No. 83181

IN THE SUPREME COURT OF THE STATE OF NEVADA

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,

Respondents.

On Appeal from the Eighth Judicial District Court
The Honorable Adriana Escobar
District Court Case No. A-21-833086-C

RESPONDENTS NEVADA DEPARTMENT OF CORRECTIONS AND DIRECTOR CHARLES DANIELS' ANSWERING BRIEF

AARON D. FORD
Attorney General
STEVE SHEVORSKI (Bar No. 8256)
Chief Litigation Counsel
JEFFREY M. CONNER (Bar No. 11543)
Deputy Solicitor General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1136
jconner@ag.nv.gov

Attorneys for Respondents
Nevada Department of Corrections
and Director Charles Daniels

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STATEMENT OF THE ISSUES

Did the district court appropriately exercise its discretion in denying Floyd's request for a temporary restraining order and preliminary injunction when it determined that Floyd failed to show a likelihood of success on the merits on his constitutional challenge to NRS 176.355?

STATEMENT OF FACTS

When Floyd filed the underlying complaint, he also filed a motion for temporary restraining order with notice and preliminary injunction. 1-AA-017–29. Floyd acknowledged that he needed to show a likelihood of success on the merits to prevail. 1-AA-020. And he argued that he could do so because NRS 176.355 provided insufficient guidance to the Department of Corrections and its Director[1] on (1) how to "choose, obtain, and administer lethal drugs"; (2) "quantity and quality standards for those lethal drugs"; and (3) "executing condemned inmates in a humane and constitutional manner." 1-AA-022. In

[1] This brief refers to the Nevada Department of Corrections and Director Daniels collectively as the Department.

addition to briefly arguing those points, Floyd added a point about lack of information on the location of the execution. 1-AA-022–25.

Floyd also argued that the absence of adequate guidance "resulted in execution attempts that failed to comply with constitutional standards. . . ." 1-AA-025–027. And he argued that he would suffer irreparable harm that could not be adequately remedied by compensatory damages if the district court did not grant his motion. 1-AA-028.

The Department responded. 1-AA-058–068. The Department's argument focused on Floyd's failure to establish a likelihood of success on the merits. 1-AA-058–067. And the Department noted that the district court did not need to address any other factors because Floyd's failure to establish a likelihood of success on the merits ends the inquiry. 1-AA-068.

After Floyd filed a reply, the district court held a hearing on the motion. 1-AA-070–85; 2-AA-313–350. And at the conclusion of the hearing, the district court made an oral ruling from the bench denying the motion. 2-AA-335–346. The court then directed the Department to

prepare a proposed order and provide a copy to Floyd's counsel for approval of its form and content before submitting it to the court. 2-AA-346. Finally, the district court signed and entered its written order denying Floyd's motion because Floyd failed to show a likelihood of success on the merits. 2-AA-361–371.

Floyd filed a timely notice of appeal. 2-AA-374–375. In the interim, the Department and Dr. Ihsan Azzam filed motions to dismiss. At a hearing held on December 9, 2021, the district court expressed its intent to grant those motions, though the district court has not yet issued a written order to that effect.

SUMMARY OF THE ARGUMENT

This appeal is soon to be moot. The district court recently indicated its intent to grant the defendants' motions to dismiss. Although it has not yet entered a written order granting those motions, entry of the order is imminent. And dismissal of the complaint moots an appeal on the propriety of a temporary restraining order or preliminary injunction. *See*, *e.g.*, *Manzonie v. State ex rel. DeRicco*, 81 Nev. 53, 55, 398 P.2d 694, 695 (1965). But if the appeal is not subject to

dismissal for mootness, this Court should affirm the district court's denial of Floyd's motions.

Separation of powers is one of the most fundamental principles of our form of government. But as history has shown, the line between the legislative role of writing the law and the executive role of carrying out the law is often imprecise. And that lack of precision has led to the development of the non-delegation doctrine. The non-delegation doctrine recognizes that the Legislature is prohibited from transferring its power to enact law to another branch of government *State v. Shaughnessy*, 47 Nev. 129, ___, 217 P. 581, 583 (1923). This typically occurs when the Legislature fails to provide "suitable standards" to guide the Executive's exercise of authority to carry out public policy. *Sheriff v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). But after it has adequately defined a particular public policy, the Legislature may delegate to the Executive the authority to fill in the gaps necessary to carry out that policy. *Id.*

Does NRS 176.355 adequately define public policy on carrying out a death sentence in Nevada? That is the ultimate question in this case.

Floyd posits that NRS 176.355 violates the principles of non-delegation by failing to provide a more precise definition for the State's preferred method of execution. But Floyd fails to articulate how the absence of the higher level of precision he desires in NRS 176.355 offends the principles of separation of powers that inform application of the non-delegation doctrine. Thus, the district court correctly concluded that Floyd failed to establish a likelihood of success on the merits.

The core of non-delegation is to prevent arbitrary decision-making by the executive branch. *Luqman*, 101 Nev. at 154, 697 P.2d at 110. But NRS 176.355 does not leave the Director to arbitrarily define how to carry out a death sentence under Nevada law. Rather, as the district court correctly determined, NRS 176.355 unambiguously identifies lethal injection as Nevada's preferred method of execution and appropriately leaves fine-tuning the details of implementing an execution by lethal injection to the Department. For that reason, the district court did not abuse its discretion in denying Floyd's motions for a temporary restraining order and preliminary injunction.

Further, the district court's analysis on Floyd's failure to establish a likelihood of success on the merits is supported by near unanimous rejection of non-delegation challenges to method of execution statutes in other states. And the Arkansas Supreme Court has limited the application of the lone case Floyd is able to cite in his favor, *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012). Thus, *Jones* is an outlier and limited in application.

And Floyd's argument on irreparable harm also actually supports the district court's conclusion on Floyd's failure to establish a likelihood of success merits. In his opening brief, Floyd identifies the harm he is seeking to avoid: a possible violation of the Eighth Amendment. But the possibility that a state's chosen method of execution could result in an execution that is cruel and unusual under the Eighth Amendment places no constraint on which government actor establishes the details of an execution protocol. Rather, proper consideration of the constitutional prohibition of cruel and unusual punishment in the non-delegation context undermines Floyd's position that Nevada law does not provide adequate guidance for the Department in setting an execution protocol. The law presumes that the Legislature considered

the prohibition of cruel and unusual punishment as an existing constraint on the Department's decisions in preparing an execution manual. And 42 U.S.C. § 1983 provides Floyd with an adequate vehicle for litigating his Eighth Amendment concerns.

Finally, even when considering Floyd's newly raised argument that he has at least raised a substantial case on the merits that required the district court to evaluate the other preliminary injunction factors, his arguments fall flat. His concerns about the potential for a violation of the Eighth Amendment do not justify entry of an injunction in this matter. Floyd can pursue those issues in his federal law suit where he is challenging to the execution protocol under the Eighth Amendment. And his stated policy concern about whether NRS 176.355 should include more detail is a matter for the Legislature to resolve. If it decides that including more detail in NRS 176.355 is good policy, the Legislature is free to reach that conclusion. But the non-delegation doctrine does not demand that result. This Court should affirm the district court's order denying Floyd's motions.

STANDARD OF REVIEW

District courts have discretion in deciding whether to issue a preliminary injunction. *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015). Thus, this Court's review is limited to whether "'the district court abused its discretion or based its decision on an erroneous legal standard or on a clearly erroneous finding of fact.'" *Id.* (quoting *Boulder Oaks Cmty, Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009)). And questions of law are reviewed de novo. *Id.*

ARGUMENT

I. Dismissal of the complaint renders an appeal on the propriety of a preliminary injunction moot.

The dismissal of a complaint renders questions on the propriety of a preliminary injunction moot. *Manzonie*, 81 Nev. at 55, 398 P.2d at 695. At a hearing on December 9, 2021, the district court indicated its intent to grant the defendants' motions to dismiss. Although the district court has yet to issue a written order, the order is imminent. As a result, this appeal is soon to be moot.

* * *

II. Floyd fails to establish an abuse of discretion.

If this appeal is not subject to dismissal for mootness, this Court should affirm. Floyd fails to show that the district court abused its discretion in denying his requests for a temporary restraining order and preliminary injunction. The district court cited and applied the correct legal standards. And the district court correctly determined that Floyd failed to show a likelihood of success on the merits when applying that standard. Finally, even considering Floyd's new argument that the district court still needed to consider other factors because Floyd identified serious questions going to the merits of his case, Floyd's arguments fail to establish the propriety of a preliminary injunction.

A. The district court cited and applied the correct legal standard.

Floyd charges the district court with failing to apply the standard this Court set forth in *Luqman*. OB at 14-17. Floyd's argument is irreconcilable with the district court's order. The court cited and expressly applied *Luqman*, along with numerous other decisions from this Court that address application of the non-delegation doctrine. 2-AA-365–370. In particular, the district court noted that "Floyd never grapples with the distinction between making law and properly

conferred discretion in carrying out the Legislature's policy" before identifying the distinction between the two actions. 2-AA-368–69.

Thus, Floyd's claim that the district court failed to apply *Luqman* is belied by the record. Rather, Floyd's argument boils down to him disagreeing with the district court's application of the non-delegation doctrine. And for the reasons explained below, Floyd still has not articulated how NRS 176.355 grants the Department the power to make law, rather than merely delegating the authority to address the facts and conditions necessary to carrying out public policy the Legislature already established.

B. Floyd did not show a likelihood of success on the merits

As Floyd conceded below, he needed to show a likelihood of success on the merits to obtain a preliminary injunction. 1-AA-020 (quoting *Shores v. Global Specialists, Inc.*, 134 Nev 503, 505, 422 P.3d 1238, 1241 (2018)). And the district court correctly determined that Floyd failed to make that showing.

1. Floyd fails to articulate how NRS 176.355 results in the Department making law rather than carrying out the law.

The non-delegation doctrine is an application of the principle of separation of powers. *Luqman*, 101 Nev. at 153, 697 P.2d at 110 (citing Nev. Const. art. 3, § 1). As the district court articulated in its order, the non-delegation doctrine draws a line between making the law and carrying out the law. 1-AA-365–366. Relevant here, is that the legislative branch writes the law by defining the elements of crimes and establishing the punishments for criminal offenses, and the executive branch enforces the law by investigating and prosecuting crimes and carrying out the relevant punishment. *Del Papa v. Steffen*, 112 Nev. 369, 377-78, 925 P.2d 245, 250-51 (1996); *Egan v. Sherriff*, 88 Nev. 611, 614, 503 P.2d 16, 19 (1972).

As the district court noted, Floyd's motion failed to articulate how NRS 176.355 results in the Department crossing the line into lawmaking. 1-AA-368–369. And his opening brief on appeal fares no better. Floyd insists that the allowing the Director to create an execution protocol is an exercise in making law. But his position comes

up short when it is measured against this Court's non-delegation cases, *Luqman* included.

First, Floyd challenges the statute because it is silent on a list of issues. OB at 19-20. But Floyd fails to explain how the Department is making law when it makes decisions about (1) the drug or combination of drugs to use, (2) the dosage and sequencing of the drugs, (3) the preferred method for injecting those drugs, (4) where to obtain the drugs, (5) the qualifications and training for the execution team, (6) providing notice of the selected drugs to the prisoner, and (7) setting up the execution chamber.

None of those determinations involves the Department exercising a legislative function by defining a new crime or a new punishment, as would have been the case if the Legislature had delegated the authority to set conditions of lifetime supervision to the State Board of Parole Commissioners in *McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016). They are no different than the Pharmacy Board considering the effects and properties of various drugs when categorizing them into schedules in *Luqman* or the Board of Wildlife

Commissioners setting various standards for checking hunting traps that this Court recently addressed in *Smith v. Board of Wildlife Commissioners*, 461 P.3d 164, 2020 WL 1972791 (Nev. 2020) (unpublished). Each of the foregoing points addresses a factual issue or a condition necessary to carrying out the Legislature's adequately expressed desire that a death sentence be carried out by lethal injection.

Floyd also complains that NRS 176.355 does not provide any qualitative direction regarding the Director's required consultation with the Chief Medical Officer. OB at 22. But Floyd fails to explain how the absence of the detailed direction he desires regarding the Director's consultation with the Chief Medical Officer somehow transforms the nature of the Director's role under NRS 176.355 into lawmaking. The Director's decisions in establishing an execution manual remain an exercise in fact-finding or resolving conditions necessary to carrying out the Legislature's directives.

Thus, everything that Floyd insists is missing from NRS 176.355 involves decisions that the Legislature can constitutionally delegate to the Department. And Floyd fails to show that Nevada law allows the

Department to act arbitrarily in establishing a protocol, which is the concern of the non-delegation doctrine. Thus, the Legislature can provide more detail if it desires to do so, but Article 3, Section 1 of the Nevada Constitution does not demand that result.

2. Floyd's concerns about a possible Eighth Amendment violation prove his position on non-delegation wrong.

Floyd suggests that the district court misunderstood his argument because it referenced decisions from this Court applying the Eighth Amendment to NRS 176.355. OB at 18. Yet, in trying to establish irreparable harm, Floyd turns to the Eighth Amendment. OB at 34. Despite the apparent contradiction in Floyd's arguments, the existence of the prohibition of cruel and unusual punishment undercuts Floyd's argument on the lack of adequate guidance to control the Executive's decision-making in this context. Thus, even if Floyd were correct that language of NRS 176.355 alone lacks adequate guidance to constrain the Department's decision-making, Floyd's argument falls when the Eighth Amendment is added to the equation.

The non-delegation doctrine's purpose is ensuring that the law adequately defines the parameters of executive authority for carrying

out public policy. *Luqman*, 101 Nev. at 154, 697 P.2d at 110. Proper consideration of principles that control statutory construction, which aid this Court in giving meaning to statutory language, emphasize the importance of the federal and state prohibitions against cruel and unusual punishment in this context. It is fundamental that the Legislature is presumed to understand the current state of law when it adopts new statutory language. *Northern Nevada Ass'n of Injured Workers v. Nevada State Indus. Ins. System*, 107 Nev. 108, 112, 807 P.2d 728, 730 (1991). Inherent in that presumption is the Legislature's awareness of constitutional mandates. *See McNeill*, 132 Nev. at 556, 375 P.3d at 1025. And consistent with the presumption of regularity, the Legislature is free to presume that the Department will abide by relevant constitutional mandates when carrying out the directives the Legislature sets forth by statute. *State v. Gee*, 46 Nev. 418, ___, 211 P. 676, 682 (1923).

Thus, Floyd's argument that the non-delegation doctrine required the Legislature to explicitly define all the details for establishing an execution protocol when it adopted lethal injection as the preferred means of execution in Nevada makes no practical sense. This Court

already rejected a similar claim nearly a century ago because the Legislature does not need to restate in a statute what the federal and state constitutions already demand of the Department when carrying out an execution. *Id.* at ___, 211 P. at 681-82.

Thus, the district court's references to this Court's cases addressing the Eighth Amendment do no demonstrate that the district court misunderstood the nature of Floyd's claim. The limitations that the Eighth Amendment places on the Department are relevant to understanding the scope of the Department's authority under NRS 176.355.

3. An abundance of authority from other jurisdictions supports the district court's order.

Floyd also turns to out-of-state authority for assistance. OB at 24-29. But he is only able to cite a single case—the *Jones* case from Arkansas—to supports his position. OB at 25. Every other decision the district court identified that consider a challenge to lethal injection statutes based upon the non-delegation doctrine—ten of them—denied

relief. 2-AA-369–370.[2] And even the Arkansas Supreme Court has revisited and limited *Jones* by rejecting a challenge asserting that the lethal injection statute in Arkansas continued to violate "separation-of-powers because it delegates to the [Arkansas Department of Correction] the 'absolute discretion' to determine the type of barbiturate to use and sets no guidelines or standards concerning the competence of personnel who will carry out death sentences." *Hobbs v. McGehee*, 458 S.W.3d 707, 709 (Ark. 2015).

Thus, *Jones* is an outlier in holding that a state constitutional provision on the separation of powers mandates that the state legislature provide specific guidance on how to select the drugs to be used in an execution. And the Arkansas Supreme Court has limited the scope of that decision by rejecting further challenges to its statute on the method of execution.

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[2] *See O'Neal v. State*, 146 N.E.3d 605, 620 (Ohio Ct. App.), *appeal allowed on other grounds,* 154 N.E.3d 98 (Ohio 2020); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018); *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7-8 (W.D. Mo. Nov. 16, 2012); *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). *State v. Hawkins*, 519 S.W.3d 1, 61 (Tenn. 2017).

Floyd also suggests this Court should consider that various other states have not addressed the issue because (1) the state's legislature decided to provide "standards detailing the type, quantity, or quality of drugs required," or (2) the issue has not been presented with a non-delegation challenge. OB at 27-28. But Floyd provides no explanation on how those points have any bearing here. That a state legislature decided to include additional detail in its relevant statutory framework says nothing of whether principles of separation of powers demanded that the Legislature include that level of detail. And this Court should not speculate on how other states court will eventually resolve the issue if they have not already been presented with the opportunity to do so.

Finally, Floyd argues that in some states where courts have rejected non-delegation challenges, the relevant statutory framework provides more detail on the method of execution. OB at 25 n.4. But Floyd fails to explain how there is a material difference between the language in the statutes from those states and the wording of NRS 176.355. Thus, Floyd fails to explain why the outcome of those cases would change if those other courts had been reviewing a statute identical to NRS 176.355.

The wealth of authority on this issue from outside Nevada strongly supports the district court's determination that Floyd failed to show a likelihood of success on the merits. This Court should affirm the district court's decision that Floyd failed to show the necessary likelihood of success on the merits.

C. Floyd did not argue the substantial-case-on-the-merits standard in the district court, but even when considering the other factors for analyzing a preliminary injunction, he fails to show that a preliminary injunction is warranted.

Ordinarily, this Court will not entertain arguments raised for the first time on appeal. *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997). In his opening brief, Floyd argues that the district court erred by not considering other factors for analyzing the propriety of a preliminary injunction because his case "presents serious legal questions" on the merits. OB at 32. But his motion expressly stated that he needed to show a likelihood of success on the merits to obtain injunctive relief. 1-AA-020. This Court should decline to consider this new argument.

Even so, Floyd's argument on irreparable harm lacks merit. Floyd argues that "it is reasonably likely that Floyd will suffer cruel and

inhumane treatment expressly prohibited by the Eighth Amendment." OB at 34. This, he asserts, establishes the necessary irreparable harm, arguing that his right to be free from "inhumane treatment" and "his interest in life" outweigh the Department's interests in fulfilling their duties to carry out an execution. OB at 34. But Floyd can address that concern, and is in the process of doing so, by raising an Eighth Amendment challenge to the protocol. And Floyd's argument about his interest in life is misplaced for the same reasons this Court recognized that a protocol challenge is similar to a challenge to conditions of confinement. *McConnell v. State*, 125 Nev. 243, 247-49, 212 P.3d 207, 310-11 (2009). The question presented in this case has no bearing on the validity of Floyd's capital sentence; that issue has been addressed and resolved through Floyd's direct and collateral challenges to his judgment of conviction. But the State has a compelling interest in seeing its valid criminal judgments carried out. *See*, *e.g.*, *Hart v. State*, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000) (recognizing state interests in finality of criminal convictions), *overruled on unrelated grounds by Harris v. State*, 130 Nev. 435, 329 P.3d 619 (2014); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Finally, Floyd asserts a public policy argument on why NRS 176.335 should have more detail about the procedure for establishing an execution protocol. OB at 34-37. The irony of Floyd's "policy" argument is that deciding whether it would be good policy to include more detail in NRS 176.355 is just that: a question of public policy for the Legislature. Thus, the district court correctly found that Floyd failed to show a likelihood of success on the merits on his constitutional challenge because the non-delegation doctrine does not demand that the Legislature include the details Floyd seeks in NRS 176.355.

CONCLUSION

This Court should affirm the district court's order denying Floyd's motion for a temporary restraining order and preliminary injunction.

Dated this December 20, 2021.

AARON D. FORD
Attorney General

/s/ *Jeffrey M. Conner*
Jeffrey M. Conner (Bar No. 11543)
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Century Schoolbook Microsoft Word 2010 in 14 pt. font.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3,897 words.

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.

Dated this December 20, 2021.

AARON D. FORD
Attorney General

/s/ *Jeffrey M. Conner*
Jeffrey M. Conner (Bar No. 11543)
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 20th day of December, 2021, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Jeffrey M. Conner*
Jeffrey M. Conner (Bar No. 11543)
Deputy Solicitor General