduling drugs, and further listed requirements for classifying drugs in certain schedules, the Board was merely conducting fact-finding and thus the delegation was proper. *Id.* at 154, 697 P.2d at 110-11. This Court also held that the Legislature must make the application or operation of a statute complete within itself and an administrative agency may only ascertain whether certain factors or conditions for the operation of the statute exist. *Id.* Thus, a constitutional delegation of authority vests the delegated agency with mere fact-finding authority and not the authority to legislate as "[t]he agency is *only* authorized to determine the facts which will make the statute effective." *Id.* at 154, 697 P.2d at 110. Inclusion of "sufficient suitable standards" to guide the agency was the key to preventing an improper delegation of legislative authority. *Id.*

This Court continues to apply the suitable and sufficient *Luqman* standard. Just last year, the Court found that the Legislature's delegation of authority to an agency was only proper where it specified

suitable and sufficient standards by requiring the agency to find certain facts before applying the regulation. In *Smith v. Bd. of Wildlife Commissioners*, the Board of Wildlife Commissioners established a statute governing the frequency for trappers to check their snares, traps, and similar devices. 461 P.3d 164, 2020 WL 1972791, at *1 (Nev. 2020). In finding that the delegation was proper, this Court applied *Luqman* and found that the Legislature provided sufficient suitable standards when it allowed the agency to engage in fact-finding to determine whether an area was "populated" or "heavily used," as a predicate determination for requirements that traps be checked more frequently. *Id.*, at 2. The Legislature left the application of the statute dependent upon the existence of certain facts or conditions to be determined by the agency (specifically, a determination of whether an area was heavily used or populated). *Id.*

2. The district court did not apply the established *Luqman* standard, but instead applied its own incorrect standard.

Here, the district court did not apply the *Luqman* "sufficient suitable standards" requirement. Rather, the district court incorrectly

determined that NRS 176.355's language was "not ambiguous." *See* 2AA368; 2AA338–42. Specifically, the district court determined that the words "lethal" and "injection," as used in NRS 176.355 were "not ambiguous," therefore, the statute did not create an improper delegation of legislative authority. 2AA368. The district court used the same reasoning at the hearing, stating "I've read it over,…it's not ambiguous …." 2AA338–42. This reasoning is inadequate under the *Luqman* standard which requires a finding that the statute include suitable and sufficient guidelines to be complete. A statute that does not specify any means of execution could also be unambiguous. But it would not provide sufficiently suitable standards to guide the Director's discretion.

By using this incorrect standard, the district court incorrectly determined that NRS 176.355 constitutes a lawful delegation because the statute does not authorize NDOC to establish a new method of punishment. *See* 2AA339–40. However, the exclusivity of the method provided by statute, namely, lethal injection, does not negate the fact

that the Legislature's failure to provide sufficient suitable standards still empowers NDOC to act beyond mere fact-finding.

Directly to Floyd's point that the statute has not provided suitable sufficient standards to guide NDOC, in the district court's order defining "injection," the definition used by the court *is* ambiguous as it contains multiple meanings: subcutaneous or hypodermic; intramuscular; or intravenous. None of these various definitions for the term "injection" are outlined with specificity in NRS 176.355. *See* 2AA368. The statute also leaves unanswered whether the Director has any obligation to accept guidance or direction received from the CMO of Nevada, or from any other medical professional for that matter, in the selection of drugs and the development of the execution protocol. The statute requires the Director to "consult" with the CMO, but is silent as to whether the Director is to follow the guidance provided by the CMO or may simply ignore that guidance and unilaterally decide, perhaps without any input from a medical professional, what drugs are to be employed. Open questions like this within the statute are precisely what make this statute an unconstitutional delegation of legislative

authority. Guidance concerning how the lethal injection protocol is to be administered must come from the Legislature.

The district court's own "not ambiguous" standard has no basis in law and cannot be sufficient. Because the district court did not apply the *Luqman* standard requiring a statute to contain sufficient suitable standards, its order denying Floyd's request for injunctive relief was erroneous and should be reversed.

3. The Nevada legislature has not provided sufficient suitable standards to guide the implementation of NRS 176.355; therefore, Floyd can establish a likelihood of success of the merits.

The district court erroneously found that NRS 176.355 constitutionally delegates lawmaking authority to NDOC and abused its discretion by determining that Floyd was not entitled to injunctive relief because he could not succeed on the merits of his non-delegation claim. However, this Court has previously addressed the issue of legislative delegation generally, and had the appropriate standard been applied, Floyd would have shown a likelihood of success on the merits.

a. Lack of suitable and sufficient standards vests the Executive with law making authority

As an initial matter, the district court misapprehended Floyd's argument by improperly focusing on the fact that this Court has found NRS 176.355 to be constitutional *on Eighth Amendment grounds*. *See, e.g.*, *State v.* Gee, 46 Nev. 418, 418, 211 P.676, 681–82 (1923) *and McConnell v. State*, 120 Nev. 1043, 1055, 102 P.3d 606, 615–16 (2004). Floyd argues that NRS 176.355 is unconstitutional under the *separation of powers doctrine,* not the Eighth Amendment. Thus, application of the separation of powers doctrine to Nevada's death penalty statute is a matter of first impression for this Court.

Turning to the "sufficient suitable standards" test established in *Luqman*, the Nevada Legislature has properly delegated authority to agencies where the Legislature provided sufficient suitable standards to guide the agency's fact-finding. *See Pine v. Leavitt*, 84 Nev. 507, 510–12, 445 P.2d 942, 944–45 (1968) (holding the Legislature's delegation of authority to a licensing board constitutional when sufficient standards and guidelines for issuing licenses were established and the Board *only*

engaged in fact-finding to determine which applicants met those requirements); *City of North Las Vegas v. Public Service Commission*, 83 Nev. 278, 281–82, 429 P.2d 66, 68 (1967) (concluding that the Legislature's delegation was lawful where standards to guide the administrative body's decisions were placed *in the statute*); *City of Las Vegas v. Mack*, 87 Nev. 105, 109, 481 P.2d 396, 398 (1971) (holding the statute's delegation to county commissioners was lawful because *sufficient guidelines were stated*); *Smith v. Board of Wildlife Commissioners,* 461 P.3d 164, 2020 WL 1972791 (Nev. 2020) (finding statutory language mandating that an administrative agency adopt regulations that require "[a] person to visit [his or her] trap . . . at least once each 96 hours" constituted sufficient guidance).

Applying the *Luqman* test here shows that NRS 176.355 unconstitutionally delegates legislative authority to the executive because it does not provide sufficient suitable standards to guide agency decision-making, thereby permitting the agency to act beyond mere fact-finding. NRS 176.355 is silent regarding the multitude of imperative questions concerning the protocol itself, including the drugs

to be used, the method of injection, the qualitative input from the Chief Medical Officer, and others. [3] The Legislature has failed to outline any of the following non-fact-finding decisions in NRS 176.355:

> - The class(es) of drug(s) to be used in executions;
>
> - The dosage and sequencing of the drug(s);
>
> - The quantity and quality of the drug(s);
>
> - The number of drugs to be used (e.g. single drug protocol vs. multiple drug protocol, two drug protocol vs. three drug protocol, etc.);
>
> - The method for administering each of the drugs and, assuming the only method to be intravenous administration, how and where the intravenous ports are to be established;
>
> - From where and whom the prison is to procure the drug(s) to be used in the lethal injection;
>
> - The training, qualifications, and experience required of those who are appointed to gain intravenous access and administer the lethal injection drug(s);
>
> - How those responsible for gaining intravenous access and administering the lethal injection drug(s) are to be trained to operate under the

[3] Notably, the district court did not examine whether NRS 176.355 provides suitable sufficient standards to guide the executive in determining the answers to any of these open questions. The district court instead focused on the two words "lethal" and "injection" when it incorrectly determined that the statute was not an improper delegation of legislative authority. *See* 2AA368; 2AA338–42

> protocol, and the minimum amount of training required in order to obtain proficiency and to provide for a constitutionally acceptable execution;
>
> - How much notice the condemned will receive once drug(s) are identified; and
>
> - The suitability and sufficiency of the execution location.

The district court failed to apply the *Luqman* standard, finding that "the separation of powers doctrine is a floor…it's specifying the minimum standard to determine whether or not a branch of government is doing something that properly belongs to another branch." 2AA361–73. There is no authority supporting this proposition. *Luqman* is clear: the Legislature may constitutionally delegate authority to an agency *only* when the statute includes "sufficient suitable standards" to guide the agency in finding facts to carry out the enforcement of that statute. 101 Nev. at 154, 697 P.2d at 110. There are no standards within the text of NRS 176.355 to guide NDOC in fact-finding determinations and there are no answers to the important questions left open stated above.

b. NRS 176.355's consultation requirement is flawed and provides no mandatory standard that the Director must follow the guidance of qualified medical personnel when creating and implementing the protocol

The statute is also silent concerning the Director's consultation requirements with Nevada's Chief Medical Officer ("CMO"). Although NRS 176.355 requires that the Director consult with the CMO, the Legislature fails to provide suitable standards regarding a "consult," such as: (1) the means of communication (in person or video-conferencing media, written via email or letter); (2) the duration of communications; and (3), most importantly, the weight, if any, that the Director is required to afford the opinion and advice of the CMO. Indeed, the Legislature does not even require the Director to specifically give weight to or follow any advice given by the CMO. The statute further provides no guidance to a Director who would seek to abdicate responsibility and place all weight on the shoulders of the CMO—or, conversely, a CMO who refuses to consult with a Director. The consultation requirement is ultimately meaningless without additional guidance.

c. Without suitable sufficient standards, an unqualified individual has unfettered discretion to exercise legislative authority and independently create Nevada's execution protocol

Director Daniels is not qualified to make unilateral medical decisions that go beyond mere fact-finding to guide the enforcement of law. Under NRS 176.355, Director Daniels, who is not medically trained, is granted authority to determine the entirety of the lethal injection protocol to be used in Floyd's execution. This includes the authority to unilaterally determine the method of injection, including the drug(s) to be used, their dosages, and sequencing, with only a formalistic consultation with the CMO that he is not required to follow or incorporate into any aspect of the protocol. NRS 175.355 is also silent concerning the timing of when such consultation must occur and when the final protocol must be published to Floyd.

These decisions go beyond a mere "determination of fact." When dealing with a protocol that will end a person's life, the very act of consulting, weighing, and rendering a decision concerning which drugs should be used and how the drugs should be injected into the

condemned person is necessarily more than merely making a determination of a fact. This is an exercise in law making. Accordingly, NRS 176.355 presents an unconstitutional delegation of legislative authority. Based on the above, it is clear that had the district court applied the correct standard, Floyd would have established a reasonable likelihood of success on the merits. Floyd was therefore entitled to injunctive relief.

C. As an issue of first impression in Nevada, this Court may look to other jurisdictions for guidance.

Although this Court has an established standard for determining whether a statute improperly delegates legislative authority, this Court has never had to decide this precise question relative to Nevada's death penalty statute. As this is a matter of first impression for Nevada, it is helpful to look to outside jurisdictions for guidance. *See Dixon v. State*, 137 Nev. __, 485 P.3d 1254, 1258 (2021) (turning to other jurisdictions to resolve a matter of first impression); *Martinez Guzman v. Second Judicial Dist. Court, et. al.*, 137 Nev. __, --- P.3d ---- , 2021 WL 4487900137, at *4, (September 30, 2021) (turning to outside jurisdictions for guidance on a matter of first impression).

Although currently the minority view,[4] this Court should adopt the legal analysis of the Arkansas Supreme Court in *Hobbs v. Jones* because it uses a fact-finding standard similar to Nevada's to determine the constitutionality of statutes. 412 S.W.3d 844, 850 (Ark. 2012). In *Hobbs*, the Arkansas Supreme Court held that its lethal injection statute was facially unconstitutional because it delegated unfettered discretion to the executive. *Id*. Specifically, because the statute failed to determine "the chemicals to be used and the policies and procedures for administering the lethal injection," it delegated more authority than just "the power to determine certain facts, or the happening of a certain

[4] Notably, in the jurisdictions where legislative delegation of the state's lethal injection protocol has been upheld, the statutes contain more detail than NRS 176.355. *See* Tex. Code Crim. Proc. Art. 43.14; *Ex parte Granviel*, 561 S.W.2d 503, 507 (Tex. Crim. App. 1978); 11 Del. Code § 4209 (held unconstitutional on other grounds by *Rauf v. State,* 145 A.3d 430 (2016)); *State v. Deputy*, 644 A.2d 411, 417 (Del. Super. 1994); Idaho Code § 19-2716; *State v. Osborn*, 631 P.2d 187, 201 (1981); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 302-09 (2018) ("[T]he death penalty shall be inflicted by . . . an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections and Rehabilitation."); *Cook v. State*, 281 P.3d 1053, 1055-56 (Ariz. App. 2012) ("Penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.").

contingency, on which the operation of the statute is, by its terms, made to depend." *Id.* at 850–51. The court took issue with the executive's "absolute, unregulated, and undefined discretion" to choose which chemicals would be used and the quantity without any guidance provided from the legislature on how to choose those chemicals. *Id.* at 854. The Arkansas Court further held that such discretionary power may only be delegated by the Legislature to a state agency when reasonable guidelines are provided. *Id.*, at 852.

The standard established by the Arkansas Supreme Court in *Hobbs* mirrors the standard set by this Court in *Luqman*. 101 Nev. 149, 151, 697 P.2d 107, 108–09 (1985). Applying this standard, the Arkansas Supreme Court determined that the statute gave the Arkansas Department of Corrections the power to decide *more* than just the facts and *all* the contingencies with no reasonable guidance given, absent the generally permissive use of one or more chemicals, including the injection preparations and implementation. *Hobbs*, 412 S.W.3d at 854. Moreover, when comparing the outcome in *Hobbs* to the case at hand, a finding of improper delegation is even more necessary here because the

Arkansas statute is more detailed than NRS 176.355, and the Arkansas Supreme Court still found it included insufficient guidance to constitute a constitutional delegation.

While Floyd recognizes the position he urges is the one adopted by a minority of jurisdictions it is also relevant that some other states have either the details required for a constitutional delegation codified in their current statutory schemes or have not yet addressed the question presented in their case law. The first category of states will not have an occasion to decide the question, while the second may ultimately decide that the minority approach is the better reasoned one. For example, representing the first category of jurisdiction, several states have lethal injection statutes that include standards detailing the type, quantity, or quality of drugs required. *See e.g.*, Ark. Code Ann. § 5-4-617(c) (2020); Miss. Code Ann. § 99-19-51(1) (West 2020); Or. Rev. Stat. § 137.473(1) (West 2020); Wyo. Stat. Ann. § 7-13-904(a) (West 2020); 61 Pa. C.S. Ann. § 4304(a)(1) (West 2010); Utah Code Ann. § 77-19-10(2) (West 2020). Other states, representing the second category, including Nevada, have simply not yet addressed whether the legislature's

delegation to the executive branch is unconstitutional. *See*, *e.g.*, NRS 176.355; Okla. Stat. Tit. 22, § 1014; Ga. Code Ann. § 17-10-38; La. Rev. Stat. § 15:1569; *see also State v. Kleypas*, 40 P.3d 139, 254-55 (Kan. 2001) (overruled on other grounds by *State v. Wilson*, 431 P.3d 841 (Kan. 2018)) (addressing only whether Kansas's lethal injection protocol constitutes cruel and unusual punishment for failure to adopt specific guidelines).

The approach taken by the Arkansas Supreme Court is the only one that adequately protects both the democratic process and Floyd's weighty interest in a humane execution. The process of legislators considering pending legislation contains all the hallmarks of transparency and accountability that are lacking under NRS 176.355. Qualified medical witnesses can testify regarding the efficacy of, and the humaneness of, different drug combinations before the Legislature and the public can consult legislative history to determine how the ultimate decision was made. This is an important debate that has never occurred in this state. This important check on executive authority also minimizes the risk that the decision ultimately made will result in the

use of an execution protocol that is cruel and unusual under the state and federal constitutions.

In determining the constitutionality of a legislative delegation, Nevada, like Arkansas, *only* permits fact-finding authority to be delegated and requires the Legislature to provide sufficient standards which will guide the decisions made by the agency. *Id*. These unique similarities distinguish *Hobbs* from other states with dissimilar outcomes and make adopting the reasoning used therein the most reasoned approach for this Court, despite it being the minority position among the states. Accordingly, along with controlling authority supporting Floyd's argument, persuasive authority from Arkansas also supports a holding that NRS 176.355 is an unconstitutional delegation of legislative authority.

D. The district court erred by failing to consider the irreparable harm Floyd will suffer if injunctive relief is not granted.

1. The district court improperly determined that Floyd was not entitled to injunctive relief after it improperly found that Floyd did not establish a likelihood of success on the merits of his claim.

Along with failing to apply the *Luqman* "suitable sufficient standard," the district court also incorrectly failed to consider whether Floyd had satisfied the other requirements for a preliminary injunction or temporary restraining order. Specifically, the district court failed to consider the irreparable harm factor by refusing to weigh Floyd's interest in his life against the State's minimal interest in moving forward with the execution before the Legislature makes a decision on the execution protocol. The court also completely failed to consider the irreparable harm that would result by ignoring the public's interest in ensuring that executions in the state of Nevada proceed in conformity with constitutional standards.

NRS 33.010 provides for injunctive relief in order to prevent the State from violating the constitutional rights of its citizens. Injunctive

relief will be granted where (1) there exists a likelihood of success on the merits; and (2) there is a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damages are an inadequate remedy. *Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). As discussed above, Floyd established a likelihood of success on the merits. And because he will face an irreparable harm, he can meet both requirements and is therefore entitled to injunctive relief.

2. Although Floyd can establish a reasonable likelihood of success on the merits, such a showing is not required to grant injunctive relief.

The district court failed to conduct any analysis concerning the irreparable harm that will come to Floyd if injunctive relief is not granted, despite this prong's relevant and imperative place in the injunctive relief analysis. 2AA346. The district court denied Floyd's request for injunctive relief because it determined that Floyd was unable to establish a likelihood of success on the merits relying on *Finkel v. Cashman Pro., Inc.,* 128 Nev. 68, 72, 270 P.3d 1259, 1262

(2012). 2AA363. The district court's reliance on *Finkel* is misplaced. A movant does not always need show a probability of success on the merits. *See, e.g.*, *Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000). Where a party presents a substantial case on the merits when a serious legal question is involved and can show that the balance of equities weighs heavily in favor of granting the stay, a stay can be granted without establishing a reasonable likelihood of success on the merits. *Id*. Floyd presents serious legal questions related to the State's ability to use an untested and experimental lethal injection protocol created exclusively by an unqualified individual with no required input from the CMO. In this case, Floyd was not required to show a likelihood of success on the merits in order to obtain a preliminary injunction. Accordingly, the district court erred when it failed to consider Floyd's and the public's interests.

Further, the district court noted "the Court should also weigh the relative hardship of the parties and the public interest." 2AA363, *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev.

712, 721, 100 P.3d 179, 187 (2004). The district court, however, specifically declined to take this step, citing *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) as support for its omission. 2AA371 In *Boulder Oaks*, this Court ended its analysis upon finding that Respondent Andrews did not establish a likelihood of success on the merits and reversed the district court's order granting injunctive relief without conducting a balancing of interests—a factual scenario vastly distinguishable from the issue here. There, Andrews sought an injunction to prevent the community association from amending its covenants, conditions, and restrictions. No party risked their life in that litigation, despite all financial interests involved. Here, the State seeks to execute Floyd. There can be no question that the district court should have given due consideration to Floyd's interests and hardship, and also to the interests of the general public in having a humane execution protocol that comports with constitutional standards. The harm that will befall Floyd if injunctive relief is not granted will be irreparable and permanent, and far outweighs the Defendant's interests. Indeed, the only harm

Defendants will suffer is delay in carrying out Floyd's execution, a harm this Court does not recognize as irreparable. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 2004) (citing *Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000)).

There can be no question that only injunctive relief can prevent the irreparable harm Floyd will suffer. If NDOC is permitted to move forward with its untested protocol developed by a non-medical professional without meaningful input from the CMO, it is reasonably likely Floyd will suffer the cruel and inhumane treatment expressly prohibited by the Eighth Amendment. The interests of the defendants in this matter are far outweighed by not only Floyd's interest in his constitutional right against inhumane treatment, but also his interest in life.

3. Public policy considerations demand a democratic process.

Democracy requires that the Legislature, not the Executive, make law. The Legislature is the entity with the most resources, public accountability, and transparency to ensure that the separation of

powers doctrine, which is integral to Nevada's democratic process, remains protected. *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967). Even if the Legislature delegates authority, the Executive's discretion is limited and guided by the Legislature's standards.

The entire premise of the modern administrative state rests on a claim about institutional competency, and underlying that claim is an assumption of agency expertise. Corinna Barrett Lain, *Death Penalty Exceptionalism and Administrative Law*, 8 Belmont L. Rev. 552, 561 (2021). Reality, however, shows the flaw in this assumption. The person in charge of the state DOC--the DOC director, or commissioner in some states--has no training or expertise remotely relevant to lethal injection. *Id.*, at 562. Corrections department personnel may be experts in prison discipline and security, but lethal injection is more akin to a medical procedure. *Id*.

In Nevada, a plain reading of NRS 176.355 shows that the Director of NDOC is the sole individual charged with developing and carrying out the execution protocol. The Legislature has improperly delegated its lawmaking powers to the executive branch by permitting

Director Daniels, untrained in medicine, to unilaterally determine the execution protocol without any regard to the weight of the opinion provided by the CMO and without public comment or a transparent process.

Public policy demands that the protocol be developed by the proper lawmaking body—the legislature—where proposed legislation undergoes a period of investigation and public comment to ensure that the interests of Nevada and affected individuals are duly considered. This investigation necessarily includes testimony from trained members of the medical community who can intelligently comment concerning the issues distinctly not addressed by the current statute: the classifications of drugs to be utilized, the specific drugs to be used, the potential interactions and effects of different drugs, the risks of pain associated with different drugs and mixtures, and more as stated above.

An open and public legislative investigation also provides an opportunity for public comment and debate—the touchstone of this country's democratic process. *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (Scalia, J. dissenting) ("It is a proud boast of our democracy that

we have a government of laws and not of men."). These important considerations of public policy further militate in favor of following *Luqman* as applied in Arkansas in the *Hobbs* case.

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IX. CONCLUSION

For the foregoing reasons, Floyd requests that this Court reverse the district court's order denying his motion for preliminary injunction and remand the case with instructions to enjoin NDOC from carrying out an execution until the Legislature amends NRS 176.355 in a manner that is consistent with state constitutional standards.

DATED this 5th day of November, 2021.

Respectfully submitted,

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1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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3. Finally. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that

this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 5th, 2021. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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