IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

DON DAVIS, RAY DANSBY,
ANDREW SASSER, KENNETH ISOM,
MICKEY THOMAS, THOMAS SPRINGS,
ZACHARIAH MARCYNIUK, GREGORY DECAY,
STACEY JOHNSON, and BRANDON LACY PLAINTIFFS

v. **CASE NO. _____**

LINDSAY WALLACE, in her official capacity as
Secretary, Arkansas Department of Corrections
DEXTER PAYNE, in his official capacity as
Director, Arkansas Division of Correction,
ARKANSAS DEPARTMENT OF CORRECTIONS, and
ARKANSAS DIVISION OF CORRECTION DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Come Plaintiffs Don Davis, Ray Dansby, Andrew Sasser, Kenneth Isom, Mickey Thomas, Thomas Springs, Zachariah Marcyniuk, Gregory Decay, Stacey Johnson and Brandon Lacy, through their attorneys, and for their Complaint for Declaratory and Injunctive Relief state:

Introduction

1. For more than forty years, Arkansas's only punishments for persons tried and convicted of capital murder were death by lethal injection and life without parole. During that time, defendants, judges, defense lawyers, prosecutors and juries understood that if there was a capital offense for which a death sentence was imposed, it would be carried out by lethal injection. Numerous men were sentenced to die by lethal injection under this statutory scheme, including all the named Plaintiffs.

2. Arkansas's most recent legislative session upended that statute, imposing new punishments for capital murder. The 2025 Act to Amend the Method of Execution to Include Nitrogen Gas, Act 302 of the Regular Session, codified at Ark. Code Ann. § 5-4-615 and 617 ("Act 302" or "the Act") changed the punishment for capital murder from "death by lethal injection" to "death."[1] Act 302 now allows the Arkansas Division of Correction ("ADC") to choose between executing the Plaintiffs by nitrogen hypoxia, or the previously authorized method of execution by lethal injection (using either a single drug barbiturate protocol or a three-drug protocol).

3. Act 302 is unconstitutional and otherwise cannot be applied to the Plaintiffs. Act 302 violates Arkansas's separation of powers doctrine in three ways: (1) it delegates to the Department of Corrections and ADC Director absolute, unfettered discretion to choose between lethal injection and nitrogen hypoxia as the means for executing the Plaintiffs; (2) it provides no standards to the Department of Corrections and ADC Director to constrain and guide the use of nitrogen hypoxia; and (3) it impairs the judicial function by imposing and modifying prior sentences. Additionally, the Act's new punishment of nitrogen hypoxia for capital murder cannot be inflicted on any of the Plaintiffs because (1) the Legislature did not expressly make the Act retroactive to sentences imposed before its effective date of August 5, 2025; and (2) the Act cannot change the punishment imposed on each of the Plaintiffs—

[1] Ex. 1 (Act 302, An Act to Amend the Method of Execution to Include Nitrogen Gas, 2023 Ark. Acts 302 (codified at Ark. Code Ann. §§ 5-4-615, -617)). This and all exhibits cited in this Complaint are attached hereto and incorporated by reference as if fully set forth herein.

death by lethal injection—to another punishment—death by nitrogen hypoxia—without violating the Arkansas Constitution's due process protections and prohibitions on bills of attainder.

Jurisdiction and Venue

4. This Court has jurisdiction over the subject matter of this action pursuant to Amendment 80 of the Arkansas Constitution, the declaratory judgment statute, Ark. Code Ann. § 16-111-101 *et seq.*, and Ark. Code Ann. § 17-87-105. This Court has personal jurisdiction over Defendants under Ark. Code Ann. § 16-4-101(B).

5. Venue in this Court is authorized by Ark. Code Ann. § 16-60-103(3), which allows suits against state agencies and state officers to be brought in Pulaski County.

Exhaustion of Remedies

6. Plaintiffs assert that exhaustion is not required, or is futile, under Ark. Code § 16-106-301 because Defendants have no authority to grant the relief requested; therefore, adequate relief cannot be provided at the administrative level. In an abundance of caution, however, Plaintiffs assert that they have either fully exhausted, or are in the process of exhausting, the Arkansas Department of Corrections inmate grievance process as outlined in Exhibit 2 and have no available administrative remedies.[2] The responses received from the Department confirm that the issues raised in the instant Complaint are "non-grievable" and "beyond the

[2] Ex. 2 (ADC Administrative Directive 19-34: Inmate Grievance Procedure (Effective December 2, 2019)).

Division's control," thereby confirming Plaintiffs' contention that exhaustion of these issues is neither possible nor required.[3]

Parties

7. Plaintiffs Don Davis, Ray Dansby, Andrew Sasser, Kenneth Isom, Mickey Thomas, Thomas Springs, Zachariah Marcyniuk, Gregory Decay, Stacey Johnson, and Brandon Lacy are all prisoners under a sentence of death and in the custody of the ADC while awaiting execution. They are currently housed in the Varner Unit near Grady, Lincoln County, Arkansas.

8. Plaintiffs were each sentenced to death prior to the effective date of Act 302.

9. Defendant Lindsay Wallace is the Secretary of the Arkansas Department of Corrections, a cabinet-level position within the executive branch of Arkansas's state government.

10. Defendant Arkansas Department of Corrections is an agency of the executive branch of the State of Arkansas. The Arkansas Department of Corrections includes the Arkansas Division of Correction. Service on the Department of Corrections is accomplished by service on Secretary Wallace.

11. Defendant Dexter Payne is the Director of the Arkansas Division of Correction. He is an employee of the Department of Corrections, appointed by the Board of Corrections, who serves at the pleasure of the Secretary of the ADC, a

[3] Ex. 29 (Arkansas Division of Correction, Inmate Grievance Appeals, Andrew Sasser grievance (June 17, 2025)).

cabinet-level department in the executive branch. Ark. Code Ann. § 12-27-107. Defendant Payne oversees the Division of Correction and all of its employees and agents. Payne is ultimately tasked with determining the method and means of execution.

12. The Division of Correction is a division within the Department of Corrections and is responsible for carrying out death sentences in general and for procuring and using the drugs, gas, or other equipment necessary to conduct executions. Service on the Division is accomplished by service on Director Payne.

Factual Allegations

Plaintiffs' Convictions and Sentences

13. Each Plaintiff was convicted of a capital offense under a statutory scheme that expressly limited the jury to select between a sentence of life without parole or a sentence of death by lethal injection. Plaintiffs' resulting death sentences were all specifically and exclusively sentences for death by lethal injection.

14. On March 6, 1992, a jury convicted Plaintiff Don Davis of first degree felony murder and other offenses.[4] On March 9, 1992, his jury recommended a sentence of "**death by lethal injection**" for his capital murder conviction and fines and terms of years for his lesser convictions.[5] The jury's verdict forms stated that the two sentencing options available were "death by lethal injection" or "life without

[4] Ex. 3 (Judgment and Commitment, *State v. Don William Davis*, Benton County Circuit Court Case No. CR 91-80-1 (March 10, 1992)).
[5] Ex. 4 (Trial Transcript Excerpt, *State v. Don William Davis*, Benton County Circuit Court Case No. CR 91-80-1, Vol. 14, Page 3588 (March 6, 1992)).

parole."[6] The court accepted the jury's recommendation and sentenced Mr. Davis to death by lethal injection.[7]

15. On June 11, 1993, following a jury trial, Plaintiff Ray Dansby was found guilty of two counts of first-degree murder. The jury was instructed to "decide whether, with respect to each count, he [was] to be sentenced to death by lethal injection or to life imprisonment without parole."[8] The verdict forms explicitly charged the jury to unanimously agree to the conclusions regarding the aggravating circumstances and "sentence Ray Dansby to death by lethal injection" or "sentence Ray Dansby to life imprisonment without parole."[9] The jury sentenced Dansby to "**death by lethal injection**" for each of his first-degree murder convictions.[10]

16. Potential jurors for Plaintiff Andrew Sasser's capital trial were instructed throughout voir dire that "a capital murder case has two unique punishments one being death by lethal injection and the other being life in prison without parole."[11] After the jury found Sasser guilty of capital murder, the judge instructed it to "again retire and deliberate and decide whether he is to be sentenced

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[6] Ex. 5 (Verdict Form, *State v. Don William Davis*, Benton County Circuit Court Case No. CR 91-80-1 (March 6, 1992)).
[7] Ex. 4 at 3.
[8] Ex. 6 (Trial Transcript Excerpt, *State v. Ray Dansby*, Union County Circuit Court Case No. CR 92-360, Vol. 4, Page 776 (June 11, 1993)).
[9] Ex. 7 at 2, 5 (Verdict Form, *State v. Ray Dansby*, Union County Circuit Court Case No. CR 92-360 (June 11, 1993)).
[10] Ex. 8 (Amended Judgment and Commitment, *State v. Ray Dansby*, Union County Circuit Court Case No. CR 92-360 (June 11, 1993)).
[11] Ex. 9 at 3 (Trial Transcript Excerpt, *State v. Andrew Sasser*, Miller County Circuit Court Case No. CR 93-348-3 (February 1994)).

to death by lethal injection or by life in prison without parole."[12] The prosecution likewise emphasized in Sasser's penalty phase closing that "this evidence also certainly justifies the decision to give him death by lethal injection."[13] On March 2, 1994, Sasser's trial judge pronounced that the jury "ordered and adjudged that you are in fact guilty of capital murder and you are sentenced to **death by lethal injection**."[14]

17. On September 23, 1994, Plaintiff Stacey Johnson was convicted of capital murder and sentenced to death following a re-trial by jury after his first conviction and death sentence were reversed by the Arkansas Supreme Court. After the guilty verdict was returned, the court instructed the jury that it would "decide whether he is to be sentenced to **death by lethal injection** or to life imprisonment without parole."[15]

18. At the start of his 2001 trial, Plaintiff Kenneth Isom's trial judge impaneled the jury by noting, "[i]n Arkansas there are two possible punishments for capital murder. One is life without parole. The other is death by lethal injection."[16] At various times during voir dire, potential jurors were told that a sentence of death

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[12] Ex. 10 at 2 (Trial Transcript Excerpts, *State v. Andrew Sasser*, Miller County Circuit Court Case No. CR 93-348-3 (March 1994)).
[13] *Id.* at 3.
[14] *Id.* at 4.
[15] Ex. 11 (Trial Transcript Excerpt, *State v. Stacey Johnson*, Sevier County Circuit Court Case No. CR-93-54 (November 21, 1997)).
[16] Ex. 12 at 2 (Trial Transcript Excerpts, *State v. Kenneth R. Isom*, Drew County Circuit Court Case No. CR-2001-52-2 (December 17, 2001)).

meant death by lethal injection.[17] Isom was found guilty of capital murder, attempted capital murder, residential burglary, aggravated robbery, and rape, and on December 20, 2001, the judge pronounced that the jury determined Isom be sentenced to "**death by lethal injection**."[18]

19. Throughout voir dire, potential jurors for Plaintiff Mickey Thomas's capital trial were told "there are two possible punishments for capital [murder]. One is life without parole and the other is death by lethal injection."[19] When questioned whether he believed the death penalty to be a humane punishment, one potential juror said, "I don't see that it would be inhumane if it was lethal injection, because it doesn't seem like it would be that painful."[20] After finding Thomas guilty, the jury was instructed to "decide whether he is to be sentenced to **death by lethal injection** or to life imprisonment without parole."[21] On September 28, 2005, Thomas was twice sentenced to death and his sentence was pronounced accordingly:[22]

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[17] *See, e.g.*, *id.* ("Every one of you, if the death penalty is imposed, must sign your name to this piece of paper saying, 'Kenneth Isom is to be put to death by lethal injection.'"); ("[If you find the Defendant guilty of capital murder, is one of two things. It'll be either life without parole or death by lethal injection.").
[18] Ex. 13 (Trial Transcript Excerpt, *State v. Kenneth R. Isom*, Drew County Circuit Court Case No. CR-2001-52-2 (December 20, 2001)).
[19] Ex. 14 (Trial Transcript Excerpt, *State v. Mickey David Thomas*, Sevier County Circuit Court Case No. CR-04-52 (September 21, 2005)).
[20] Ex. 15 (Trial Transcript Excerpt, *State v. Mickey David Thomas*, Sevier County Circuit Court Case No.CR-04-52 (September 22, 2005)).
[21] Ex. 16 at 2 (Trial Transcript Excerpts, *State v. Mickey David Thomas*, Sevier County Circuit Court Case No.CR-04-52 (September 27, 2005)).
[22] *Id.* at 3.

20. In November 2005, after finding Plaintiff Thomas Springs guilty of capital murder, his jury was instructed to "retire to deliberate and decide whether on that offense he is to be sentenced to **death by lethal injection** or whether it will be life imprisonment without parole."[23] Upon sentencing Springs to death, the judge announced his sentence: "You will be committed to the custody of the Arkansas Department of Corrections for execution of this sentence as provided by law which will be by lethal injection."[24]

21. On December 11, 2008, following a jury trial, Plaintiff Zachariah Marcyniuk was found guilty of capital murder. During voir dire, one potential juror was advised that if he sentenced Marcyniuk to death "then he would be executed by lethal injection."[25] Before sentencing, Marcyniuk's jury was instructed they would "again retire to deliberate and decide the issues as to whether he is to be sentenced to **death by lethal injection** or to life in prison without parole."[26] The following day, after the jury returned a sentence of death, the court sentenced Marcyniuk to be "transported to the Director of the Department of Correction for the purpose of administering a continuous intravenous injection of lethal quantities of ultra short acting barbiturates in combination with a chemical paralytic agent until the

[23] Ex. 17 at 2 (Trial Transcript Excerpts, *State v. Thomas Leo Springs*, Sebastian County Circuit Court Case No.CR-2205-88 (November 16, 2005)).
[24] *Id.* at 3.
[25] Ex. 18 at 6 Trial Transcript Excerpts, *State v. Zachariah Marcyniuk*, Washington County Circuit Court Case No. CR-2008-475-1 (December 12, 2008)).
[26] *Id.* at 2.

Defendant's death is pronounced according to the accepted standards of medical practice."[27]

22. On April 24, 2008, Plaintiff Gregory Decay was found guilty of two counts of capital murder following a jury trial and, on April 28, sentenced twice to **death by lethal injection**.[28] In the reading of Decay's sentence, the court ordered Decay transported to the Department of Correction "for the purpose of administering a continuous intravenous injection of lethal quantities of ultra short acting barbiturates in combination with a chemical paralytic agent until [Decay's] death is pronounced according to the accepted standards of medical practice."[29]

23. Throughout the voir dire for his 2009 trial, Plaintiff Brandon Lacy's jury was instructed they would determine whether Lacy would be sentenced to life or "death by lethal injection."[30] The impaneled jury was instructed that, following sentencing phase arguments, they would "again retire to deliberate and decide whether he is to be sentenced to **death by lethal injection** or to life imprisonment

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[27] *Id.* at 10.

[28] Ex. 19 (Trial Transcript Excerpt, *State v. Gregory Decay*, Washington County Circuit Court Case No. CR-2007-999-1 (October 29, 2008)).

[29] *Id.*

[30] Ex. 20 (Trial Transcript Excerpt, *State v. Brandon Lacy*, Benton County Circuit Court Case No. CR2007-1550-1 (April 28, 2009)); Ex. 21 (Trial Transcript Excerpt, *State v. Brandon Lacy*, Benton County Circuit Court Case No. CR2007-1550-1 (April 29, 2009)); Ex. 22 (Trial Transcript Excerpt, *State v. Brandon Lacy*, Benton County Circuit Court Case No. CR2007-1550-1 (April 30, 2009)); Ex. 23 (Trial Transcript Excerpt, *State v. Brandon Lacy*, Benton County Circuit Court Case No. CR2007-1550-1 (May 1, 2009)).

without parole."[31] The prosecutor wrapped up his closing argument by reminding the jury "it's your duty to find that the only appropriate sentence in this case is death by lethal injection."[32]

Relevant History of Capital Punishment Statutory Scheme

24. Before lethal injection was introduced into the Arkansas capital punishment scheme, "death by electrocution" and "life imprisonment without parole" were the only available punishments for capital offenses. A.S.A. 1947, § 41-1351.

25. With the enactment of Arkansas Acts of 1983, Act 774, §§ 1, 5, 6 ("the 1983 legislation"),[33] the Arkansas legislature amended its death penalty statute to replace "death by electrocution" with "death by lethal injection."

26. Since 1983, the punishment provision has provided: "A person convicted of a capital offense shall be punished by death by lethal injection or by life imprisonment without parole." Ark. Code Ann. § 5-4-615.[34]

27. The punishment provision has not changed since the 1983 legislation; lethal injection has remained Arkansas's only method of execution for crimes committed after 1983 for over forty years.[35] The methods provision of the Arkansas death penalty statute, however, has undergone many iterations.

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[31] Ex. 24 at 3 (Trial Transcript Excerpts, *State v. Brandon Lacy*, Benton County Circuit Court Case No. CR2007-1550-1 (May 12, 2009)).
[32] *Id.* at 2.
[33] Ex. 25 (Act 774, §§ 1, 5, 6, 1983 Ark. Acts 1747 (method of execution provisions)).
[34] *Id.*
[35] *Id.* at § 3 ("[A]ny defendant sentenced to death by electrocution prior to July 4, 1983, could elect to be executed by lethal injection.").

28. In 1983, Act 774 provided that that the method by which lethal injections were to be to be administered was "by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice." Acts of 1983, Act 774, §§ 1, 5, 6.

29. In 2009, the General Assembly adopted Act 1296, which amended Arkansas's method of execution statute to grant the ADC unfettered discretion to select any chemical or chemicals to use in lethal injection procedures, providing no guidance on how to make its selection. *See* Arkansas Act 1296 of 2009, Ark. Code Ann. § 5-4-617 (2010). Arkansas Act 1296 of 2009 altered Arkansas Act 1983 but not Ark. Code Ann. § 5-4-617.

30. Act 1296 rewrote the methods provision to allow that: "the sentence of death is to be carried out by intravenous injection of one (1) or more chemicals, as determined in kind and amount in the discretion of the Director of the Department of Correction." Ark. Code Ann. § 5-4-617 (2010). The legislature did not provide any guidance to the ADC on how to select the chemical or chemicals to be used, nor the quantity or manner of administration.

31. Act 1296 also clarified that the policies and procedures for carrying out a death sentence under the death penalty statute are not subject to the Arkansas Administrative Procedures Act. Ark. Code Ann. § 5-4-617(5)(B) (2010).

32. The Arkansas Supreme Court subsequently struck down the 2009 iteration of § 5-4-617 as an unlawful delegation of legislative authority under Article IV of the Arkansas Constitution. *See Hobbs v. Jones*, 412 S.W.3d 844, 2012 Ark. 293 (2012) (*Hobbs I*). The Supreme Court found that Act 1296 was invalid because it "fail[ed] to provide reasonable guidelines for the selection of chemicals to be used during lethal injection and it fail[ed] to provide any general policy with regard to the lethal-injection procedure." *Id.* at 15.

33. However, the Arkansas Supreme Court declined to characterize Act 1296 as a sentencing statute because the statute merely clarified, rather than changed, the methods provision of the law governing lethal injection executions. *Arkansas Dep't of Corr. v. Williams*, 2009 Ark. 523, at *8, 357 S.W.3d 867 (2009). The Court explained that Arkansas Act 1296 of 2009 clarified the applicability of the Arkansas Administrative Procedures Act to the method of execution procedures found in Ark. Code Ann. § 5-4-617, but did not impact "his criminal liability or his sentence," 2009 Ark. at *9, 357 S.W.3d at 872. The Court reiterated the "well-established rule" that a sentencing statute must not apply retroactively but held that because Act 1296 did not alter the death-sentenced inmate's previously imposed "criminal liability or his sentence," it was not a sentencing statute and there was thus no issue as to its possible retroactive effect. *Id.*

34. In response, the General Assembly adopted a new method of execution statute, specifying the procedure ADC was to follow in administering lethal injection. Arkansas Act 139 of 2013, codified at Ark. Code Ann. § 5-4-617 (2014) (instructing

the ADC to carry out the sentence of death by administering a lethal amount of a barbiturate after first administering a benzodiazepine). Arkansas Act 139 of 2013 (Act 139), codified at Ark. Code Ann. § 5-4-617 (2014). Under the authority of this new statute, the ADC adopted a new lethal injection procedure.

35. On April 26, 2013, numerous prisoners on Arkansas's death row, including several of the named plaintiffs in the instant action, filed a lawsuit challenging both Act 139 and the specific lethal injection procedure adopted by the ADC. *See McGehee et al. v. Hobbs et al.*, No. 60CV-13-1794 (Pulaski County Cir. Ct.).[36] Those plaintiffs argued that Act 139 unlawfully delegated legislative authority to the ADC by granting it unfettered discretion to choose among a broad range of drugs and to select both the members of its execution team and the training (if any) they would receive.

36. Those plaintiffs also challenged the ADC's specific 2013 lethal injection procedure, alleging that ADC's protocol utilized "a completely untried combination and quantity of drugs that will take hours to be injected and to reach their peak effect, that will produce agonizing and degrading effects during the procedure, and that will severely and permanently injure—but may not kill—[them]."[37]

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[36] Ex. 26 (Amended Complaint, *McGhee et al. v. Hobbs et al.*, Pulaski County Circuit Court Case No. 60CV-13-1794 (June 14, 2013)).

[37] Ex. 27 at 2 (Complaint, *McGhee et al. v. Hobbs et al.*, Pulaski County Circuit Court Case No. 60CV-13-179460CV-13-1794 (April 26, 2013)).

37. On February 21, 2014, this Court entered summary judgment for the plaintiffs, striking down Arkansas Act 139 of 2013, Ark. Code Ann. § 5-4-617 (2014), as violating the separation of powers doctrine in the Arkansas Constitution.[38]

38. On appeal, a divided Arkansas Supreme Court reversed and narrowly upheld Act 139 because "the legislature has provided guidance as to (1) the method the ADC must use, intravenous injection; (2) the type or class of drug the ADC must use, a barbiturate; and (3) the amount of the drug the ADC must use, an amount sufficient to cause death." *Hobbs v. McGehee*, 458 S.W.3d 707, 721, 2015 Ark. 116, at *16 (2015) (*Hobbs II*). The new iteration of the methods provision was found to "provide a general framework within which the ADC must operate and does not place absolute, unregulated and undefined discretion in the ADC." *Id.*

39. Despite the Court's finding regarding the constitutionality of Act 139, in March of this year, the General Assembly hastily enacted legislation that amended the statute to change the punishment for capital murder and to add nitrogen suffocation as an additional method of execution. Nitrogen was pursued by the bill's sponsor, Representative Jeffrey Reed Wardlaw, in response to a June 2024 mass shooting in his district, which includes Dallas County.[39] The Legislature quickly

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[38] Ex. 28 (Memorandum Opinion and Order, *McGhee et al. v. Hobbs et al.*, Pulaski County Circuit Court Case No. 60CV-13-1794 (February 21, 2014)).

[39] *See* Josh Snyder, *Panel Oks nitrogen execution bill*, Arkansas Democrat-Gazette (Feb. 28, 2025). Ironically, the defendant in that case, Travis Posey, has since pleaded guilty to four counts of capital murder and 11 counts of attempted capital murder in exchange for a sentence of life without the possibility of parole. *See* Daniela Dehaghani, *Arkansas mass shooter Travis Posey pleads guilty, avoids death penalty in plea deal*, KATV News (July 22, 2022), https://katv.com/news/local/arkansas-mass-

passed Act 302 despite its lack of guidance and clarity and numerous red flags pertaining to the bill's constitutionality. [40] As outlined in detail below, the amended statute delegates additional and unfettered authority to unelected executive branch officials, and provides even less guidance, than the version of the statute narrowly upheld by the Arkansas Supreme Court in *Hobbs II*.

40. With Act 302, the General Assembly has changed the punishment provision and enacted yet another amendment to the methods provision. In so doing, it has discarded the very framework and guidance on which the statute's constitutionality hinged in *Williams* and *Hobbs II*. The latest iteration, which went into effect on August 5, 2025, reinstates the ADC's "absolute, unregulated and undefined discretion" in determining the method it will use to carry out the death penalty. *Id.*

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shooter-travis-posey-pleads-guilty-avoids-death-penalty-in-plea-deal-mad-butcher-trial-capital-murder-attempted-capital-murder-grocery-store-justice-community. His sentencing hearing occurred on August 4, 2025—the day before the effective date of Act 302. *Id.*

[40] The lack of guidance to the ADC was raised in the legislative discussions of Act 302. Rep. Ashley Hudson, for example, said, "I don't see anywhere in this bill where it [ ] provides some sort of additional guidance to the Department of Corrections or allows the Legislature to chime in on the method, because it says here simply that the director of the Division of Correction will just tell the [] prisoner what their method of execution will be." To Amend the Method of Execution to Include Nitrogen Gas: Hearing on H.B. 1489 Before the H. Judiciary Comm., 2025 Leg., 95th Sess. (Ark. 2025) (Question by Rep. Ashley Hudson, Member, H. Judiciary Comm. at 10:34:58 – 10:35:17). *See also id.* (Deputy Solicitor General Dylan Jacobs at 10:10:46 – 10:10:49 ("The exact protocol for executions is dealt with by the Department of Corrections, so I think we defer to them on the specifics of it.")

Claims for Relief

41. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

Count I: Violation of Separation of Powers – Nondelegation

42. Article IV of the Arkansas Constitution provides:

> The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.
>
> No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

43. "The doctrine prohibiting delegation of legislative power has long been recognized, in Arkansas." *McCarty v. Arkansas State Plant Bd.*, 2021 Ark. 105, at 4, 622 S.W.3d 162, 164 (2021). Act 302 violates this doctrine, enumerated in Article IV of the Arkansas Constitution (the Separation of Powers Article), by unlawfully delegating the determination of the method and means by which an inmate under sentence of death is to be executed, to the ADC. By leaving the decision as to how the state will carry out executions to the ADC, with no guidance as to how to make that decision, the legislative branch grants excessive discretion to the executive branch and fails in its "responsibility to proclaim the law through statutory enactments." *McCarty*, 2021 Ark. at 3, 622 S.W.3d at 164.

44. Under *Hobbs I*, a method of execution statute violates the separation of powers if it gives "unfettered discretion" to the ADC to make decisions about how to carry out executions and/or fails to provide "reasonable guidelines," "includ[ing] appropriate standards by which the [ADC] is to exercise [its] power." 2012 Ark. at 10, 14–15, 412 S.W.3d at 852, 854.

45. In upholding Arkansas's method of execution statute in *Hobbs II,* the court relied on "reasonable guidelines" the statute provided "to ADC in determining the method it will use to carry out the death penalty[,]" such as specifying that the department use "a barbiturate in an amount sufficient to cause death." 2015 Ark. at *15–16; 458 S.W.3d at 717. The majority concluded that "by providing guidance on the method for carrying out the death penalty, the drugs to be used, the order in which the drugs are to be administered, the amount to be administered, and the general policy for carrying out the death penalty in Arkansas, we find that Act 139 does not violate the separation-of-powers doctrine and is distinguishable from Act 1296, which we struck down in [*Hobbs I*]." *Id*. at *16–17; 458 S.W.3d at 718.

46. The 2013 iteration of the method provision was upheld as a proper delegation of legislative authority because "the legislature has provided guidance as to (1) the method the ADC must use, intravenous injection; (2) the type or class of drug the ADC must use, a barbiturate; and (3) the amount of the drug the ADC must use, an amount sufficient to cause death." *Id*.

47. Despite the clear direction in *Hobbs II*, Act 302 vests the Division of Correction with additional, unfettered discretion to select between two forms of lethal injection and an entirely new, never-before-administered method of execution—suffocation by nitrogen gas. But Act 302 provides no guidance as to how ADC is to make that decision, or the auspices or administration of the nitrogen gas. The new discretion conferred by Act 302, when superadded to the discretion already provided by § 5-4-617 (2014), —and which *Hobbs II* only narrowly authorized— renders Act 302 invalid under the Arkansas Constitution.

48. First, the Act violates the separation of powers doctrine because it provides no guidance to the Secretary of the ADC or the Director of the Division of Correction in how to choose between either of the two methods of lethal injection or suffocation by nitrogen gas.

49. The Arkansas Supreme Court has recognized that some discretionary power may be designated to a state agency **so long as** "reasonable guidelines" are provided. *Hobbs II*, 2015 Ark. at 9, 458 S.W.3d at 713 (citing *Bakalekos v. Furlow*, 2011 Ark. 505). Those guidelines must include "appropriate standards by which the administrative body is to exercise this power." *Id.* However, the legislature may not delegate "unregulated, and undefined discretion" to an executive agency without providing *some* criteria to guide the agency's choice. *Id.*; *see also Venhaus v. State ex rel. Lofton*, 285 Ark. 23, 684 S.W.2d 252 (1985).

50. Act 302 is free of such criteria. Its Section 2(a) states only this: "The Division of Correction shall carry out a sentence of death either by intravenous lethal

injection of the drug or drugs described in subsection (d) of this section in an amount sufficient to cause death **or by nitrogen gas.**" Ex. 1 at 1 (emphasis added).

51. Second, the Act violates the separation of powers doctrine because it provides no specifications as to how the Plaintiffs would be gassed. It is silent as to the quantity or quality of gas the ADC must use, how the gas will be administered (e.g. via a hood or mask, or within a gas chamber), and what precautions must be taken to safeguard witnesses and ADC staff from accidental death or injury.[41] The inclusion of such guidance was essential to the Arkansas Supreme Court's narrow upholding the former statute; *Hobbs II* relies upon the statute's provision of "the method for carrying out the death penalty, the drugs to be used, the order in which the drugs are to be administered, the amount to be administered, and the general policy for carrying out the death penalty[.]" *Hobbs II*, 2015 Ark. at *17, 458 S.W.3d at 718. Such guidelines are completely lacking from Act 302's provisions for nitrogen gas.

52. As are standards or guidelines concerning the qualifications and training of the personnel who will carry out the nitrogen gas execution, or for the source or quality of the nitrogen used. While Act 302 connotes the inclusion of standards and guidance in the selection of drugs used for lethal injection, *see* Section 2(d), the Act is silent about the procurement of nitrogen gas.[42]

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[41] Rep. Tippi McCullough at 10:15:21 – 10:15:25 ("I don't see in the bill that there are staff safety protocols.").

[42] *Id.* ("So would you source it from not from a manufacturer, not medical grade, would you source industrial grade nitrogen?") Rep. Andrew Collins at 10:37:10 – 10:37:18;

53. This leaves only questions: How will the ADC choose what method to use for a given individual? If the ADC chooses nitrogen, will it be administered via a mask? A hood? A gas chamber? What will the concentration of the gas be? How will ADC obtain the gas, and how will it verify its quality and composition? At what rate will the gas flow? Who will administer the gas, and how will they be trained? How long will the gas be administered?

54. The Act does not provide any guidelines, much less the requisite "reasonable guidelines," that allow a delegation of legislative power to stand under Article IV of the Arkansas Constitution. The legislature has "abdicated its responsibility and passed to the executive branch, in this case the ADC, the unfettered discretion to determine all protocols and procedures … for a state execution." *Hobbs I*, 2012 Ark. 293, at *15; 412 S.W.3d at 854.

55. Act 302 is, on its face, violative of the separation of powers doctrine in the Arkansas Constitution.

Count II: Violation of Separation of Powers – Legislative and Executive Overreach

51. Under Arkansas law, "it is the court's function to impose a sentence." *Ford v. State*, 99 Ark. App. 119, 122, 257 S.W.3d 560 (2007). The imposition of a death sentence is the specific function of a jury. *See* Ark. Code. Ann. § 5-4-603.

Id. ("There's nothing in the law that prevents us from using an impure form of nitrogen gas that's not medical grade, not intended for use on humans, and will make what is already bad worse.") Rep. Collins at 11:16:16 – 11:16:28.

52. It is a longstanding rule in Arkansas that "valid sentences cannot be modified once execution of the sentence has begun." *Lambert v. State*, 286 Ark. 408, 409, 692 S.W.2d 238, 239 (1985). "A sentence is put into execution when the trial court enters a judgment of conviction or a commitment order." *Gates v. State*, 353 Ark. 333, 336, 107 S.W.3d 868, 869 (2003).

53. The trial court in each Plaintiff's case entered a judgment of conviction or a commitment order prior to the effective date of Act 302. (And, "generally speaking, absent a statute, rule, or available writ, once the circuit court enters a judgment and commitment order, jurisdiction is transferred to the Department of Correction—the Executive Branch." *Richie v. State*, 2009 Ark. 602, at 11, 357 S.W.3d 909, 915 (2009).

54. At no point after a sentence is imposed does jurisdiction over that individual's specific sentence pass to the legislative branch. Application of Act 302 to Plaintiffs would constitute a substantive modification of Plaintiffs' sentences from "death by lethal injection" to "death," and would therefore constitute legislative overreach into the judicial and executive functions in violation of Art. IV. While jurisdiction over the sentence does pass to the executive branch, that jurisdiction does not permit the executive to modify the sentence as they see fit. The ADC must be prohibited from executing Plaintiffs under any protocol it adopts for executions by nitrogen gas because that would modify the sentences given to the Plaintiff's by the courts, thus violating Art. IV. The ADC must not be permitted to exceed its authority

by substantively changing Plaintiffs' sentence from "death by lethal injection" to "death by nitrogen gas."

Count III: Non-Retroactivity

55. It well-established that "a sentence must be in accordance with the statutes *in effect on the date of the crime.*" *State v. Ross*, 344 Ark. 364, 367, 39 S.W.3d 789, 791 (2001) (emphasis added); *State v. Townsend*, 314 Ark. 427, 430, 863 S.W.2d 288, 289 (1993) (Sentencing is "controlled entirely by statute" and "shall not be other than in accordance with the statute in effect at the time of the commission of the crime.") "Only when the General Assembly expressly provides, will a statute be applied retroactively." *Edwards v. State*, 347 Ark. 364, 367, 64 S.W.3d 706, 707 (2002).

56. All the named Plaintiffs were convicted of crimes committed before the effective date of Act 302 and were sentenced before the effective date of Act 302. At the time of Plaintiffs' crimes, convictions and sentencings, the only available punishments for capital offenses were "death by lethal injection" or "life imprisonment without parole." Ark. Code Ann. § 5-4-615 ("A person convicted of a capital offense shall be punished by death by lethal injection or by life imprisonment without parole pursuant to this subchapter"); s*ee also Loyd v. Knight*, 288 Ark. 474, 477, 706 S.W.2d 393, 395 (1986) ("The word 'shall' when used in a statute means that the legislature intended mandatory compliance with the statute unless such an interpretation would lead to an absurdity.")

57. The Act's amendments to Ark. Code Ann. § 5-4-615 substantively change the *punishment* and *sentences* for capital offenses, rather than the *procedure* for carrying out executions. The changes introduce and impose new punishments for these past convictions. [43] Its provisions are not remedial or procedural, nor do they clarify the language of the existing statute. Instead, Act 302 fundamentally changes the punishment for capital murder. Accordingly, it cannot apply to Plaintiffs.

58. The change from "death by lethal injection" to "death" is not a mere clarification of procedure. *Cf. Williams*, 2009 Ark. at *9; 357 S.W.3d at 872 (Act 1296 did not impermissibly alter the inmate's sentence where it merely clarified existing law). It is a change that "attaches new legal consequences to events completed before its enactment." *Id.* at *8; 357 S.W.3d at 871 (citing *Landgraf*, 511 U.S. at 269-270). Act 302 increased the number of available punishments for capital offenses.

59. When read in conjunction with the other provisions of Act 302, the removal of the language "by lethal injection" now allows for a different punishment for capital murder than authorized by statute at the time of Plaintiffs' crimes. *See* Ex. 1; Ark. Code Ann. § 5-4-617.

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[43] While Ark. Code Ann. § 5-10-101 (c)(1) indicates that capital murder is punishable by "death" or "life imprisonment without parole," Ark. Code Ann. § 5-4-615, is the controlling statute because it was a more specific statute in effect at the time of the Plaintiffs' crimes. First, the "death by lethal injection" of Ark. Code Ann. § 5-4-615 is reflected in the sentences and pronouncements given to these Plaintiffs, *supra*. Second, "it is blackletter law for statutory construction to give effect to the specific statute over the general." *Johnson v. Wright*, 2022 Ark. 57, at 10, 640 S.W.3d 401, 407 (2022).

60. Nitrogen hypoxia did not exist as a punishment for capital offenses under Arkansas law at the time Plaintiffs' crimes occurred.[44]. Rather, "death by lethal injection" and "life without parole" were the only permissible punishments. Act 302 thus changes the criminal liability or sentence to which an individual facing a capital murder conviction is exposed and it is, therefore, a sentencing statute.

61. Were Act 302 deemed applicable to the Plaintiffs, its changes to Ark. Code Ann. § 5-4-615 would modify the sentences they received at trial to one chosen by the legislature. Plaintiffs were sentenced to "death by lethal injection." For them to be executed by other means, the sentence and judgment would need to be changed.

62. Act 302 contains no provisions allowing for retroactive application. It contains "no language indicating the Act should be applied retroactively." *Ross*, 344 Ark. at 368, 39 S.W.3d at 791. Such language could have been added but was not. It must, therefore, be applied prospectively only. *See e.g.*, *Howell v. State*, 2019 Ark. 59, at 5, 567 S.W.3d 842, 846 (2019) (holding "that the revised punishment provided . . . is not retroactive and applies only to crimes committed on or after March 20, 2017, the effective date of the Act.").

63. As such, Act 302's provisions regarding punishment must be "prospective only." *State v. Galyean*, 315 Ark. 699, 701, 870 S.W.2d 706, 707 (1994). Act 302's changes to the punishment provisions of Ark. Code Ann. § 5-4-615 became

[44] The deletion of the limiting phrase leaves those who are subject to this statute facing not only the punishments contemplated under Act 302 but also those who may be identified by the Legislature in the future. Ark. Code Ann. §§ 5-4-615 and 617

effective on August 5, 2025. They should apply only to those persons whose crimes occurred on or after August 5, 2025.

64. Plaintiffs, who were sentenced for crimes committed before Act 302's effective date of August 5, 2025, cannot be subject to the Act and cannot be executed under any protocol the ADC adopts pursuant to the Act.

Count IV: Retroactive Legislation-Due Process Violation

65. Article II Section 8 of the Arkansas Constitution protects the due process rights of criminal defendants, ensuring that no one shall "be deprived of life, liberty or property, without Due Process of law." Due process mandates that "laws involving substantive rights cannot be constitutionally applied retroactively." *Alpe v. Fed. Nat'l Mortg. Ass'n*, 2023 Ark. 58, at 4, 662 S.W.3d 650, 653 (2023).

66. Even if this Court were to determine that Act 302 does not run afoul of the longstanding rule against retroactive application of sentencing statutes, state due process rights would limit its application to prospective cases, as imposing new possible punishments on Plaintiffs would upend their statutorily created expectations, and it must be applied prospectively because to allow otherwise would upend settled statutory expectations involving possible punishments.

67. Since the time of their conviction, Plaintiffs had an expectation that they would be punished by one of two statutorily authorized means: death by lethal injection or life without the possibility of parole. This expectation, created by the plain language of Ark. Code Ann. § 5-4-615, constitutes a vested right to one of those two

forms of punishment "because rights conferred by statute are determined according to statutes which were in force when the rights accrued and are not affected by subsequent legislation." *Coco v. Miller*, 193 Ark. 999, 1003, 104 S.W.2d 209, 211 (1937).

68. Accordingly, since the time of their crimes and sentencing, Plaintiffs have had a legitimate, reasonable, and settled expectation that, upon conviction, they would either spend the rest of their lives in prison or die by lethal injection. In fact, by statute, should the procedures be held invalid regarding the imposition of the death penalty or should the death penalty be declared invalid, the Legislature previously mandated that capital murder would then be punished "by life without the possibility of parole." Ark. Code Ann. § 5-4-601(b).

69. This right informed every aspect of the proceedings against Plaintiffs. At the time Plaintiffs were sentenced, the judges and juries who imposed their sentences understood, were instructed, and expected that any death sentence would only be carried out by lethal injection.[45]

70. The decisions and arguments Plaintiffs and their attorneys made at trial and throughout the appeals process were informed by their reliance upon Plaintiffs' expectation that lethal injection was the sole authorized method of execution. The risk of being subjected at a different date to a different form of punishment may have changed the calculus as to some of those decisions or arguments. In particular, some

[45] *See* Exs. 3–24.

Plaintiffs may have accepted offers of life without the possibility of parole if they had known a sentence of death could result in suffocation by nitrogen gas or another method later to be identified by the General Assembly.

71. Because Plaintiffs' crimes occurred, and sentences were imposed, prior to the enactment date, their statutory right to punishment by life without parole or lethal injection is vested. Defendants cannot revoke a vested statutory right without violating due process. *Arkansas Dep't of Hum. Servs. Div. of Econ. & Med. Servs. v. Walters*, 315 Ark. 204, 210, 866 S.W.2d 823, 825 (1993)("[I]t would violate due process to disturb vested rights.").

72. Should Act 302 apply retroactively, it would strip Plaintiffs of these vested rights. The new law thus unsettles the legitimate expectations of Plaintiffs and the judges and juries who sentenced them.

73. Applying the current iteration of the Act's changes to Ark. Code Ann. § 5-4-615 to Plaintiffs would bring to bear the precise concern that motivates the presumption against retroactive statutes: the Legislature here has used its "unmatched powers" to "sweep away settled expectations suddenly and without individualized consideration" in response "to political pressures" and in order to get "retribution against [an] unpopular group[s]" in violation of their due process rights. *See Landgraf*, 511 U.S. at 266, 270; *Cambiano v. Arkansas State Bd. of L. Examiners*, 357 Ark. 336, 341, 167 S.W.3d 649, 653 (2004) ("If a sanction is determined to be punitive, rather than regulatory or administrative, it will be subject to a due process

challenge as if it were subject to an *ex post facto* challenge.") Because the "Legislature has no power to divest legal or equitable rights previously vested" the amendment providing for changes to the punishment for capital murder and additional method of execution cannot apply retroactively. *Gillioz v. Kincannon,* 213 Ark. 1010, 1018, 214 S.W.2d 212, 216 (1948). Unless applied only prospectively, Act 302 is unconstitutional under Article II § VIII of the Arkansas Constitution.

Count V: Unconstitutional Bill of Attainder

74. The Arkansas Constitution forbids the passing of any "bill of attainder." Ark. Const. Art. II, § 17.

75. "A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Howton v. State*, 2021 Ark. App. 86, at 4, 619 S.W.3d 29, 34 (2021). Historically, "a bill of attainder" was "a parliamentary act sentencing a named individual or identifiable members of a group to death." *Burns v. State*, 303 Ark. 64, 68–69, 793 S.W.2d 779, 781 (1990).

76. Plaintiffs were sentenced by juries to "death by lethal injection." As previously discussed, this was reflected in the jury charges, verdict forms, pronouncement of sentence, and judgment. Act 302 changes the punishment imposed by those juries (and authorized by the legislature at the time of the crime) to an undetermined method of punishment to be decided at a later date by an unelected official.

77. To the extent Act 302 imposes a different punishment upon those persons currently sentenced to die by lethal injection--i.e. death by nitrogen hypoxia or, possibly, other methods of execution created by the Legislature in the future—it is an unconstitutional bill of attainder because the law inflicts punishment against them without the benefit of judicial protections.

78. As applied to Plaintiffs, Act 302 fails to reasonably further any nonpunitive legislative purpose.

79. Should Act 302 be applied retroactively, because it punishes a particular group of criminal defendants—those sentenced to death by lethal injection—without the benefit of a trial on that new punishment, it constitutes an unconstitutional bill of attainder under Article II, § 17 of the Arkansas Constitution.

Prayer for Relief

WHEREFORE, Plaintiffs pray that the Court award the following relief:

a. An order finding that Act 302 is unconstitutional in its entirety as a violation of the separation of powers doctrine, both as applied and on its face, and cannot be applied to the Plaintiffs;

b. An order finding that Act 302 is not retroactive and that Plaintiffs cannot be executed by nitrogen hypoxia because they were convicted and sentenced before August 5, 2025;

c. A declaratory judgment that Act 302 is applicable only to those who committed crimes on or after August 5, 2025; or in the alternative,

an order finding Act 302 unconstitutional as violative of due process, inapplicable to the Plaintiffs and mandate that it be applied prospectively only;

d. Injunctive relief prohibiting the ADC from carrying out executions pursuant to Act 302 on those whose crimes occurred prior to August 5, 2025 including the Plaintiffs; and

e. Any other necessary and proper relief to which they may be entitled.

Dated: August 5, 2025

Respectfully submitted,

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