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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

FREDDIE EUGENE OWENS, BRAD KEITH SIGMON, GARY DUBOSE TERRY, and RICHARD BERNARD MOORE,.....................*Respondents-Appellants*,

v.

BRYAN P. STIRLING, in his official capacity as the Director of the South Carolina Department of Corrections, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; and HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina,.*Appellants-Respondents*.

RESPONDENTS' RESPONSE TO APPELLANTS' MOTION TO LIFT ABEYANCE, DISMISS APPEAL, AND VACATE CIRCUIT COURT ORDER

Respondents-Appellants ("Respondents") are four death-sentenced inmates who prevailed in a declaratory judgment action challenging the legality and constitutionality of South Carolina's amended execution method statute, S.C. Code Ann. § 24-3-530 (Supp. 2022).[1] Appellants-Respondents ("Appellants") now seek to dismiss their appeal as moot and vacate the circuit court

[1] During the pendency of this action, two additional death-sentenced inmates have exhausted their appeals—Mikal Mahdi and Marion Bowman. This Court stayed the issuance of their execution notices pending the outcome of this case. Order, *Mahdi v. State*, No. 2014-002131 (S.C. Feb. 9., 2023); Order, *State v. Bowman*, No. 2002-023546 (S.C. Jun. 8, 2023). A third inmate, John Wood, has also exhausted his appeals but this Court stayed the issuance of any execution notice for him due to a pending competency to be executed claim. Order, *State v. Wood*, No. 2002-022661 (S.C. Nov. 17, 2022).

order because the South Department of Corrections ("SCDC") announced it obtained pentobarbital for lethal injection executions. Neither dismissal nor vacatur is appropriate, and this Court should deny Appellants' motion and address the important issues raised in this case.

INTRODUCTION

The 2021 amendments changed South Carolina's default method of execution from lethal injection to electrocution and added the firing squad as a third option; it also empowered the Director of SCDC to deem which of these alternative methods is "available." "The amended statute now provides that any person sentenced to death has a 'right of election' among electrocution, the firing squad, or lethal injection." *Owens v. Stirling*, 438 S.C. 352, 355, 882 S.E.2d 858, 860 (2023).

Following a four-day trial, including competing testimony from multiple expert witnesses, the circuit court issued an order declaring that: (1) both the firing squad and the electric chair violate Article I, Section 15 of the South Carolina Constitution because they are cruel, corporal and unusual punishments; (2) the statutory language providing that an inmate has a right to elect a method of execution when alternatives are deemed "available" by the SCDC Director is unconstitutionally vague and an improper delegation of authority; (3) the retroactive application of the amended statute violates *ex post facto* prohibitions; and (4) the statutory right to elect a method of execution is violated by the fact that an inmate does not have a choice between two constitutional methods of execution.

The State appealed, and Respondents filed a cross-appeal challenging the circuit court's pretrial denial of discovery. On January 26, 2023, after oral argument, this Court reversed in part and remanded, finding that the trial court abused its discretion by denying discovery. *Owens*, 438 S.C. at 360, 882 S.E.2d at 862 ("We find the Inmates' requests for information regarding lethal injection are relevant and necessary for the proper adjudication in this matter."). The lower court

was instructed to oversee the completion of discovery within sixty (60) days, and the remainder of the State's appeal was held in abeyance.

No additional discovery took place. Instead, Appellants requested an emergency stay of the proceedings while the Legislature considered (and ultimately passed) amendments to S.C. Code Ann. § 24-3-580 (2023) (the "Secrecy Statute"). Prior to its amendment, this statutory provision prohibited disclosure of "the identity of a current or former member of an execution team" absent a "court order under seal for the proper adjudication of pending litigation." S.C. Code Ann. § 24-3-580 (Supp. 2022). The new and expanded version of the Secrecy Statute extended this protection to drug suppliers (and all other persons or entities associated with the "planning or administration" of an execution), eliminated the "court order" provision, and exempted the purchase of lethal injection drugs from South Carolina's procurement rules, DHEC regulations, and Pharmacy guidelines. S.C. Code Ann. § 24-3-580 (2023). The statute now provides that lethal injection drugs need not be provided by a licensed pharmacist, nor is a prescription from a qualified physician required for anyone to "supply, manufacture, or compound any drug intended for use in the administration of the death penalty." *Id.*

Armed with its new Secrecy Statute, SCDC has now announced that it procured pentobarbital from an unidentified source and adopted a one-drug lethal injection protocol. SCDC's Director, Bryan Stirling, reported that the Department contacted over 1,300 manufacturers, suppliers, compounding pharmacies, and other "potential sources" (virtually all of whom apparently declined to sell the necessary drugs) before eventually securing pentobarbital. Affidavit of Bryan P. Stirling, *Owens v. Stirling*, No. 2022-001280, at ¶ 6 (S.C. Sept. 19, 2023).

ARGUMENT

I. Respondents' Article I, Section 15 Claims and Method Choice Claim Are Not Moot, and Respondents Have Standing.

a. Respondents' Article I, Section 15 claims and method-choice claim remain justiciable.

The announcement that SCDC has obtained lethal injection drugs does not fully resolve the significant constitutional and statutory questions in this case, and it would be a waste of judicial time and resources to require new litigation of these same issues in the future. Specifically, Respondents' claims that electrocution and firing squad violate Article I, Section 15 of the South Carolina Constitution and that the statute requires a choice between two or more constitutional methods of execution remain justiciable.[2]

This case was filed pursuant to the Uniform Declaratory Judgments Act, which "is to be liberally construed and administered" to achieve its intended purpose "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.'" S.C. Code Ann. § 15-53-130. The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or

[2] Respondents concede that their ex post facto, vagueness, nondelegation, and "as applied" statutory violation claims are moot for purposes of the current litigation. However, as Appellants acknowledged, these claims may require relitigation in the future. As long as the amended execution methods statute, S.C. Code Ann. § 24-3-530, remains operative law in South Carolina, these claims will be justiciable in a future case should the Director again declare that lethal injection is unavailable. Further, the mootness of the statutory issues is contingent on whether SCDC does in fact have properly supplied, properly stored, reliable, and effective pentobarbital. SCDC was not able to obtain pentobarbital, by their own admission, from the first 1300 suppliers they contacted, which necessarily raises concerns about the quality and efficacy of the drugs, as discussed further below. If the drugs have been improperly compounded, improperly stored, or are otherwise unreliable, the question of whether lethal injection is truly "available" remains.

abstract character." *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) (quotation omitted). As this Court explained in *Sunset Cay, LLC v. City of Folly Beach*,

> [t]he Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship.

357 S.C. 414, 423–24, 593 S.E.2d 462, 466 (2004) (citation omitted).

A justiciable controversy remains because S.C. Code § 24-3-530, as amended, provides a statutory right of election between at least two constitutional methods. This Court has previously recognized "the statutory right of inmates to elect their manner of execution," Order, *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (S.C. June 16, 2021), and the State appears to agree in its motion that § 24-3-530 "already provides an inmate the opportunity to elect between two constitutional methods." Motion to Dismiss at 8. As this Court has already determined, "the statutory right of inmates to elect the manner of their execution" is violated when "only one method of execution [is] available." Orders, *State v. Sigmon* & *Sigmon v. State*, Nos. 2002-024388, 2021-000584 & *State v. Owens*, No. 2006-038802 (June 16, 2021) (internal citation omitted). The circuit court concluded that both the firing squad and the electric chair are unconstitutional methods of execution. There is therefore no meaningful way for Respondents to exercise their statutory right of election, and this necessarily implicates the parties' dispute over the constitutionality of the firing squad and the electric chair.

This controversy is not hypothetical or abstract. Respondents desire to elect lethal injection is predicated upon it being carried out in a reliable and effective way, using drugs that are properly

manufactured by a reputable source. South Carolina's recent adoption of the expanded Secrecy Statute offers no such assurances. On the contrary, the new Secrecy Statute states that the drugs can be obtained from *anyone*, without the participation of a licensed pharmacist or physician. Moreover, it is clear from SCDC's prior actions (including their steadfast resistance to producing discovery) that the State will not voluntarily disclose further particulars about the nature, quality or efficacy of the drugs it has recently acquired. *See infra* Section II.

b. Even if the claims are moot, multiple exceptions apply.

There are three exceptions to the mootness doctrine, all of which apply here. First, the appellate court can take jurisdiction if the issue raised is capable of repetition but generally will evade review. This exception "does not require a reasonable expectation that the same complaining party be subjected to the action again." *Byrd v. Irmo High School*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). Third, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot. *Id*.

There can be no dispute that the issues in this case are capable of repetition. Indeed, Respondents will be required to make a new election upon this Court's issuance of execution notices, S.C. Code § 24-3-530(A), and there are already multiple inmates in line behind Respondents whose executions have been stayed pending the outcome here. SCDC has provided no information regarding how many lethal injection executions they are able to carry out, nor whether its supplier is capable of providing pentobarbital for future executions in the long term. It

is also clear that, if this Court does not finally resolve these matters now, they will generally evade review. The State's own arguments demonstrate why.

All future inmates facing execution dates under the current statute will have a period of one to two weeks[3] after the execution order is issued in which to make their statutory right of election. If those inmates file another lawsuit, it is very unlikely that any court will intervene before the election date has passed (as this case's own history establishes), and if they elect lethal injection, the State will make the same mootness arguments they make here. On the other hand, if those inmates elect either electrocution or the firing squad, the State will argue that they have "waived" any challenges to those methods by selecting them. Motion to Dismiss at 5, n.* (arguing an inmate who selects either electrocution or firing squad "would waive any challenge to the constitutionality of that method."). If an inmate is unable or unwilling to make any election, the statute imposes a default method of electrocution—a method that the lower court declared unconstitutional after hearing *the same evidence* that any future litigant would need to present to address that question. Thus, the issues here are both certain to recur and likely to evade review.

The public interest exception also applies. The seminal case defining this exception is *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E.2d 88 (1947). In *Ashmore*, the plaintiff sought to enjoin a government body from issuing bonds to fund the construction of a new auditorium. The trial court denied the request for injunction, and a subsequent election rendered

[3] Respondents are required to elect an execution method within 14 days of their execution date. S.C. Code § 24-3-530(C). Execution dates are set "the fourth Friday" after the Clerk of the Supreme Court issues an execution notice upon the completion of an inmate's appeals. S.C. Code 17-25-370. Thus, depending on what day of the week an execution notice is issued, inmates can have as little as one week or up to two weeks in which to select a method.

the issue moot. Nevertheless, the Court decided the case was justiciable on appeal because the issues raised were of substantial public importance, explaining:

> [T]he case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued public questions of importance. The last stated factor brings into play the principle, now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest.

Id. at 96, 44 S.E.2d at 96–97.

Whether South Carolina's constitution sanctions death in the electric chair or by firing squad are matters that concern all citizens. This is not a private dispute between individuals. It is one in which "an authoritative determination for the future guidance of public officers" is necessary. *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622, 104 N.E.2d 769, 772 (1952). It is also an area in which no final judicial guidance currently exists. *See Sloan v. Dep't of Transp*., 379 S.C. 160, 169, 666 S.E.2d 236, 240 (2008) (finding the public interest exception applied, in part because "[i]n the instant case . . . there is no case law specifically addressing the DOT's authorization of an emergency procurement."). Thus, it is in the public interest that these issues be resolved.

For much the same reasons, a decision on the merits of this case will affect future events and have collateral consequences for the parties. Such a decision will determine whether all death-sentenced inmates in this State will be granted a statutory right of election between two or more constitutional methods of execution, and whether the State is barred from offering either electrocution or the firing squad as available options. *See id.* at 169, 666 S.E.2d at 240 (finding the capable of repetition, yet evading review exception applied and, for the same reasons, "a decision on the merits will certainly affect future events").

It would be a senseless waste of time and resources to vacate the lower court's judgment, as the State requests, simply to allow for future litigation of these same issues. The next set of potential plaintiffs are already in line, and more will follow. Now is the time to finally resolve these questions. The evidence has been developed and the issues are ripe for this Court's review. The parties and the public need this Court's authoritative resolution and guidance.

c. Respondents have standing.

"A plaintiff has standing to challenge legislation when he sustained, or is in immediate danger of sustaining, actual prejudice or injury from the legislative action." *Jowers v. S.C. Dep't of Health & Env't Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018). To meet the test for standing, a plaintiff must have suffered an "injury in fact"—"an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (quotation omitted).

Respondents have constitutional standing because they are in immediate danger of sustaining actual prejudice or injury from the State's violation of their statutory right of election and their state constitutional rights. There is currently only one constitutional execution method available in South Carolina. Once this Court issues new execution orders, Respondents will be required to make *a new election* within fourteen days of their scheduled execution dates. S.C. Code § 24-3-530(A). Without resolution of the constitutional issues, there will be no meaningful statutory election, nor will Respondents' counsel be in a position to adequately advise Respondents about how to exercise that statutory right.[4] Thus, Respondents are facing the imminent danger that

[4] Director Stirling's affidavit does not specify whether the Department has a sufficient quantity of pentobarbital to carry out all four executions (or additional future executions) by lethal injection. Stirling's detailed description of the difficulty the Department has faced suggests otherwise. The shelf-life of compounded pentobarbital is approximately 45 days if the product is properly produced and then immediately frozen. *See, e.g.*, State's Motion to Modify Briefing Schedule,

they will be executed without being able to exercise their statutory right to a choice between at least two constitutional methods.

Even if this Court decides that Respondents lack constitutional standing, the standing requirements are satisfied under the public importance exception. "[T]he rule [of standing] is not an inflexible one." *Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). Standing may also be conferred on a party "when an issue is of such public importance as to require its resolution for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). "The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Id*. at 199, 669 S.E.2d at 341. "Unlike with constitutional standing, a party is not required to show he has suffered a concrete or particularized injury in order to obtain public importance standing." *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). Nor must the respondent "show he has an interest greater than other potential plaintiffs." *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007).

Capital punishment is an issue of significant public importance in South Carolina. There are 35 people on South Carolina's death row, all of whom the State seeks to execute in the name of public safety and South Carolina citizens. Moreover, this Court has conferred standing in numerous cases raising issues of significantly less public importance than those present here.[5]

State v. Dixon, No. CR–08–0025–AP (Ariz. 2021) (Arizona Attorney General admitting that compounded pentobarbital has a beyond-use date of 45 days and not 90 days, as initially alleged). Unless SCDC has a reputable and reliable source of high-quality pentobarbital, there is no guarantee that even the current plaintiffs (much less future death-sentenced inmates) will all be offered and willing to make an election for lethal injection.

[5] *See e.g.*, *Sloan v. Dep't of Transp*., 379 S.C. 160, 170, 666 S.E.2d 236, 241 (2008); (finding standing existed to challenge the DOT's use of emergency procurement provisions for a

South Carolina's potential use of the electric chair or the firing squad is "at least as important as the proper funding for a clinical hospital for MUSC." *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472. Thus, even if the Respondents lack constitutional standing, the standing requirements for these claims are satisfied under the public importance exception.

II. Further Discovery Regarding Lethal Injection Remains Necessary, and This Court Has Authority to Order It.

The discovery issue on which this Court initially remanded this case—the availability of lethal injection—is still crucial; the relevant questions have simply changed. Notwithstanding the fact that there is currently only one method of execution in South Carolina that has not been enjoined as unconstitutional, the right of election is meaningless if neither Respondents nor any court can obtain any information about whether lethal injection will be performed properly. Respondents' concession that lethal injection by a single dose of pentobarbital is constitutional has always been premised on such an execution being carried out in a reliable and effective way, using drugs that are properly manufactured by a reputable source. Oral Argument, 1:09:46 ("**[D]one properly**, then lethal injection is clearly a humane method of execution." (Blume) (emphasis added)). By its own admission, SCDC was turned down by over 1,300 contacts before obtaining pentobarbital, which raises concerns about the legitimacy, efficacy and purity of drugs obtained from the Department's 1301st choice. Affidavit of Bryan P. Stirling, *Owens v. Stirling*, No. 2022-001280, at ¶ 6 (S.C. 2023). Without further information, Respondents face selecting blindly

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construction project in Charleston County); *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) (holding standing existed to challenge the Governor's holding of a commission in the Air Force Reserves); *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (conferring standing to challenge a preservation society's conveyance of property); *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (finding standing existed to argue a county exceeded its authority by issuing hospital bonds).

between a method of execution of uncertain efficacy (lethal injection) and two antiquated methods that the circuit court has deemed unconstitutional due to the pain and damage each method is certain to cause.

Allowing this case, and executions, to move forward should require some assurance that the drugs obtained by SCDC will be effective and reliable for use in a lethal injection execution. This Court has the authority to order SCDC to turn over information related to the quality and effectiveness of the drugs to Respondents, or at least to the Court itself. This Court should do so before resolving this case and allowing executions to resume.

The Court can order such a disclosure without requiring SCDC to disclose identity information protected by the Secrecy Statute, S.C. Code § 24-3-580 (prohibiting disclosure of the identity of a current or former member of an execution team). The Secrecy Statute explicitly protects only the identities of the suppliers of the drug, not information regarding the drug itself or quality controls surrounding the drug.[6] Respondents concede SCDC can turn over information about execution methods with the identities of anyone involved redacted, and it could do so under a protective order, to avoid disclosures prohibited by the Secrecy Statute.[7]

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[6] Any argument by the State that the Secrecy Statute protects all information related to the lethal injection drugs, and the specific information requested below would raise serious constitutional issues that would need to be litigated in a separate action.

[7] At oral argument, this Court recognized—and the State conceded—that the State could turn over otherwise sealed information to Respondents under a protective order:

> Q (Few, J.): I'm talking about a protective order that says they can have it, but it's sealed, and it can't be disclosed outside of a very small circle of people. If you got that now, what's the legal basis on which this Court is not entitled to know what the department did to try to satisfy, to comply with the statute?
>
> A (Plyler): I am not aware of any legal basis that this Court couldn't order [SCDC] to provide that information to you.

Respondents submit that to have assurances the drugs obtained by SCDC are of the quality to be effective and reliable, the Court should order disclosure of the following information:[8]

- The qualifications of the supplier(s) and/or compounder(s) of the lethal injection drugs (and any supplier(s) of the components to be used in compounding);
- The date or dates on which the drugs were manufactured or compounded;
- If the drugs were compounded, the procedure followed by the compounder;
- Information about quality control measures used to ensure the purity and efficacy of the lethal injection drugs, including the results of any tests or analyses performed on the drugs;
- Information about storage and handling of the lethal injection drugs; and
- The expiration dates of lethal injection drugs to be used in the executions, including, if relevant, the expiration dates of any stabilizing compounds and the expiration dates of the active execution drug.

SCDC can make these disclosures in compliance with the Secrecy Statute, as it has done in the past with information regarding electrocution and firing squad. In discovery in the circuit court, SCDC disclosed numerous specifics about the process of electrocution, including the voltage, number of shocks, and details about the electric chair, and about the firing squad, including the number and type of bullets, type of guns, and timing of shots. SCDC even provided reports of multiple tests on the electric chair circuitry—much the same information requested here. The information provided contained details about the particulars of each method of execution, and what quality control measures were in place, without including the identities of anyone on the execution

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Oral Argument at 2:29:20–41.

[8] The State has not yet disclosed its execution protocol to Respondents. Accordingly, Respondents do not currently request information expected to be contained within the protocol or seek to challenge the protocol. Respondents currently seek only information relating to the efficacy of the drug obtained by SCDC.

team or otherwise involved in the execution process, and the same can be done with respect to lethal injection.

Respondents' concerns about the quality and reliability of pentobarbital obtained with no quality assurances is not unfounded. Pharmacists have expressed grave concerns about the quality of execution drugs obtained from compounding pharmacies, a likely source for SCDC's drugs given their statements to the Legislature and the difficulties they had in obtaining the drugs. "Regulatory oversight of compounding pharmacies is much less rigorous than for FDA-approved drugs." Declaration of Gail A. Van Norman, M.D., *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-0145, at ¶ 96 (D.D.C. 2019). Specifically, drugs from compounding pharmacies are not required to undergo testing for product quality, consistency, safety, or efficacy. *Id.* at ¶ 97.

This lack of oversight frequently results in pharmaceutical preparation errors, specifically subpotency (the compound contains less drug than labeled), and superpotency (contains more drug than labeled). *Id.* at ¶ 98, 105. "If the chemical combination is improper, chemicals can react to form small solid particles, which can be excruciatingly painful upon injection." Declaration of David B. Waisel, M.D., *Justice 360 v. Stirling*, No. 3:20-cv-03671-MGL, at ¶ 16 (D.S.C. 2020). The potential for subpotency is of particular concern in lethal injection executions, as it creates the risk that the drugs administered will be powerful enough to cause pain, but not death. Respondents have consulted with a pharmacologist on this question, who advised Respondents that using an insufficient amount of the drug will induce a coma or brain death in the inmate but will not actually cause death.

In the past several years, these concerns have become a reality in multiple states that have botched executions or been forced to call them off due to problems with the drug supply or the

execution protocol. For example, in Texas, five of the eleven inmates executed in 2018 expressed feeling a burning sensation during the execution after Texas used drugs acquired from a compounding pharmacy whose license was on probation for numerous safety violations. "Investigation Reveals Texas Obtained Possibly Tainted Execution Drugs from Pharmacy with Tainted Safety Record," *Death Penalty Information Center* (Nov. 29, 2018), https://deathpenaltyinfo.org/news/investigation-reveals-texas-obtained-possibly-tainted-execution-drugs-from-pharmacy-with-tainted-safety-record.

Disclosure of the information requested will aid South Carolina in avoiding these problems without disclosing the identity of the suppliers or anyone else involved in the execution process. However, the State's steadfast refusal to produce any discovery with respect to lethal injection has made clear that it will not disclose any of this information in the absence of a court order. This Court should enter such an order.

Appellants conceded at oral argument that this Court has the inherent authority to order SCDC to provide more information about lethal injection and the Department's process for obtaining lethal injection drugs. Oral Argument, *Owens v. Stirling*, No. 2022-001280 (S.C.), 32:19 ("[T]his Court has shown that it is capable of ensuring that if it has questions about the director's statements on availability, you can ask follow up questions to learn more details." (Lambert)); 39:11 ("If there is a role for judicial review of the determination, it should belong to this Court, without another round of a civil lawsuit in circuit court and discovery and . . . so forth." (Lambert)); 2:32:01 ("[I]t's implied that if . . . the Department of Corrections has to certify to this Court, that this Court can determine whether they're satisfied with the certification or not." (Plyler)). Indeed, as the Chief Justice pointed out, it is impossible for this Court to determine whether it is satisfied with SCDC's statement of lethal injection's availability when the Department refuses to provide

any information other than the simple fact that it believes lethal injection to be available. Oral Argument, 2:32:14 ("But how do we determine that we're satisfied with it without any information?" (Beatty, C.J.)). This Court should use its authority to require disclosure of further information regarding the drugs obtained by SCDC to ensure their quality and reliability are assured.[9]

III. This Court Should Not Vacate the Lower Court's Order.

Because this case is not moot, the Court should decline to vacate the circuit court's order. But even if the Court views this case as moot, vacatur is not warranted. When a case becomes moot, the remedy of vacatur "is not, as once commonly thought, mandatory." *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 327 (4th Cir. 2021) (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25–26 (1994)). Rather, it is available only in "extraordinary" or "exceptional" cases where a party meets the burden of demonstrating equitable entitlement to vacatur in an otherwise moot case. *Bancorp*, 513 U.S. at 26, 29. The appropriate inquiry involves an equitable assessment based on two considerations: fault and the public interest.

First, regarding the question of fault, this Court should consider "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. The assessment of this factor begins with the premise that Respondents are the prevailing party:

> Respondent[s] won below. It is petitioner's burden, as the party seeking relief from the status quo of the [circuit court's] judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur.

Id. at 26. Even in a case of settlement by agreement between the parties, the Supreme Court has indicated that the equities do not necessarily favor vacatur. *Id.* ("That the parties are jointly

[9] Alternatively, the Court could order the circuit court to continue handling discovery to address these issues.

responsible for settling may in some sense put them on even footing, but the petitioner's case needs more than that").

The State claims it is not at fault for any mootness in this case because, prior to passage of the Secrecy Statute, the State worked diligently but was unable to obtain lethal injection drugs. But there is no evidence to support that claim. The State refused to disclose any information about what efforts, if any, the State undertook to obtain lethal injection drugs prior to the filing of this lawsuit, during its litigation in the lower court, and *even after* this Court ordered a remand for that very purpose. Yet again, the State is asking this Court to simply take it at its word, without question, and not only dispense with this litigation but further grant it the extraordinary remedy of vacating the lower court's opinion. This Court should not do so.

Second, this Court's decision should take account of the public's interest. As Justice Scalia explained in *Bancorp*:

> Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur.

Id. at 26 (quotation omitted). Mere disagreement with the decision that one seeks to have vacated cannot suffice to warrant equitable relief. *See id*. at 27 (finding it "inappropriate" to vacate mooted cases "on the basis of assumptions about the merits"). There is no value to the public in the State's desire to "clear the path for future relitigation of the issues between the parties." Motion to Dismiss at 11. Every lawyer who represents one of the four Respondents in this case, and others who will follow, is faced with counseling their client about how to make an election in the manner of their death. They need to know what the law permits. They need the courts' guidance to determine whether a repeat lawsuit of this same general nature will be necessary in the future. Moreover, the general public deserves to know what is or is not sanctioned under South Carolina's constitution.

This Court is the highest court in our State's judicial system, and it should issue a final decision. If the Court declines to do so, it should allow the circuit court's order to stand because the balance of equities does not support the State's request to vacate the lower court's opinion.

CONCLUSION

For the foregoing reasons, this Court should deny Appellants' Motion to Lift Abeyance, Dismiss Appeal, and Vacate Circuit Court Order. Further, this Court should either (1) order SCDC to disclose further information regarding lethal injection to the extent this Court deems just and proper; or (2) direct the Circuit Court to continue discovery on lethal injection issues pursuant to its original remand.

Respectfully submitted,

By: s/ Lindsey S. Vann

Lindsey S. Vann (No. 101408)
Emily Paavola (No. 77855)
Allison Franz (No. 105189)
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

John H. Blume (No. 743)
CORNELL LAW SCHOOL
158 Myron Taylor Hall
Ithaca, NY 14853

Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
506 Pettigru (29601)
P.O. Box 6938
Greenville, SC 29606

John Christopher Mills (No. 9067)
J. CHRISTOPHER MILLS, LLC
2118 Lincoln Street
Columbia, SC 29202

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