

Case No. 84081

Supreme Court of Nevada

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Zane Michael Floyd,

Appellant,

vs.

The State of Nevada Department of
Corrections, Charles Daniels,
Director, Department of Corrections,

Appellee.

DEATH PENALTY CASE

Appeal from the Eighth Judicial District Court

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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JURISDICTIONAL STATEMENT

This is an appeal from the district court’s January 7, 2022, order denying Appellant Zane M. Floyd’s Complaint for Declaratory and Injunctive Relief. 3AA744–50, 4AA751. On January 10, 2022, Floyd filed a timely Notice of Appeal pursuant to NRAP 4. 4AA756–59. The district court’s order denying Floyd’s Complaint is appealable under NRAP 3A(b)(1) as it is a final judgment entered in an action or proceeding commenced in the court in which the judgment was rendered.

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 should 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 other pending matters before this Court (Case No. 83436), judicial economy favors keeping all of the cases before the same court.¹

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

STATEMENT OF THE ISSUES

Whether the district court erred in dismissing Floyd's Complaint by misapplying *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985) and finding that NRS 176.355 provides suitable and sufficient standards to guide the Director of the Nevada Department of Corrections in exercising legislative authority to create an execution protocol.

¹ Floyd notes that the Nevada Supreme Court assumed jurisdiction of the appeal from the denial of his preliminary injunction. *Floyd v. NDOC, et al.*, Case No. 83181, Order Dismissing Appeal at 2 (filed April 21, 2022), Document No. 22-12707.

I. Relevant Statutory Provision

A. 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.

II. Statement of the Case

This appeal arises from the district court's dismissal of Floyd's complaint for declaratory and injunctive relief to prevent the Nevada Department of Corrections ("NDOC") from executing him using a novel, experimental, and untested lethal injection protocol established pursuant to an improper delegation of legislative authority to the executive branch 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, 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. *Id.*

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 creating the execution protocol.

On June 17, 2021, the district court entered an Order Denying Plaintiff’s Motion for Temporary Restraining Order with Notice and Preliminary Injunction. 2AA361–73.²

On August 23, 2021, NDOC Defendants filed a Motion to Dismiss the complaint. 2AA370–80. Defendant Ihsan Azzam filed a Motion to

² Floyd’s appeal from the denial of his motion for preliminary injunction was dismissed by this Court as moot because Floyd could obtain review of his constitutional claim with the instant appeal. *Floyd v. NDOC, et al.*, Case No. 83181, Order Dismissing Appeal at 2 (filed April 21, 2022), Document No. 22-12707 (stating that “Floyd’s claims are well-suited for review in the appeal from the denial from the district court’s order dismissing the complaint for injunctive relief, currently pending under Docket No. 84081”).

Dismiss 2AA381–87 and a Motion for Joinder with the NDOC Defendants’ Motion to Dismiss 2AA388–90 on October 7, 2021. Floyd responded to the NDOC Defendant’s Motion to Dismiss on October 7, 2021, 2AA391–405 and then to Defendant Azzam’s Motion on October 19, 2021. 3AA68996. NDOC Defendants filed a reply on October 28, 2021. 3AA721–28. On January 7, 2022, the district court entered an order granting the Defendants’ Motion to Dismiss. 3–4AA741–55. This appeal follows.³

III. Statement of The Facts⁴

On May 6, 2021, NDOC Director Charles Daniels testified in federal court regarding the creation of the execution protocol NDOC intends to use in Floyd’s execution. *See* 2AA320 (referencing the hearing in federal court), *and* 1AA191–234 (transcript of NDOC Director Daniels’ testimony). During the hearing, Director Daniels

³ Floyd and Dr. Azzam have stipulated to a dismissal agreement removing him as a Defendant from the instant appeal contemporaneously with the filing of the instant brief.

⁴ 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).

acknowledged, among other things, 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. 1AA194. Director Daniels has unilateral authority concerning what drug(s) to present to the Chief Medical Officer (“CMO”), Ihsan Azzam, for the basis of any opinion. 1AA230. 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.

IV. Summary of Argument

In denying Floyd’s Complaint, the district court misapplied the standard for reviewing non-delegation claims. In applying the wrong standard, the court incorrectly determined that Floyd was not entitled to injunctive relief because he could not succeed on the merits.

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 Director of the Nevada Department of Corrections (NDOC) by improperly permitting him 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 and leaves many crucial questions open concerning how the drugs are selected and administered, and the extent to which the Director must consult with, consider, and utilize input from medical professionals when making these decisions. This is an issue of first impression in Nevada concerning the constitutionality of NRS 176.355.

According to the reasoning of the district court, 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 district court applied would not necessarily even require a means of execution to be stated to constitute a constitutional delegation of

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

V. Argument

A. Standard Of Review

The instant appeal must be reviewed *de novo*. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Although the district court has discretion in determining whether to grant a permanent 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).

“Permanent injunctive relief may only be granted if there is no adequate remedy at law, a balancing of equities favors the moving party, and success on the merits is demonstrated.” *Chateau Vegas Wine*,

Inc. v. S. Wine & Spirits of Am., Inc., 127 Nev. 818, 824 P.3d 680, 684 (2011), *as corrected on denial of reh’g* (April 17, 2012).

Here, the district court misapplied the law. The district court did not dispute that there was no adequate remedy at law and did not consider the balance of equities.⁵ The district court ruled the statute was not vague. 3AA748. But the relevant inquiry concerns the sufficiency and suitability of the standards provided by the Legislature to guide the discretion of the Director. And the district court did not consider the public policy reasons that militated in favor of adopting the approach to the separation of powers doctrine that is consistent with this Court’s case law and democratic principles. Additionally, the district court failed to hold an evidentiary hearing. Since there was no evidentiary hearing below, there are no factual findings presented here to which deference is owed. As the district court misapplied the law, it also abused its discretion in denying Floyd’s complaint for declaratory and injunctive relief.

⁵ There can be no dispute that Floyd’s execution under an unconstitutional statute constitutes irreparable injury.

B. NRS 176.355 unconstitutionally delegates unfettered legislative authority to the Director of NDOC.

1. This Court requires the Legislature to establish suitable and sufficient standards to guide an agency's use of authority when a delegation of power occurs

In *Lugman*, this Court found that the Legislature constitutionally delegated authority to an executive agency. 101 Nev. at 151, 697 P.2d at 108–09. 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.

Moreover, 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. In *Smith v. Bd. of Wildlife Commissioners*, this 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. 461 P.3d 164, 2020 WL 1972791, at *1 (Nev. 2020).

There, the Legislature passed a statute pertaining to the Board of Wildlife Commissioners which governed the frequency for trappers to check their snares, traps, and similar devices. *Id.* 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 *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.” 3AA748. 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. 3AA748. 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 *Luqman* which requires a finding that the statute include suitable and sufficient guidelines to be constitutional. 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 erroneously 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 the Director of 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* imprecise as it contains multiple meanings: subcutaneous or hypodermic; intramuscular; or intravenous. 3AA748. None of these various

definitions for the term “injection” are outlined with specificity in NRS 176.355.

The statute also leaves unanswered whether the Director has any obligation to accept guidance or direction received from the CMO, 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 it an unconstitutional delegation of legislative authority. Guidance concerning how the lethal injection protocol is to be formulated must come from the Legislature.

The district court’s “not ambiguous” standard has no basis in law and was in error. Because the district court did not apply the *Luqman* standard requiring a statute to contain sufficient suitable standards, its

order denying Floyd's complaint for declaratory and 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 succeed on the merits

The district court erroneously found that NRS 176.355 constitutionally delegates authority to the Director of 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. As explained above, this Court has previously addressed the issue of legislative delegation generally, and had the appropriate standard been applied, Floyd would have shown he was entitled to relief 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*.

3AA750. *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*, 461 P.3d 164, 2020 WL 1972791, at *1 (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. The Legislature has failed to outline any of the following critical issues concerning the execution protocol 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 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.

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 in NRS 176.355 to guide the Director of NDOC in fact-finding determinations and there are no answers to the important questions left open as stated above.

b. NRS 176.355’s consultation clause provides no requirement that the Director must follow the guidance of qualified medical personnel when creating the execution protocol

NRS 176.355 is also insufficient and unsuitable as it concerns the Director’s consultation requirement with Nevada’s Chief Medical Officer (“CMO”), Ihsan Azzam. Although NRS 176.355 requires that the Director consult with the CMO, the Legislature fails to provide suitable standards regarding a “consult,” such as 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 follow any advice given by the CMO. The statute further provides no guidance to a Director who would seek to abdicate responsibility to the CMO—or, conversely, a CMO who refuses to consult with the Director. The

consultation requirement is ultimately meaningless without additional guidance.

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. 2AA302-12. 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 him to consult or assist the Director in creating the protocol. *See* 2AA381–87. 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.

- c. Without suitable sufficient standards, an unqualified individual has unfettered discretion to exercise legislative authority to 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 provided to Floyd and the public.

These decisions go beyond a mere "determination of fact." When creating an execution 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 they 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 succeeded on the merits. Floyd was therefore entitled to declaratory and injunctive relief.

C. As an issue of first impression, this Court may look to other jurisdictions for guidance and should adopt the minority position enunciated by the Arkansas Supreme Court.

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, it is helpful to look to outside jurisdictions for guidance. *See Dixon v. State*, 137 Nev. ___, 485 P.3d 1254, 1258 (2021) (reviewing case law from 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).

1. The position of the Arkansas Supreme Court in *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012), most closely follows the *Luqman* standard

Although currently the minority view,⁶ 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

⁶ 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.”).

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 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 Supreme 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 this case, a finding of improper delegation is even more necessary here because the Arkansas statute was 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 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 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 reasonable 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 finding that NRS 176.355 is an unconstitutional delegation of legislative authority.

2. The minority position better respects the democratic process

Proper respect for democratic principles 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 the 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, particularly with respect to execution protocols. The person in charge of NDOC--the Director--has no training or expertise remotely relevant to creating a lethal injection protocol. *See 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.*

Under NRS 176.355, the Director of NDOC is the sole individual charged with creating 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 its citizens are duly considered. This investigation would include testimony from trained members of the medical community who can intelligently comment concerning the issues 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 *Lugman* as applied in the *Hobbs* case.

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VI. Conclusion

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

Dated this 18th day of May, 2022.

Respectfully submitted,

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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*

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Certificate Of Electronic Service

I hereby certify that on May 18, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

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