**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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Case No. 83181

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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.

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

# Appellant's Reply to State's Answering 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 Zane 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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## Table of Contents

## Table of Authorities

**Federal Cases** **Page(s)**



**State Cases**

**State Statutes**

## I. Introduction

Floyd filed his Opening Brief with this Court on November 5, 2021, and the Nevada Department of Corrections (hereinafter "the State") filed its Answering Brief ("RAB") on December 20, 2021. Defendant Ihsan Azzam, M.D., filed his motion for joinder with the State's brief on December 21, 2021.

The State first argues that this appeal is moot because Floyd's complaint for injunctive relief has been dismissed by the district court.[1] Next, the State argues that the district court properly applied the standard set forth in *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 151, 697 P.2d 107, 108-09 (1985). Finally, the State contends that the district court correctly determined that Floyd was not entitled to injunctive relief because he could not establish a likelihood of success on the merits of his non-delegation claim.

However, as will be explained below, this appeal is not yet moot, and each of the State's arguments are meritless. The State

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[1] At the time of the filing of the State's Answering Brief, the district court's order dismissing Floyd's complaint had not been filed.

misapprehends Floyd's arguments and misconstrues the authority guiding the issues in this case.

## II. Argument

### A. Floyd's appeal is not moot because the issues are capable of repetition and threaten to evade review

The State first argues that this appeal should be dismissed as moot because the district court's dismissal of Floyd's complaint for declaratory and injunctive relief moots this appeal. *See* RAB at 8. The State cites *Manzonie v. State ex rel. De Ricco*, 81 Nev. 53, 55, 398 P.2d 694, 695 (1965), for this proposition. The State's contention is incorrect. Although the district court entered an order dismissing Floyd's Complaint, dismissal of this appeal is not warranted as *Manzonie* can be distinguished from this case.[2] Further, because the issues in Floyd's case are capable of repetition yet may evade review, they fall within an exception to the mootness doctrine.

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[2] The district court's order dismissing the complaint was entered on January 7, 2022. Mr. Floyd filed a timely notice of appeal of the district court's decision on January 10, 2022. That appeal has been docketed with this Court as Case No. 84081

A moot case is one which seeks to determine an abstract question not resting upon existing facts or rights. *Martinez-Hernandez v. State*, 132 Nev. 623, 625, 380 P.3d 861, 863 (2016). The determination of whether an issue is moot is a question of law that appellate courts review *de novo*. *Id*. A case is moot when the "parties lack a legally cognizable interest in the outcome." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1020 (9th Cir. 2010).

Here, although the State cites *Manzonie,* 81 Nev. at 53, in support of its argument that "the dismissal of a complaint renders questions on the propriety of a preliminary injunction moot," dismissal of Floyd's appeal is inappropriate as the State fails to show how *Manzonie* is applicable here. RAB at 8. *Manzonie* is silent concerning the nature of the underlying request for injunctive relief, leaving this Court with no means to compare the nature of the requested preliminary injunction in *Manzonie* with the necessity of injunctive relief for Floyd. Thus, dismissal under *Manzonie* is not required.

Moreover, *Manzonie* has only been cited once by this Court to dismiss an appeal from an injunction after the district court's dismissal

of an appellant's complaint. *See Peccole v. City of Las Vegas*, 132 Nev. 1016, 385 P.3d 594 (2016). *Peccole* is distinguishable from this case, as it involves a complaint regarding the appellant's water rights. Here, Floyd seeks an injunction to prevent the State from executing him under a statute that unconstitutionally delegates legislative authority to the Director of NDOC to create an execution protocol without sufficiently suitable standards to guide the Director's discretion.

Even if *Manzonie* controls, however, this appeal is not moot because this issue is capable of repetition and may continue to evade this Court's review. The current stay of the proceedings in the district court (in Department VI) to seek an execution order and warrant for Floyd's execution only covers this Court's adjudication of two pending writ petitions in Case Nos. 83167, 83225. The stay does not presently include the appeal from this case or the one recently filed from the district court's dismissal of the complaint. Floyd therefore requests that this Court refrain from dismissing the instant appeal until it is clear that he will receive consideration of this issue on appeal in Case No. 84081. Otherwise, Floyd risks being executed before this constitutional

issue can be decided by the Court as an execution warrant can be sought for as soon as approximately three weeks from the hearing on the State's request for the warrant. NRS 176.495(2). Floyd's execution before this Court has had the ability to decide this important constitutional issue of first impression means the issue would necessarily evade this Court's review. Dismissal on mootness grounds is therefore inappropriate.

An exception to mootness exists when an issue is "capable of repetition, yet evading review." *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 171–72, 87 P.3d 1054, 1057 (2004). This occurs when "the duration of the challenged action is relatively short and there is a likelihood that a similar issue will arise in the future." *Id.*; *see also Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010) (finding that the duration of a challenged action is too short where it is almost certain to run its course before a reviewing court can give the case full consideration.).

In *Traffic Control Servs., Inc.,* the trial court granted a preliminary injunction that enforced a non-competition clause while the

parties litigated its assignability following a merger. 120 Nev. at 171, 87 P.3d at 1056. During appeal, this Court found that although the preliminary injunction had subsequently expired, it did not moot the issue as the injunction was of a short duration, making it likely to evade review, and the case involved a matter of widespread importance. *Id.*

Additionally, in *Alcoa, Inc. v. Bonneville Power Admin.*, the Ninth Circuit summarized the standard for issues that are capable of repetition yet evade review. *Alcoa, Inc. v. Bonneville Power Admin,* 698 F.3d 774, 774 (9th Cir. 2012). In *Alcoa*, petitioners sought review of terms in a contract that had since been completed by defendants. *Id.* at 785-86. In reviewing whether some of Alcoa's claims against BPA were moot, the court concluded that an issue is capable of repetition where there is evidence that it has occurred in the past, or there is a reasonable expectation that the petitioner would again face the same alleged invasion of rights. *Id.* at 787. As a result, the court ultimately held that the issues in *Alcoa* were capable of repetition, yet evading review, because the time frames outlined in the contract related to the

terms in dispute were short in duration and the same parties would be involved in subsequent disputes. *Alcoa, Inc.*, 698 F.3d at 786–87.

Like in *Traffic Control* and *Alcoa*, the issues here similarly fall within the standard for capable of repetition, yet evading review. Floyd will always have an interest in preserving his life. Accordingly, if the State continues to seek to execute him, this controversy can (and will) repeat. Further, these issues will continue to evade review as the time to complete litigation before an execution warrant is sought or an execution is actually carried out is not long enough to complete a full round of review in this Court. *See* NRS 176.495(2). And given the short duration of time from which the State is able to seek an execution warrant this issue risks evading review for future capitally sentenced defendants.

Finally, the improper delegation of legislative authority to the execution is a matter of great public importance similar to that in *Traffic Control.* The dispute in *Traffic Control* related to the enforceability of non-competition agreements and the loss of employment, which was considered by this Court to be a matter of great

public importance. *Traffic Control Servs.*, 120 Nev. at 172, 87 P.3d at 1057. If the loss of employment and an employer's ability to enforce a non-competition agreement is a matter of great public importance, the government's ability to, and methods used to, take a life is surely a matter of equal or greater public importance that this Court should consider. The manner in which the Director of NDOC creates lethal injection protocols based on a statute that does not contain the required *Luqman* suitable standards is a matter of great public importance. *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 151, 697 P.2d 107, 108-09 (1985). This matter is of even greater public importance because it is an issue of first impression and Floyd's life is at stake.

As Floyd can establish that this issue is of great public importance and is capable of repetition, yet evading review, the instant appeal is not yet moot.

### B. The district court's denial of Floyd's preliminary injunction was an abuse of discretion

#### 1. The district court erred by not applying the appropriate legal standard in its review of NRS 176.355

The State argues that the district court properly applied the legal standard for delegations of authority outlined in *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 151, 697 P.2d 107, 108-09 (1985). RAB at 9. The State contends that this is evidenced by the district court "cit[ing] and expressly appl[ying] *Luqman*" in the order. RAB at 9. But this is incorrect.

As Floyd argued in the Opening Brief, *Luqman* requires that the Legislature only delegate fact-finding authority and, even then, the statute still must contain sufficient suitable standards to guide the agency's use of that authority. Opening Brief (OB) at 12-17. Although the district court cited *Luqman*, the court clearly misapplied that standard. Rather than relying on *Luqman*'s requirement that the statute contain "sufficient suitable standards," the district court incorrectly and improperly determined that NRS 176.355 was "not ambiguous." *See* OB at 14-15. However, the dividing line between a

proper and improper delegation is not based on whether the statutory provision at issue is also void for vagueness: even a clear delegation of authority by the Legislature can be invalid as is the case with NRS 176.355.

Accordingly, this Court must correct the district court's misapplication of law and reverse its order denying Floyd's request for injunctive relief.

### 2. Floyd has shown a likelihood of success on the merits

Applying the wrong legal standard, the district court incorrectly determined that Floyd did not establish a likelihood of success on the merits. On appeal, the State contends that Floyd did not demonstrate a likelihood of success because he "has not articulated how NRS 176.355 grants the Department the power to make law, rather than merely delegating authority to address the facts and conditions necessary to carrying out public policy the Legislature already established." RAB 10.

However, contrary to the State's assertion, Floyd has shown that he has a likelihood of success on the merits. *See* OB at 17-24. However, NRS 176.355, on its face, provides an unsuitable and insufficient

standard as it does not state the type of lethal injection protocol that should be used or provide adequate guidelines to ensure that the Director of NDOC's decision is sufficiently informed. Moreover, the approach adopted by the Arkansas Supreme Court in *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012), is persuasive authority that should be applied here because Arkansas uses the same comprehensive statutory scheme analysis for nondelegation cases as Nevada.

#### a. The district court failed to consider that NRS 176.355's permissive language regarding the medical consultation requirement renders it an unsuitable and insufficient standard

The State argues that the NDOC Director's ability to decide: "the combination of drugs to use," "the dosage and sequencing of the drugs," and "the preferred method for injecting those drugs," does not amount to making law as they are all questions of "fact-finding" or "resolving conditions necessary to carrying out the Legislature's directives." RAB 12-13. The State further argues that even though "NRS 176.355 does not provide any qualitative direction regarding the Director's required consultation with the Chief Medical Officer" pertaining to the lethal

injection drugs, the statute's language is still sufficient, and will not permit the NDOC director "to act arbitrarily in establishing a protocol." RAB 14. But the State's arguments are flawed. Any delegation of power outside of fact-finding authority is unconstitutional. Moreover, if the CMO is not required to consult with the Director, then the guideline isn't sufficient, as it leaves the Director with the ability to act arbitrarily in deciding the lethal injection protocol when he has no pharmacological and medical expertise.

NRS 176.355(2)(b)'s plain language shows that the statute fails to provide any suitable or sufficient standards to ensure that the Chief Medical Officer (CMO) actually renders advice or participates in the creation of the protocol. NRS 176.355(2)(b) states that the Director *must consult* with the CMO before deciding the lethal injection protocol. However, the statute does not define what a "consult" is or require the Director to give any weight to the CMO's advice. Most notably, it does not place a similar statutory requirement on the CMO to participate in the consultation. And if there is not an identical requirement for CMO

to participate in consultations, the provision becomes optional, and thus a facially insufficient standard.

Indeed, this concern is evidenced by Floyd's current lethal injection litigation in federal court. When Floyd began litigating NDOC's execution protocol, the CMO requested that the State provide him with different counsel because he had a conflict with the Director. 2 AA 331. This conflict likely arose because the CMO refused to give any opinion or advice to the Director regarding the lethal drugs despite NRS 176.355(2)(b)'s consultation requirement. *Id*. Then, as support for his motion to dismiss Floyd's Complaint, the CMO argued that as a matter of law NRS 176.355 places no statutory obligation on the CMO to consult or assist the director in creating the lethal injection combination. *See Dr. Azzam's Motion to Dismiss, Floyd v. Nevada Dept. of Corrections, et. al*., No. A-21-833086-C (8th Jud. Dist. Ct. Nev.). And if the CMO's statutory interpretation is correct, and there is not an identical requirement for the CMO to participate in consultations, then the purported safeguard contained in the statute is illusory. As is, NRS 176.355 leaves the NDOC Director, someone who admittedly lacks any

medical expertise, the unfettered authority to arbitrarily choose the execution drugs, sequencing, and dosages without any oversight from a qualified medical professional.

Additionally, the State's contention that "[t]hese are fact-intensive questions best answered by [NDOC] the administrative agency with relevant experience" is belied by NRS 176.355(2)(b)'s express language. By mandating a consultation with the CMO it is clear that the Legislature did not believe NDOC alone had the relevant experience to create a lethal injection protocol. Moreover, the Director is not merely carrying out a sentence or answering a fact-finding question. Because the lethal drugs, sequencing, and dosages are not provided for, and no substantive consultation is required, the NDOC Director is left to "resolv[e] conditions necessary to carrying out the Legislature's directives." *See* RAB at 13 (stating that under NRS 176.355 NDOC's Director has the power to "resolv[e] conditions necessary to carrying out the Legislature's directives" outside of fact-finding authority when creating the protocol). But exercise of that level of power falls squarely within proscribing parts of the method and manner of execution, an

action that ultimately amounts to lawmaking—a clear violation of Nevada's separation of powers doctrine.

#### b. This Court should follow the lead of the jurisdictions that require and/or have sufficiently suitable standards in their statutory schemes

The State argues that there is no material difference between the lethal injection statutes in jurisdictions where courts have not found the statutes to be improper delegations of legislative authority and Nevada's lethal injection statute. RAB at 18. This is incorrect. As outlined in the opening brief, these statutes contain more detail for the lethal injection protocol than NRS 176.355 and that greater detail is materially different. *See* OB at 25 n.4. These statutes specify, for example, that the lethal injection drugs must be administered intravenously. *Id.*; *see e.g.*, Tex. Code Crim. Proc. Art. 43.14 and Idaho Code § 19-2716. NRS 176.355 impermissibly leaves these considerations, and others, to the Director without any restrictions or guidance.

### c. NRS 176.355 lacks suitable and sufficient guidelines because it is not a part of a comprehensive statutory scheme

Finally, the State argues that Floyd has not shown a likelihood of success on the merits as only the Arkansas Supreme Court has held that the Legislature's unfettered delegation of authority, to the Executive, to decide a state's lethal injection protocol, violates the separation of powers doctrine. RAB at 16. Yet, the State's argument ignores a crucial point; while *Hobbs v. Jones*, 412 S.W.3d 844, 850 (Ark. 2012), is admittedly the minority approach on this issue, it is more persuasive here. Like Nevada, Arkansas uses a comprehensive statutory scheme requirement when determining the constitutionality of a delegation of authority. Adopting this approach not only aligns with this Court's controlling nondelegation precedent, i.e., *Luqman*, 101 Nev. at 151, 697 P.2d at 108, and *Pine v. Leavitt*, 84 Nev. 507, 510-12, 445 P.2d, 942, 944-45 (1968), but it also ensures that the democratic process is respected when it comes to matters of making law.

The parties agree that *Luqman* and *Pine* are the controlling authority on this issue. RAB 4-5; 1 AA 63. In both cases, this Court

found suitable and sufficient standards where the statutes at issue had comprehensive statutory schemes in place. *See Luqman,* 101 Nev. at 152, 697 P.2d at 109 (upholding a delegation of authority where the statutory scheme consisted of over 100 provisions); *Pine,* 84 Nev. at 510, 445 P.2d at 944 (upholding a delegation of authority under a statute with 80 provisions). The minority approach on this issue, reflected in the decision of the Arkansas Supreme Court, similarly shows that a comprehensive statutory scheme is necessary to ensure a constitutional delegation of authority. *See Hobbs*, 412 S.W.3d at 850-55. Accordingly, because the minority approach is the better fit with this Court's precedents on nondelegation issues, it should be adopted.

NRS 176.355 bears no resemblance to the statutory schemes at issue in *Pine* and *Luqman*. Unlike *Pine* and *Luqman*, NRS 176.355 only has one provision. And that single section provides nothing more than a single sentence stating that the execution must be by lethal injection. *See* NRS 176.355. But this is inadequate. As evidenced by this Court's precedent, suitable and sufficient standards demand a comprehensive statutory scheme. A comprehensive scheme is critical because it ensures

that the law is created based upon a fundamental principle of Nevada's government—the democratic process. *See Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 247 (1967) ("The division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people."). But because this is an issue of first impression, debate by the Legislature on this important subject has been dormant. Indeed, the Nevada Legislature hasn't modified or debated Nevada's lethal injection statute since 1983. And because this Court has never reviewed the constitutionality of NRS 176.355 under the separation of powers doctrine this important debate has still not occurred. As a result, Nevadans are left with a lethal injection execution system that is neither suitable nor sufficient.

NRS 176.355 in its current form does not adhere to the democratic process. Simply stating the means of execution does not provide a suitable standard. Death by lethal injection can be achieved by a variety of injection methods using a variety of drugs. That unfettered discretion is the distinction between making law and simply conferring fact-finding discretion. Society has drastically changed since 1983 and

looking at the high rate of botched lethal injection executions across the country shows that the minority approach to reviewing lethal injection statutes, as outlined in *Jones*, is the better path. *See* Death Penalty Information Center, Botched Executions, (last visited Jan. 11, 2022), https://deathpenaltyinfo.org/executions/botched-executions (stating that out of all methods of execution lethal injection has the highest instance of resulting in a botched execution). This high rate of botched executions is due to the unique nature of lethal injections, and the lack of a comprehensive statutory scheme to guide departments of correction, such as evidenced here. Because of this, NRS 176.355, more than any other statute, deserves for the Legislature to conduct robust debate and hearings to determine suitable and sufficient standards for delegations of power. Deciding which drugs will be used to execute an inmate and in what dosage and sequencing is a weighty decision with great implications. As such, it should be made based on a robust policy debate that occurs in the Legislature where the peoples' representatives are allowed to hear evidence, take testimony, receive input from the medical community as the Legislature intended, and create a

comprehensive statutory scheme reflecting suitable and sufficient standards to guide the NDOC Director's use of authority.

As things currently stand, the NDOC Director obtains execution drugs by subterfuge from the same Cardinal Health online health care portal that NDOC uses to obtain health care medications for incarcerated inmates. The drug protocol is not selected because the drug combination is the result of the newest advances in medical science or will result in a humane execution. Only the Legislature can make the important policy decisions required for having an execution protocol that conforms to society's evolving standards of decency. Only once those important law-making decisions have been made will the Director of NDOC be in a position to constitutionally implement a protocol consistent with the Legislature's intent.

### 3. The District Court did not consider Floyd's unique irreparable harm

The State's answering brief also misapprehends the role that the Eighth Amendment plays in Floyd's arguments. RAB at 14-16. As outlined in the Opening Brief, Floyd is not arguing an Eighth Amendment claim, but instead a violation of Nevada's separation of

powers doctrine. *See* OB at 23-24. The discussion of the Eighth Amendment in Floyd's Opening Brief was merely an illustration of the real risks involved in permitting the NDOC Director to unilaterally create and carry out a lethal injection protocol without suitable and sufficient guidelines. OB at 30-31. The risk of a cruel and/or unusual death from an untested execution protocol based on an unconstitutional statute is an irreparable harm for which monetary damages are inadequate. Accordingly, the district court should have granted Floyd's request for injunctive relief.

For the other reasons outlined above and in the Opening Brief, Floyd requests that this Court find NRS 176.355 an improper delegation of legislative authority and grant the requested injunctive relief.

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## III. 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 19th day of January, 2022.

Respectfully submitted,

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## 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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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 either:

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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,

*/s/ David Anthony*
David Anthony
Assistant Federal Public Defender

**Certificate of Electronic Service**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 19th, 2022. Electronic Service of the foregoing **Appellant's Reply to State's Answer** shall be made in accordance with the Master Service List as follows:

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