THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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.*

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY CONCERNED PUBLIC HEALTH PROFESSIONALS, SCIENTISTS, FORMER REGULATORS, AND EDUCATORS IN SUPPORT OF RESPONDENTS-APPELLANTS

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January 30, 2024

Pursuant to Rule 213, South Carolina Appellate Court Rules ("SCACR"), a group of public health professionals, scientists, former regulators, and educators hereby moves for leave to file an *amicus curiae* brief in the above-captioned matter. The *amici* have spent decades working in their respective fields seeking to protect the public health and to ensure the safety and efficacy of drugs in the United States. As more fully explained below and in the attached proposed *amicus* brief, the current appeal addresses issues of substantial concern to the proposed *amici* and about which they have unique knowledge, and they, therefore, seek to participate in this appeal.

Among the issues presented in the appeal is whether South Carolina properly can avoid discovery that would allow Respondents-Appellants ("Respondents"), who are incarcerated individuals facing execution, sufficient information about lethal injection drugs to reasonably ensure the protection of their constitutional rights. The state bases its defense to discovery on the state's so-called "secrecy" (or "shield") law, as recently amended, *see* S.C. Code Ann. § 24-3-580 (2023), which, according to the state, prohibits the disclosure of the persons, procedures, supply chain, drugs, and other details associated with lethal injection. Accordingly, the legality of the secrecy law is front and center in this appeal, with Respondents asserting that, if the law does forbid the sufficient information they seek about lethal injection drugs, the secrecy law is itself unconstitutional.

The proposed *amici* believe profoundly that the South Carolina secrecy law (which is perhaps the most draconian of its sort in the nation) is unconstitutional. In particular, given the proposed *amici*'s expertise, they wish to detail for the Court the conflict between the governing federal drug regulatory regime and the secrecy law, a conflict that makes the secrecy law unconstitutional under the U.S. Constitution's Supremacy Clause. The secrecy law frustrates, if not makes impossible, the transparency about the distribution of dangerous drugs and substances

that federal law seeks to ensure, directly flouts specific federal provisions, and threatens public safety itself by authorizing the circulation of dangerous substances from potentially disreputable sources and with inadequate safeguards against wider distribution. The secrecy law does all of this while, at the same time, seeking urgently to facilitate putting Respondents to death and nullifying their ability to learn about the means and conditions under which they will be put to death.

Under Rule 213, SCACR, an *amicus* brief generally "shall be limited to argument of the issues on appeal as presented by the parties." Unquestionably, the parties have presented on appeal the issue of the applicability and legality of South Carolina's secrecy law and whether the secrecy law properly can limit the discovery Respondents seek regarding potential claims of the unconstitutionality of death by lethal injection in the state; further, Respondents contend that, if construed as the state argues in this appeal, the secrecy law would be unconstitutional. The proposed *amici* too contend that the secrecy law is unconstitutional, but the *amici* recognize that the grounds for unconstitutionality they assert – namely, pursuant to the U.S. Constitution's Supremacy Clause – differ from the precise bases pressed by Respondents. Nonetheless, this Court may "consider[] arguments raised only by an *amicus* when they concern a 'matter of significant public interest.'" *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012) (quoting *Ex parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011)).

The legality of a state law that authorizes keeping secret the circumstances under which the state puts incarcerated persons to death and that, concomitantly, has serious consequences for the public health is a matter of significant public interest. Respectfully, before potentially endorsing a state law with such grave consequences for individuals on death row and that puts at risk the public health generally, the Court should consider all material constitutional issues.

WHEREFORE, the Court should grant leave to the proposed *amici* to file the attached proposed *amicus* brief.

January 30, 2024

Respectfully submitted,

/s/ John L. Warren III

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