IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

Jack Jones
P.O. Box 400
Grady, AR 71644,

v.

ARKANSAS DEPARTMENT
OF CORRECTION
P.O. Box 8707
Pine Bluff, AR 71611,

RAY HOBBS,
Director,
Arkansas Department of Correction,
P.O. Box 8707
Pine Bluff, AR, and

DOES 1–20, unknown employees
or agents of
Arkansas Department of Correction,

6th

PLAINTIFF,

Case No. CV 2010-1118

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DEFENDANTS.

AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

I. NATURE OF THE ACTION

1. In this Amended Complaint, the Plaintiff, Jack Jones, an Arkansas prisoner under a death sentence, seeks equitable relief against the Arkansas Department of Correction, Ray Hobbs, the ADC's Director, and Does 1–20, unknown executioners, who are charged with executing his capital sentence (collectively, "the ADC"). Mr. Jones seeks a declaration that the ADC is violating or intends to violate state and federal constitutional and statutory law, and he seeks an injunction barring the ADC from doing so.

2. Mr. Jones's causes of action are as follows:

(a) The Method of Execution Act, Act 1296 of 2009, Ark. Code Ann. § 5-4-617 (2009) ("MEA"), according to which the ADC Defendants intend to carry out Mr.

Jones's death sentence, violates the separation of powers and unlawful delegation doctrines of Article IV of the Arkansas Constitution.

(b) Mr. Jones's execution will occur in violation of the Federal Food, Drug, & Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* ("FDCA") because the ADC lacks a valid prescription for the dangerous drugs it intends to use, 21 U.S.C. § 353(b)(1).

(c) Mr. Jones's execution will occur in violation of the FDCA because the drugs the ADC intends to use have not been approved by the Food and Drug Administration ("FDA") for purposes that the ADC Defendants intend to use them, 21 U.S.C. § 355(a)–(b).

(d) Mr. Jones's execution will occur in violation of the Federal Controlled Substances Act ("CSA") because the ADC intends to administer one or more controlled substances during his execution and lacks a valid prescription for such drug or drugs.

(e) Mr. Jones's execution will occur in violation of the CSA because the ADC staff who will administer controlled substances during his execution do not hold, and do not intend to obtain, the requisite registration from the United States Attorney General that would allow them to do so lawfully.

(f) Mr. Jones's execution will occur in violation of the Nurse Practice Act, Ark. Code Ann. §§ 17-87-101 *et seq.*, ("NPA"), and the rules and regulations promulgated under the NPA by the Arkansas State Board of Nursing (ASBN), because Defendants plan to have one or more laypersons undertake the administration of drugs by injection during the execution.

3. Mr. Jones seeks a declaration, pursuant to Ark. Code Ann. § 16-111-103 that the

MEA violates the Arkansas Constitution and that Defendants' plan for implementing the MEA violates state and federal constitutional law, as well as state and federal statutory law.

Mr. Jones further seeks supplemental relief, pursuant to Ark. Code Ann. § 16-111-110, in the form of an injunction barring his execution under the MEA and pursuant to Defendants' unlawful plan for carrying out his sentence. Finally, Mr. Jones seeks an injunction against Defendants' unlawful practices pursuant to Ark. Code Ann. § 17-85-105.

II. PARTIES

4. Plaintiff Jack Jones is a citizen of the United States and a resident of Arkansas. He is a prisoner under sentence of death in the custody of the Defendants. He is being held at the Varner Unit of the ADC in Grady, Arkansas. No date has been set for Mr. Jones's execution.

5. Defendant ADC is an agency of the State of Arkansas. The ADC is responsible for the execution of death-sentenced inmates in the state. The ADC is a part of the executive department within the meaning of Ark. Const. art. IV.

6. Defendant Ray Hobbs became the ADC's Director on January 4, 2010, upon the retirement of Director Larry Norris. Mr. Norris presided over all 23 executions in Arkansas that occurred between 1993 and the present. On information and belief, Mr. Hobbs has never supervised an execution and has no special knowledge of the medical procedures and chemicals that may be involved in executions. Under the MEA, Mr. Hobbs is to determine, in his sole discretion and without any standards or oversight, any and all chemicals and procedures to be used in lethal injection. Mr. Hobbs is a member of the executive department within the meaning of Ark. Const. art. IV.

7. Defendants Does 1–20 are employees or agents of the ADC who participate in the

planning of, purchasing and preparation for, and carrying out of executions in the State of Arkansas.

III. JURISDICTION AND VENUE

8. This Court has jurisdiction under the subject matter of this action pursuant to Arkansas Constitutional Amendment 80, 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).

9. Venue in this Court is authority by Ark. Code Ann. § 16-60-103(3), which allows actions against state agencies and state officers to be brought in Pulaski County. Venue is also proper under Ark. Code Ann. § 17-87-105, which specifies the Pulaski County Circuit Court as the appropriate forum for NPA litigation.

V. BACKGROUND

A. The Standards of Act 774 of 1983.

10. Arkansas first adopted a form of lethal injection as its method of execution in Act 774 of 1983. That statute, left unamended until last year, authorized the Director of the ADC to "determine the substances to be uniformly administered and the procedures to be used in any execution." Ark. Code Ann. § 5-4-617 (2008).

11. The General Assembly circumscribed the Director's discretion under Act 774 with both substantive and procedural safeguards:

a. First, the statute authorizing the Director to engage in rulemaking with regard to executions provided him with some substantive guidance; he was required to adopt a "continuous" procedure and to utilize "an ultra-short-acting barbiturate in

combination with a chemical paralytic." *Id.* Barbiturates are anesthetics, and so Act 774 effectively required that the condemned inmate be injected with a drug that, if delivered properly, would render him unconscious and insensitive to pain.

b. Second, the Director had to make a "uniform[]" decision about the substances to be used, meaning that he had to create a protocol in advance and could not arbitrarily vary the chemicals used depending upon the inmate to be executed.

c. Third, the execution policies adopted, as well as the records of what happened during every execution actually conducted, were public records subject to disclosure under Arkansas's Freedom of Information Act ("FOIA"). Ark. Code Ann. § 25-19-105.

d. Fourth, the decisions made under the statute by the Director were subject to oversight by the General Assembly. Execution rules were required to be submitted for review by the Legislative Counsel. *See* Ark. Code Ann. § 10-3-309. That watchdog body polices agencies for overreaching or abuse on behalf of the General Assembly and is empowered to combat rules that are "beyond the procedural or substantive authority delegated to the adopting agency." *Id.*

e. Fifth, the procedural and substantive validity of the Director's policy judgments were subject to review by the judicial department under Ark. Code Ann. § 25-15-207 and 42 U.S.C. § 1983.

f. Sixth, the Director was required to give members of the public prior notice and an opportunity to comment upon any policies adopted under authority of Act 774. Ark. Code Ann. § 25-15-204.

These restrictions languished largely unenforced until 2008.

B. Enforcement Provokes Repeal.

12. On May 22, 2008, ADC's Director adopted an execution rule, AD 08-28, by authority of Act 774 of 1983. The wide-ranging, 26-page rule prescribed execution policy from the setting of the execution date, through the disposal of the condemned inmate's property and body. Among other things, the rule set standards for the selection of the members of the execution team. It selected the specific chemicals and the amounts and sequence of those chemicals to be used during executions. It described procedures for administering the lethal chemicals and purported to check the inmate for consciousness prior to administering painful chemicals.

13. A condemned inmate, Frank Williams, Jr., challenged AD 08-28 as procedurally and substantively invalid in a Complaint for Declaratory Judgment filed in this Court. Frank Williams's suit sought to enforce the statutory checks on the Director's discretion. In particular, Frank Williams sued under Ark. Code Ann. § 25-15-207, claiming (1) that the Director failed to follow the procedures for rulemaking set forth in the Arkansas Administrative Procedure Act, and (2) that the Director adopted a protocol in violation of the substantive standards of Act, in that AD 08-28 prescribed noncontinuous administration and called for too many chemicals. On the former point, this Court agreed with Frank Williams and enjoined use of the protocol pending compliance with the APA. *See Williams v. Ark. Dep't Correction*, No CV-2008004891 (Ark. Cir. Ct. Aug. 28, 2008).

14. Because it declared AD 08-28 procedurally invalid, this Court did not decide the inmate's substantive claims. *Id.* However, it is significant that both parties agreed that Act 774

did indeed contain standards that constrained the sorts of lethal injection policies the Director could adopt. The disagreement concerned whether AD 08-28 accorded with, or transgressed, the substantive limitations that the General Assembly had obviously placed upon the Director's discretion.

15. This Court's order of August 28, 2008, did not impose an onerous burden. By ruling that AD 08-28 was subject to the APA, this Court required only that Defendants provide prior notice of any proposed execution policy and give the public thirty days to comment upon it. If the only objective had been to develop a legally-valid execution procedure that would allow the resumption of executions, this readily could have been accomplished before the end of 2008. Instead, Defendants and the Attorney General's Office pursued legislation designed to allow the resumption of executions in a manner that avoided public and judicial scrutiny of execution policy. At the urging of Defendants and the Attorney General, the General Assembly adopted the MEA. The new law repeals all six checks of the Director's discretion that had existed under Act 774 of 1983.

C. Prior Proceedings Regarding the MEA.

16. After passage of the MEA, Defendants moved the Supreme Court to lift the injunction prohibiting executions absent compliance with the APA. Frank Williams opposed dismissal claiming that the MEA should not be interpreted to apply retroactively to existing death row inmates. The Arkansas Supreme Court disagreed and held the MEA applicable to inmates such the Prisoners. Rehearing of this decision was denied on December 10, 2009.

17. As noted, eighteen days later after it was declared applicable to existing death-row inmates, on December 28, 2009, Mr. Jones brought a suit in federal district court to challenge the

MEA as violating the federal and state constitutions. Mr. Jones sought to intervene in this action, which included the claim presently before the federal court—that the MEA violates the separation of powers principles of the Arkansas Constitution. The federal court dismissed the inmates' federal claims on the merits but declined to exercise jurisdiction over the inmates' state separation of powers claim, holding that there was a "compelling" need for "[t]hat issue [to] be decided by the Arkansas courts." Therefore, Mr. Jones filed this action to present the issue in this forum.

V. CLAIM FOR RELIEFS

Claim One: The MEA Violates the Separation of Powers

A. The Unique Strength of Arkansas's Unlawful Delegation Doctrine.

18. Article IV of the Arkansas Constitution emphatically requires that the executive department "shall be divided," "distinct," and "separate" from both the legislative and judicial departments of state government. Article IV also demands that no entity, "being of one of these departments, shall exercise any power belonging to the others." The separation of powers in Arkansas is strict, and there can be no blending of departmental powers. Article IV has long been construed to require that the functions of the legislature and judiciary be exercised by those departments alone; they may never be delegated to another authority, such as an executive officers or administrative agency.

19. The legislative power is the power to make important social choices, and the unlawful delegation doctrine bars the executive department from making such choices. In prohibiting the legislature from leaving important decisions to executives officers or agencies, the unlawful delegation rule affirms that such decisions should be made democratically, rather

than by bureaucratic officials who are not responsive to the people.

20. The General Assembly may—without unlawfully delegating its legislative authority—delegate the power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute, by its terms, is made to depend. However, even limited to these details of policy, the legislature may never repose unfettered discretion in any executive officer. To be valid, a delegation to an executive officer to determine facts, contingencies, or details must lay down a definitive declaration of policy along with established criteria, standards or guidelines for the officer to follow in making his decision. Furthermore, even such limited delegations to the executive must be conditioned by procedural safeguards in order to protect against abuse of discretion by the executive.

21. Significantly, in reviewing the constitutionality of a delegation of this sort, the question is not what the executive officers will do or have done but rather what power they have. Arkansas courts are required to test the constitutionality of legislation not by what is attempted under the legislation but upon a consideration of what is permitted by it. The presumption that public servants will do their duty cannot be indulged in determining whether an act violates the Constitution.

22. Under these standards, it is plain that the MEA represents an unlawful delegation of authority, violates the separation of powers, and contravenes Article IV of the Arkansas Constitution.

B. The Totality of the Director's Discretion.

23. Unfettered Discretion to Choose Chemicals. The new statute repeals all limitations on the substances that may be used to carry out executions. Under the MEA,

Defendants now have complete "discretion" to choose "one (1) or more chemicals" of any "kind" and in any "amount." Ark. Code Ann. § 5-4-617(a)(1) (2009). The Act contains no standard or guideline in accordance with which Defendants must exercise their discretion.

a. The MEA would permit selection of chemicals that would result in an unacceptably agonizing death. Governments have experimented with killing through injection of a wide variety of substances, including insulin, petroleum ether, gasoline, embalming fluid, hydrogen peroxide, cyanide, and even air. There is nothing in the new statute to prevent the selection of any of these chemicals.

b. Not only does the statute make clear that any chemical is acceptable, it specifically preapproves the use of chemicals that are known to cause death in an excruciatingly painful manner. The statute authorizes the administration of a one-chemical injection of a "paralytic," § 5-4-617(a)(2)(B). The most well-known and frequently-used type of chemical paralytics are neuromuscular blocking agents, such as curare. Curare and its synthetic analogs paralyze all voluntary muscles but have no effect on consciousness. They paralyze even the muscles necessary for breathing, so respiration is impossible. The drug in effect buries the recipient alive in a chemical tomb, where he is fully conscious but unable to signal distress and unable to breathe, and eventually dies by asphyxiation. Poisoning by curare and curare-like substances causes so much suffering that the American Veterinary Medical Association ("AVMA") prohibits using neuromuscular agents as the sole agent of euthanasia for animals. Section 5-4-617(a)(2)(B) permits lethal injections by curare or another neuromuscular blocking agent alone.

c. Likewise, the statute expressly authorizes a one-chemical injection of concentrated potassium chloride. Ark. Code Ann. § 5-4-617(a)(2)(C). That chemical has no effect on consciousness and causes and extreme burning pain upon injection that has been likened to having one's veins set on fire. Death by potassium chloride poisoning is known to be so excruciating that the AVMA also prohibits the use of potassium chloride as the sole agent of euthanasia. Yet, section 5-4-617 permits lethal injections of potassium chloride alone.

d. Nor is it inconceivable that a paralytic or potassium chloride alone would be selected. The menu-style format in which those chemicals are presented in the statute practically invites experimentation with their use a la carte. And, although the practice has now been condemned as inhumane, single injections of curare or potassium chloride were used in the past for animal euthanasia. Setting aside the fact that it causes a wholly unacceptable level of pain, the use of potassium chloride alone has practical advantages. Potassium chloride is cheap and would cause death most rapidly and reliably. Also, in contrast to barbiturates/anesthetics like thiopental, which are addictive drugs that may be used for recreational purposes, potassium chloride is not likely to be diverted for personal use. Furthermore, unlike other options, potassium chloride is not highly regulated and thus would not require extensive record keeping. The MEA provides no indication of how the Director should balance these advantages against the condemned inmate's interest in minimizing suffering.

e. Recent developments render these concerns all the more pressing. Since the filing of the original complaint, an ongoing, nationwide shortage has made

unavailable pancuronium bromide and sodium thiopental, paralytic and anesthetic agents often administered alongside potassium chloride during lethal injections. Without access to these agents, which render the inmate still and unconscious at the time of execution, executioners would be faced with a decision: rely on an injection of potassium chloride alone with full knowledge of the pain it would cause, or experiment with a novel chemical cocktail which might induce equal or greater pain. Given the proven unreliability of chemical supplies and the vague provisions of the MEA, circumstances that would lead executioners to select one of these unacceptable alternatives are not unimaginable, or even improbable.

f. Any substance, if injected in sufficient quantity, has the capacity to kill a human being. In this regard, the statute's suggestion that the Director could even pick saline as the sole lethal agent should be noted. Ark. Code Ann. § 5-4-617(2)(D) (providing that the Director could select only "one (1)" chemical and that this chemical could be "saline solution"). Saline solution is a simple mixture of salt and water. Yet, an overdose of concentrated saline can kill by causing hypernatremia, or salt poisoning. The complications of acute salt poisoning include internal bleeding of the brain and blood clotting. Death is often preceded by extreme mental confusion, difficulty breathing, vomiting, and violent seizures.

24. Whatever the actual choice may be, the point is that the General Assembly provides no guidance on the matter. By failing to set any limit on what chemicals the Director may select in carrying out lethal injection, the MEA fails to lay down a definitive declaration of policy on the important decision of much pain a condemned inmate may be permitted to endure

during his execution. It fails to establish any criteria, standards, or guidelines for the Director to follow in his selection of chemicals.

25. Unfettered Discretion to Choose Death Procedures. In addition, the Director is newly empowered to "determine in his . . . discretion"—without any guiding standards—"any and all policies and procedures to be applied in connection with carrying out the sentence of death." Ark. Code Ann. § 5-4-617(a)(4) (2009).

a. Nothing in the MEA would prevent adoption of intracardiac injection as the default procedure. Indeed, previously lethal injection procedures drafted by Defendants permitted intercardiac injections under certain circumstances. This procedure, which was never contemplated by any state other than Arkansas, involves the insertion of a large needle through the chest wall and directly through the muscular wall of the beating heart and into one of the chambers of the heart. Obviously, an intercardiac injection would cause extreme pain and risks innumerable excruciating complications, yet nothing in the MEA limits its use.

b. Nothing in the MEA would prevent adoption of a "cut down," an invasive surgical procedure, as the default method of gaining venous access. According to the cut down procedure that the ADC has used in the past, employees cut a deep gash into the prisoner's flesh deep enough to expose a vein for direct insertion of the needle. This procedure would result in severe pain—and was used by Defendants in the 1994 execution of Rickey Ray Rector with disastrous and inhumane results—yet nothing in the MEA limits its use.

c. Nothing in the MEA would prevent adoption of central venous placement

as the default procedure. Starting a central venous line involves inserting a large needle directly into a large vein, such as the jugular, in the individual's neck or chest. It is significantly more difficult, risky, painful, and invasive than starting an ordinary (peripheral) IV line in the recipient's arm or leg. The ADC used a central venous line to execute Clay Smith in 2001, and nothing in the MEA limits its routine use.

26. Whatever the actual choice of procedures may be, the material point is that the legislation provides no guidance. By failing to set any limit on what procedures the Director may select in carrying out lethal injection, the MEA fails to lay down a definitive declaration of policy on the important decision of how much pain a condemned inmate may be permitted to endure during his execution. It fails to establish any criteria, standards, or guidelines for the Director to follow in his selection of procedures.

C. The Lack of a Legitimate Justification.

27. The delegation of this unqualified power to Defendants cannot be justified on grounds of agency expertise. As a matter of Arkansas state constitutional principle, the distinction between departmental functions may not be compromised at the command of expediency or in response to the nod of convenience. Furthermore, as a matter of fact, Defendants have no expertise whatsoever in pharmacology or intravenous administration of chemicals. To the contrary, Defendants use a medically indefensible three-drug sequence that has resulted in a history of botched executions causing gratuitous pain and suffering. And, even if Defendants did possess particular expertise in this area, the legislative articulation of at least a goal or general principle about how lethal injection should be conducted still would be required; the MEA provides none.

28. The contents of analogous statutes further demonstrate that the power conferred by the MEA is not needed to preserve flexibility in the implementation of policy. While the MEA fails to state whether pain and suffering should be minimized, promoted, or ignored, other state legislatures have had little difficulty expressing such a judgment. For example, Kansas requires that lethal injection "cause death in a swift and humane manner." Kan. Crim. Proc. Code § 22-4001. Likewise, Ohio states that executions should "quickly and painlessly cause death." Ohio Rev. Code tit. XXIX, § 2949.22. These provisions provide at least some guidance on the important moral issue involved, but the Arkansas statute provides no like language.

29. The Ohio statute in particular shows why legislative standards are needed in this area. Ohio's Department of Rehabilitation and Correction ("the Ohio DOC"), like Arkansas, had a history of botched executions. Explicitly referencing the statutory command "to quickly and painlessly cause death," the Ohio DOC responded to problems with its execution procedure by adopting a single-drug injection of a painless anesthetic. The MEA fails to provide for the development of lethal injection policy in Arkansas because it fails to identify a goal—such as "swift and humane" or "quick[] and painless[]"—toJones which Defendant's policy should move. Ohio's legislature responsibly exercised its authority; Arkansas's General Assembly delegated its legislative authority to Defendants.

30. The content of Arkansas's animal euthanasia law also demonstrates that the MEA unlawfully delegates legislative authority. At the same time the General Assembly passed the MEA, it passed a law governing animal euthanasia that provided substantial guidance regarding pain. Under this new law, animal euthanasia must be a "humane[] killing" that is "accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of

consciousness and subsequent death, administered by a licensed veterinarian or a euthanasia technician licensed by the federal Drug Enforcement Administration and certified by the Department of Health. *See* Ark. Act 33 of 2009 § 3. In turn, the statute defines a "humane killing" as a death caused "in a manner intended to limit the pain or suffering of the animal as much as reasonably possible under the circumstances." *Id.* If Act 33 applied to condemned inmates, it would provide significance guidance to the ADC; however, the statute specifically states that it does not apply to humans, *id.*, and the MEA contains no similar "humane killing" language. Unlike Arkansas's animal euthanasia statute, the MEA does not require anaesthesia, does not require painless loss of consciousness, does not require the participation of licensed professionals, and does not direct that pain and suffering be limited as much as reasonably possible.

31. It is insufficient that the MEA calls for execution by "lethal injection." As shown, that provision does not answer the hard questions. Lethal injections are not fungible. Depending on the procedures and chemicals employed, execution by lethal injection may either be reliably humane or every bit as excruciating as the historical methods of execution that the Eighth Amendment was adopted to condemn. The humanity of Arkansas's method of execution is a basic, moral issue that must be resolved by the General Assembly.

32. Nor is it adequate (as Defendants argued in federal district court) that the Eighth Amendment's protections against cruel and unusual punishment separately constrain Defendants' decisions. The General Assembly itself could not adopt a method of execution in violation of the Eighth Amendment. Plaintiff's allegation is that Defendants are exercising authority that should be exercised by the General Assembly. That the authority delegated to Defendants is limited by

the same constraints as authority ordinarily exercised by General Assembly is—as a matter of basic logic—no defense whatsoever to that allegation. Far from rebutting the argument that it is exercising legislative power, Defendants' suggestion that they could adopt any lethal injection policy consistent with the Constitution is tantamount to an admission that they are doing so. It is the very essence of legislative power to make important policy decisions within the wide boundaries of what the Constitution allows.

D. The Absence of Procedural Safeguards.

33. In any case, the MEA's deletion of procedural safeguards renders the Eighth Amendment's theoretical check on Defendants' authority basically unenforceable. The MEA aggravates the removal of substantive standards by simultaneously making execution policy considerably less stable, public, and transparent.

a. There is no longer any uniformity requirement, meaning that decisions about the chemicals to be used and procedures to be employed may be made ad hoc. The statute contains no requirement that a written procedure be promulgated or followed.

b. Under the new statute, the "policies and procedures for carrying out the sentence of death and any and all matters related to the policies and procedures for the sentence of death including but not limited to the Director's determinations under this subsection are not subject to the Arkansas Administrative Procedures Act." Ark. Code Ann. § 5-4-617(a)(5)(A) (2009).

c. Subject to a few exceptions, the same material is deemed "not subject to the Freedom of Information Act," § 617(a)(5)(B). Furthermore, even those few exceptions to the new FOIA-exemption are illusory; the MEA provides for the FOIA to

be readily evaded even as to that limited material theoretically still subject to it.

i. While the previous scheme required the Director to disclose the policy that would actually be applied during an execution at least thirty days in advance, Ark. Code Ann. § 25-15-204(a)(1)(A), nothing in the MEA requires the Director to choose the manner of execution within a time frame to allow for discovery prior to the execution through use of a FOIA request, or to stick to any choice previously made. Ark. Code Ann. § 25-19-105(e) (If a public record is in active use or storage, the record need only be made available within three working days of the request).

ii. Even assuming the actual decision is made in advance, nothing in the MEA requires the Director to write down his decision about how an execution should be conducted, and absent such a writing, a FOIA request would be futile. Ark. Code Ann. § 25-19-105(d)(2)(C) ("A custodian is not required to compile information or create a record in response to a request made under [the FOIA]"). Because any decision about execution policy may be unwritten, may be kept secret, and may be changed at any moment without notice, any disclosure rights that ostensibly remain under the MEA are completely meaningless.

d. Together, these provisions undermine all the procedural protections that had existed under Act 774. The ADC may make execution policy without consistency, formality, or documentation. It may create policy without public notice or input before the fact, and the results of its policies are protected from disclosure after the fact. The Director is no longer required to submit his policy decisions to the Legislative Counsel

for oversight by the General Assembly. Judicial review of the ADC's decision under Ark. Code Ann. § 25-15-207 is no longer available, for the MEA makes that statute inapplicable. Lastly, the secrecy and informality of execution policymaking under the MEA hinders judicial review pursuant to 42 U.S.C. § 1983.

E. The Impermissible Purpose.

34. The MEA is unique in the national history of execution legislation in that it reflects not just the passive absence of standards, but their active removal. At the outset of lawmaking in a novel area, guidance only at the gross level may be tolerable, as it can be attributed to the uncertain impact of a new policy and the concomitant need for flexibility. Law ordinarily begins generally but becomes more specific over time, as greater experience allows legislators to plan for more contingencies. The exponential growth of the state and federal statutory codes illustrates the point. But in this instance, the process has been reversed. In this case, the General Assembly began with some standards and safeguards in Act 774 and then, after acquiring a quarter-century's experience in lethal injection policy, removed them. The legislative record shows that the MEA was purposefully designed to avoid the embarrassment of public oversight and the inconvenience of judicial review. Far from empowering the ADC to improve its practices, the MEA was crafted to ensure that it never has to do so.

F. The Democratically Disconnected Delegatee.

35. Lastly, the nature of the Director's position is also important. His is a career-type position; he is not a political appointee. The ADC's Director is "appointed by" and "serve[s] at the pleasure of the Board of Corrections." Ark. Code Ann. § 12-27-107. Furthermore, the members of the Board of Corrections themselves, though initially appointed by the Governor,

Ark. Code Ann. § 12-27-104, are largely independent from the political process. *See* Ark. Const. amend. 33. Thus, the ADC's Director holds office under appointment of officers who themselves hold office by appointment. Because the connection between the democratic process and the Director's office is so highly attenuated, substantive standards and procedural safeguards take on special importance in terms of maintaining popular control over public policy.

36. The method of executing a sentence of death must be determined by the General Assembly, acting on behalf of the People. It is the People, acting through their representatives, who must make the moral choice of whether to prevent, promote, or tolerate pain and suffering during execution, and of what types, degrees, and risks of pain and suffering that the condemned may be allowed to endure. These are the difficult problems posed by execution policy, and the MEA utterly fails to resolve them. Rather, it purports to place all of these decisions with the Director of the Arkansas Department of Correction and then eliminates every mechanism that might be used to police the Director's judgment. The statute was designed to provide the ADC with a domain in which to exercise discretionary power free from the checks and balances mandated by the Arkansas Constitution.

37. The MEA delegates legislative authority to an executive official, grants arbitrary discretion not governed by any reasonable standard, and eliminates procedural safeguards against abusive or unlawful exercise of the discretion granted. The Act is invalid because it violates the unlawful delegation and separation of powers doctrines of Ark. Const. art. IV, §§ 1 & 2.

Claim Two: Violation of the FDCA's Prescription Requirement

39. The allegations set forth in Paragraphs 1–38 are incorporated by this reference as if fully set forth herein.

39. The FDCA forbids the administration of any dangerous drug without a prescription by a practitioner who is licensed by law to administer such drugs. 21 U.S.C. § 353.

40. On information and belief, the ADC intends to use one or more chemicals in the execution of Mr. Jones that qualify as drugs within the meaning of the FDCA.

41. On information and belief, the drug or drugs that the ADC intends to use in the execution of Mr. Jones are, within the meaning of the FDCA, "not safe for use except under the supervision of a practitioner licensed by law to administer such drug [or drugs]." 21 U.S.C. § 353(b)(1).

42. On information and belief, the ADC does not hold and does not intend to obtain a valid prescription for the dangerous drug or drugs that it intends to use in the execution of Mr. Jones.

43. The ADC is thus in violation of, or threatens to violate, the FDCA.

Claim Three: Violation of the FDCA's Requirement of FDA Approval

44. The allegations in Paragraphs 1–44 are incorporated by this reference as if fully set forth herein.

45. The FDCA requires that drugs obtained through interstate commerce be approved by the FDA for their intended use. 21 U.S.C. § 355.

46. On information and belief, the ADC has obtained or intends to obtain the drug or drugs that it intends to use in the execution of Mr. Jones through interstate commerce.

47. The drug or drugs that the ADC intends to use in the execution of Mr. Jones have not been approved by the FDA for use in lethal injection and will not be duly approved prior to Mr. Jones's execution.

48. The ADC is thus in violation of, or threatens to violate, the FDCA.

Claim Four: Violation of the CSA's Prescription Requirement

49. The allegations in Paragraphs 1–49 are incorporated by this reference as if fully set forth herein.

50. The Controlled Substances Act ("CSA") forbids the administration of any controlled substance without a valid prescription. 21 U.S.C. § 829(b).

51. On information and belief, the ADC intends to administer one or more controlled substances in the execution of Mr. Jones.

52. On information and belief, the ADC does not hold and does not intend to obtain a valid prescription for the one or more controlled substances that it intends to use in the execution of Mr. Jones.

53. The ADC is thus in violation of, or threatens to violate, the CSA.

Claim Five: Violation of the CSA's Registration Requirement

54. The allegations set forth in Paragraphs 1–54 are incorporated by this reference as if fully set forth herein.

55. The CSA requires that any person who dispenses or who proposes to dispense any controlled substance must obtain a registration from the United States Attorney General permitting him to do so. 21 U.S.C. § 822.

56. On information and belief, the ADC intends or proposes to dispense one or more controlled substances in the execution of Mr. Jones.

57. On information and belief, the ADC agents or employees who intend or propose to dispense the controlled substance or substances in the execution of Mr. Jones do not hold, and

do not intend to obtain, a valid CSA registration from the Attorney General.

58. The ADC is thus in violation of, or threatens to violate, the CSA.

Claim Six: Violation of the NPA

59. The allegations set forth in Paragraphs 1–59 are incorporated by this reference as if fully set forth herein.

60. The NPA prohibits any person from practicing nursing who is not licensed by the ASBN. Ark. Code Ann. §§ 17-87-101(b)(1) and 17-87-104(a)(1)(C).

61. The injection of drugs constitutes the practice of nursing under Ark. Code Ann. §§ 17-87-102(5)–(6), 17-87-203, and 17-87-705(b)(2) and the rules and regulations of the ASBN.

62. On information and belief, the ADC intends to inject one or more drugs into Mr. Jones during his execution.

63. On information and belief, the ADC personnel who will inject the drug or drugs into Mr. Jones during his execution are not licensed by the ASBN to do so and will not be so licensed at the time of Mr. Jones's execution. On information and belief, the ADC personnel who will inject the drug or drugs into Mr. Jones during his execution do not qualify for any exception or exclusion from the NPA and are not otherwise authorized to inject drugs

64. The ADC is thus in violation of, or threatens to violate, the NPA.

VI. PRAYER FOR RELIEF

Mr. Jones respectfully requests the following relief:

65. That this Court declare, pursuant to Ark. Code Ann. § 16-111-103, that Mr. Jones's execution according to the MEA would be unconstitutional;

66. That the Court declare, pursuant to Ark. Code Ann. § 16-111-103, that the ADC's

implementation of the MEA violates the FDCA, the CSA, and NPA;

67. That this Court grant a permanent injunction, pursuant to Ark. Code Ann. § 16-111-110, barring Mr. Jones's execution absent passage of a new statute incorporating standards sufficient to satisfy the Arkansas Constitution and compliance with state and federal statutes;

68. That this Court grant a permanent injunction, pursuant to Ark. Code Ann. § 17-85-105, barring the ADC from carrying out Mr. Jones's execution in violation of the NPA;

69. That this Court explicitly reserve enforcement jurisdiction to ensure compliance with its injunction pending any appeal on the merits by Defendants; and

70. That this Court grant all other relief to which Mr. Jones may be entitled and which this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of July, 2010, a copy of the foregoing pleading was served by U.S. mail, postage prepaid, to the Arkansas Attorney Generals Office, Catlett-Prien Tower Bldg., 323 Center Street, Suite 200, Little Rock, AR 72201-2610.

Jeff Rosenzweig