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S.C. SUPREME COURT

The State of South Carolina
In the Supreme Court

CERTIFIED QUESTION

The Honorable Joseph F. Anderson, Jr.
United States District Court for the District of South Carolina

Appellate Case No. 2025-002469

American Civil Liberties Union of South Carolina
Foundation,Plaintiff,

v.

Alan Wilson, *in his official capacity as South Carolina
Attorney General, et al.*,Defendants,

&

Henry McMaster, *in his official capacity as Governor
of the State of South Carolina*, Intervenor-Defendant.

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CERTIFIED QUESTIONS

- I. Does publicly available information constitute “identifying information” under S.C. Code Ann. § 24-3-580(A)(2) (2025)?
- II. If information is publicly available, can a person “knowingly disclose” such information such that the civil penalties are implicated under S.C. Code Ann. § 24-3-580(C) (2025)?

INTRODUCTION

In 2023, South Carolina barred “disclos[ur]e” of a vast swath of information related to the death penalty, creating a criminal offense and private right of action. *See* S.C. Code Ann. § 24-3-580 (“Secrecy Statute”). At its core, the statute targets public scrutiny—i.e., “the inquiring press and inquiring people”¹—that allegedly made it harder for South Carolina to obtain lethal injection drugs. To stymie that criticism, and thereby make lethal injection available, the General Assembly enacted the Secrecy Statute “to ensure the absolute confidentiality of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence within this State.” S.C. Code Ann. § 24-3-580(I).

Here, the Court confronts two certified questions about the Secrecy Statute. Both questions arose in federal court because Defendants, after applying the statute expansively in practice, *see infra*, Part III.B, abruptly changed tack amidst litigation. Rather than following the textual command to construe the Secrecy Statute broadly, they now argue that (1) the statute’s definition of “identifying information” *excludes* “publicly available” information (whatever that means) and, even if not, (2) the statute creates no liability from publishing “publicly available” information because one cannot “knowingly disclose” that which is already “publicly available.” This Court’s interpretive methods, which follow a text-first approach to applying legislative intent, foreclose both.

¹ Henry McMaster, *Governor McMaster and SCDOC Director Stirling Discuss Lethal Injection Drug Shield Law*, YouTube, at 1:55 (Nov. 20, 2017), <https://perma.cc/D9RT-Y9L4>; *see also* Sarrita Chourey, *SC Looks to Keep Injection Drug Suppliers Secret*, Augusta Chron., 2016 WLNR 6813039 (Feb. 19, 2016) (Former SCDC Director Stirling acknowledged that opponents of the death penalty had been “very successful” at obtaining information about the creators and suppliers of lethal injection drugs and then convincing those companies not to sell them to SCDC. According to Defendant Stirling, the proposed Secrecy Statute would ensure that such critics could not “target” their speech toward these companies.).

Nothing about the text of the Secrecy Statute insinuates—much less describes—a “publicly available” exception to “identifying information” or to the statute’s criminal and civil liability. Under the Court’s principled textualism, that alone is dispositive. *See Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951) (“The court has no right to add the words [the legislature] omitted[.]”). Moreover, that reading is wholly unworkable. If the legislature intended to exclude “publicly available” information, it would have defined what “publicly available” means. Because it did not, Defendants’ arguments leave the Court to spin a definition from whole cloth. The separation of powers forbids that. *See Bentley v. Spartanburg Cnty.*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012) (“[W]e are interpreters not legislators[.]”).

In sum: it would exceed the Court’s constitutional prerogative to add and then define an atextual carveout to a statute that the General Assembly instructed the judiciary to “construe broadly.” Therefore, the answer to both certified questions is “yes.”²

STATEMENT OF THE CASE

The Secrecy Statute

In 2023, to more effectively suppress public scrutiny surrounding the death penalty (and in doing so, according to the statute’s proponents, obtain lethal injection drugs), the State amended Section 24-3-580. The 2023 Secrecy Statute broadened existing protections, including by establishing a criminal penalty and

² ACLU-SC has argued, and will continue to argue, that the Secrecy Statute is unconstitutional under the First Amendment, in part due to its breadth. It may seem odd, then, that ACLU-SC now argues that a proper interpretation of the Secrecy Statute is broader than the State suggests; but a narrow interpretation is possible only by eschewing South Carolina’s long-standing statutory interpretation principles. Here, ACLU-SC’s interest is in fully understanding what the statute does and does not prohibit.

civil cause of action for “knowing[] disclos[ure]” of “identifying information.” S.C. Code Ann. § 24-3-580(C).

The term “identifying information” “shall be construed broadly.” S.C. Code Ann. § 24-3-580(A)(2). In its own enforcement, the State has interpreted “identifying information” to include information about whether drugs are manufactured or compounded; when drugs were manufactured, were compounded, or expire; procurement; repairs and maintenance done after acquiring the drugs or equipment; execution protocols; risk mitigation measures; compliance with state and federal regulations; and cost. Likewise, the term “execution team” is “construed broadly.” S.C. Code Ann. § 24-3-580(A)(1). The Secrecy Statute applies to all death sentences regardless of method. *See* S.C. Code Ann. § 24-3-580(I).

The legislature clearly explained its aim in amending Section 24-3-580, commanding “the courts of this State” to “broadly construe[]” the statute “so as to give effect to the General Assembly’s intent to ensure the absolute confidentiality of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence within this State.” S.C. Code Ann. § 24-3-580(I).

ACLU-SC’s Activities & Federal Litigation

Following the passage of the Secrecy Statute and this Court’s decision in *Owens* that South Carolina’s methods of execution pass constitutional scrutiny, *Owens v. Stirling*, 443 S.C. 246, 904 S.E.2d 580 (2024), the State resumed executions. Beginning in September 2024, SCDC executed seven individuals on death row. Against that backdrop, the ACLU of South Carolina (ACLU-SC) attempted to compile information to share with the public about the state’s current and historic use of the death penalty. As part of that information-gathering exercise, ACLU-SC submitted a FOIA request to SCDC seeking information related

to the death penalty, including documents regarding procurement policies, the cost of carrying out executions, execution protocols, and compliance with federal and state regulations. Even though some of that information had been previously produced under FOIA and in unrelated litigation, SCDC denied the requests under the Secrecy Statute.

In early 2025, the ACLU of South Carolina challenged the Secrecy Statute as violative of the First Amendment. In its suit, ACLU-SC alleges that it “possesses ‘identifying information’ as defined by the Secrecy Statute and would disclose and disseminate this information but for the Secrecy Statute[.]” Compl. for Declaratory & Injunctive Relief, ¶ 86, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Jan. 29, 2025), ECF No. 1.

Initially, Defendants stuck to a maximalist interpretation of the statute, insisting that all execution-related information—any tidbit that could expose “more puzzle pieces,” Defs.’ Reply in Supp. of Mot. to Dismiss at 10, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (March 19, 2025), ECF No. 36—must be afforded the utmost secrecy. In fact, under the guise of the Secrecy Statute, Defendants refused to name custodians of records during discovery, Ex. 6 to Pl.’s Mot. to Compel at 1, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Aug. 15, 2025), ECF No. 80-6, even under the protection of a confidentiality order, and even though some of those custodians’ names had likely been made “public” before, *see* Reply in Supp. of Pl.’s Mot. to Confirm Confidentiality Designation at 7, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Sept. 24, 2025), ECF No. 98.

However, after discovery began, Defendants abruptly reversed course, seeking to shrink the purview of the Secrecy Statute in a transparent attempt to undermine Plaintiff’s standing—i.e., by arguing that the information ACLU-SC has is not covered by the Secrecy Statute. *See* Pl.’s Mot. to Confirm Confidentiality Designation at 2, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Sept. 3, 2025), ECF No.

86.³ Defendants’ newfound conservative approach to the Secrecy Statute prompted the current dispute.

STANDARD OF REVIEW

“When a certified question raises a novel question of law, this Court is free to answer the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.” *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 11, 800 S.E.2d 479, 480 (2017) (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)) (quotation marks omitted).

ARGUMENT

I. **Yes, “publicly available” information can constitute “identifying information” under S.C. Code Ann. § 24-3-580(A)(2) (2025).**

The statute itself provides a crystal-clear answer to this question: there is no limitation excluding “publicly available” information from “identifying information,” and the statute’s explicit purpose does not permit such a narrow reading.

The Secrecy Statute prohibits disclosure of “identifying information” about a current or former member of the “execution team.” S.C. Code Ann. § 24-3-580(C). Both terms are defined by statute. As used in the Secrecy Statute, the “identifying information” means:

[A]ny record or information that reveals a name, date of birth, social security number, personal identifying information, personal or business contact information, or

³ For reasons independent from and irrelevant to the questions currently before the Court, Defendants’ argument regarding standing fails. *See, e.g.*, Pl.’s Opp’n to Defs.’ Mot. to Certify at 5–6, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Oct. 22, 2025), ECF No. 104. Nor will this Court’s decision dispose of ACLU-SC’s constitutional claims; at minimum, the Secrecy Statute imposes content-based restrictions that are “presumptively unconstitutional.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

professional qualifications. The term “identifying information” also includes any residential or business address; any residential, personal, or business telephone number; any residential, personal, or business facsimile number; any residential, personal, or business email address; and any residential, personal, or business social media account or username.

S.C. Code Ann. § 24-3-580(A)(2). And “execution team” means:

[A]ny person or entity that participates in the planning or administration of the execution of a death sentence, including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence.

S.C. Code Ann. § 24-3-580(A)(1).

On its face, the text of the Secrecy Statute offers no basis for excluding “publicly available” information from its expansive definition of “identifying information.” To the contrary, the General Assembly instructed the judiciary that the statute and its terms “shall be broadly construed.” S.C. Code Ann. §§ 24-3-580(A), (I). Nor would adding such an exception further the statute’s purpose. The statute was enacted to silence critics of capital punishment, chill the exchange of information about how the state executes prisoners, and thwart attempts to scrutinize state action—an end better satisfied by “broadly constru[ing]” “identifying information” than by limiting its reach. Finally, it would be an extraordinary and improvident act of judicial lawmaking to add an atextual limitation on what constitutes “identifying information.” By what standard is information designated “publicly available”? The answer is not self-evident, which assigns the Court with the work of defining the term from whole cloth.

A. There is no textual basis to limit “identifying information” to “publicly available” information.⁴

“The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy.” *Kinard*, 220 S.C. at 388, 68 S.E.2d at 325 (internal quotation marks omitted). Rather, “[w]here the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).⁵ Yet that is exactly what Defendants ask: that “publicly available” be plucked out of thin air and added into the South Carolina Code.

Moreover, if somehow the provision’s text alone does not provide enough guidance, the Secrecy Statute explicitly instructs courts to “construe[] . . . broadly” both the term “identifying information” and the Secrecy Statute as a whole. S.C. Code Ann. §§ 24-3-580(A)(2), (I). Without any textual footing whatsoever, Defendants’ reading is not a reasonable one.⁶ Those bedrock principles of statutory construction are dispositive here.

⁴ Even if “publicly available” information is excluded from the statute’s ambit, that does not mean that all “publicly available” information is automatically included as “identifying information.” Rather, information only qualifies as “identifying information” under the statute if its contents contain covered information (*i.e.*, information related to the identity of execution team members).

⁵ Indeed, Defendants have previously agreed that “Section 24-3-580” itself “is the best evidence of what the Shield Statute provides.” Answer, ¶¶ 24, 72–74, 78–81, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (July 10, 2025), ECF No. 60. Defendants themselves have “den[ie]d any . . . characterization that is inconsistent with that statute.” *See, e.g., id.* at ¶¶ 78–81.

⁶ Defendants have argued in federal court that the absurdity doctrine justifies limiting “identifying information” to allegedly non-public material. But the absurdity doctrine does not give courts free-wheeling authority to rewrite statutes to fit the government’s litigating position. Rather, as Justice Scalia explained in his canonical work on interpreting legal texts, the absurdity doctrine only applies where a specific “word or phrase” was “obviously a technical or ministerial error.” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, §

B. Narrowing the statute would contradict its explicit purpose.

Under South Carolina law, “[a]ll rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used,” *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007), which is, in and of itself, the “the best evidence of the legislative intent or will,” *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010).

Here, the General Assembly was explicit in its “intent to ensure the absolute confidentiality of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence within this State.” S.C. Code Ann. § 24-3-580(I).⁷ Narrowing the scope of information that is protected is incompatible with that goal. If, for example, information is publicly *available* but not publicly *known*, it would directly undermine the General Assembly’s goal of “confidentiality” to permit widespread dissemination of that information. *See also infra*, Part II.C (“An individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply

37 “Absurdity Doctrine” (2012). It emphatically “does not include substantive errors arising from a drafter’s failure to appreciate the effect of certain provisions.” *Id.* Defendants identified no “technical” or “ministerial” error but rather claim the very sort of “substantive” error that the absurdity doctrine cannot reach. As the Supreme Court has held, even when a statute produces an arguably unreasonable result, the “remedy for any dissatisfaction with the results in particular cases lies with” the legislature, who “may amend the statute; we may not.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982); accord *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004) (Application of the absurdity doctrine is “exceptionally rare[.]”) (quotation marks and citation omitted); *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (similar).

⁷ Defendants have themselves long maintained that the purpose of the Secrecy Statute was to protect the identities of executioners so they would not face criticism, protests, or other public scrutiny. *See, e.g.*, Defs.’ Consolidated Joint Mot. to Dismiss & Resp. in Opp’n to Pl.’s Mot. for Prelim. Inj. at 17–18, 19–20, ACLU-SC v. Wilson, No. 3:25-cv-537-JFA (Feb. 21, 2025), ECF No. 32.

because that information may be available to the public in some form.”) (quoting *U.S. Dep’t of Defense v. Fed. Labor Rel. Auth.*, 510 U.S. 487, 500 (1994)). The statute’s broad language simply cannot support an atextual narrowing construction, particularly one that would cast aside this Court’s careful regard for the intent of the legislature.

C. Adding a “publicly available” exception would require judicial lawmaking to define what constitutes “publicly available.”

1. *If there is a “publicly available” exception, its scope must be defined.*

Because the term “publicly available” exists nowhere in the Secrecy Statute, it has no statutory definition. Even if a reader were somehow able to divine the atextual limitation, it would be impossible—particularly without any guidance from the statutory text—to discern between “non-public” information (disclosure of which could subject them to three years’ imprisonment) and “public” information (which would not).

Critically, the spectrum of ‘public’ to ‘non-public’ is not binary or well-defined. For example, Defendants have argued in federal court that “FOIA responses . . . are plainly on the public side of the line.”⁸ Defs.’ Resp. in Opp’n to Mot. to Confirm Confidentiality Designations at 7, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Sept. 17, 2025), ECF No. 96. But that conclusion is not so obvious. Under South Carolina’s FOIA, “[i]f the request is granted, the record must be furnished or made available for inspection or copying” *to the requestor*—not published broadly. S.C. Code Ann. § 30-4-30(C). What if an individual received a FOIA response before the passage of the Secrecy Statute that included now-restricted information, and the

⁸ Instructively, however, SCDC refused to provide certain information requested via FOIA in 2024, even though the information had been previously produced under FOIA and filed on public dockets prior to the Secrecy Statute’s passage.

individual never published that information? What about information that *would be* subject to FOIA but has not been requested (and whose existence may not even be known): is it “publicly available” merely by virtue of the fact that the information *could be* accessed if requested?

Another example: under Defendants’ reading, if an attorney mistakenly filed unredacted—or even poorly redacted—deposition transcripts containing the names of individual executioners on the public docket, those names would no longer be shielded by the statute, even if the disclosure was unintentional. That outcome would not be the “absolute confidentiality” envisioned by the Secrecy Statute. *See* S.C. Code Ann. § 24-3-580(I).

Other examples are numerous, particularly in the age of the internet. What if identifying information is disclosed on a private Facebook page, accessible only by members? How many members would render the page “public,” thereby immunizing any subsequent disclosure? One other person? Fifty? One thousand? What if a person reaches inferences based on “publicly available” information—would that conclusion also be “publicly available”? This is not merely an intellectual exercise to dream up the closest cases; these are all plausible scenarios.

Inserting “publicly available” without defining it would trigger substantial constitutional problems. Adding an atextual limitation to the statute that would make it harder to ascertain what constitutes a violation—essentially, “forc[ing individuals] to speculate, at peril of indictment, [about] whether [their] conduct is prohibited,” *Dunn v. United States*, 442 U.S. 100, 112 (1979)—would undermine the fair notice that is “[p]erhaps the most basic of due process’s customary protections.” *Sessions v. Dimaya*, 584 U.S. 148, 177 (2018) (Gorsuch, J., concurring in part) (citing *Connally v. General Contr. Co.*, 269 U.S. 385, 391 (1929)). That would be particularly problematic in “the sensitive First Amendment area,” *see Papachristou v. City of Jacksonville*, 405 U.S. 156, 165–66 (1972), because it “chill[s] speech,” *see*

Citizens United v. Fed. Elec. Comm’n, 558 U.S. 310, 324 (2010), especially where (as here) there is a threat of criminal sanction, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *see also infra*, Part III.

2. *However, undertaking that legislative function would improperly usurp the General Assembly’s authority.*

Under South Carolina law, the judiciary acts as “interpreters not legislators[.]” *Bentley*, 398 S.C. at 426, 730 S.E.2d at 301. It is the Court’s “solemn duty” to “uphold the rule of law,” “maintain judicial discipline, refrain from acting as a super-legislature, and respect the plenary authority of the South Carolina General Assembly.” *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 484, 892 S.E.2d 121, 132 (2023). Accordingly, “where a statute’s plain language is clear, a court is not allowed to change its meaning, and a court cannot speculate on legislative intention because to do so would be an assumption of legislative power.” *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 16, 760 S.E.2d 785, 792–93 (2014); *see also Benat v. State Farm Mut. Ins. Co.*, 286 S.C. 132, 134, 333 S.E.2d 57, 58 (Ct. App. 1985) (Courts “have no legislative authority and cannot vary a statutory scheme . . . no matter how logical the basis of the variance.”). Adding the requested atextual exception to the Secrecy Statute would place the Court in an untenable double-bind: the Court must either leave the new term unconstitutionally vague or infringe upon the legislature’s prerogative by defining it. Neither is permissible.

II. Yes, a person can “knowingly disclose” publicly available information such that the civil penalties are implicated under S.C. Code Ann. § 24-3-580(C) (2025).⁹

Just as there is no basis to pluck “publicly available” out of thin air and insert it into the Secrecy Statute, there is likewise no rational or textual basis to

⁹ Though the second question certified by this Court is, on its face, limited to civil penalties, this Court’s analysis would not be: it would be nonsensical to

conclude that the phrase “knowingly disclose” limits liability only to the dissemination of information that no member of the public could otherwise obtain.

A. South Carolina law already expressly contemplates the “disclosure” of public information.

Consider South Carolina’s Freedom of Information Act, which governs the disclosure of records by public bodies. *See* S.C. Code Ann. § 30-4-10, *et seq.* The purpose of FOIA is to ensure, “at a minimum cost or delay . . . access to public documents or meetings.” *Id.* § 30-4-15. When a FOIA request is submitted, the public body reviews the request “to determine if the documents are subject to *disclosure.*” *Id.* § 30-4-30(B) (emphasis added). As is relevant here, FOIA requires the “disclosure” of information that is indisputably “publicly available.” *See, e.g., id.* § 30-4-30(D), (E) (requiring that documents kept “on a publicly available Internet website” be disclosed “upon request”).

South Carolina court rules also contemplate the “disclosure” of potentially “publicly available” information. *See, e.g.,* Rule 5(a)(1)(B), SCRCrimP (requiring “*disclosure*” of a criminal defendant’s prior criminal record) (emphasis added); Rule 3.3(a)(2), RPC, Rule 407, SCACR (mandating that attorneys “*disclose* to the tribunal [adverse] legal authority” not disclosed by opposing counsel) (emphasis added); Rule 705, SCRE (requiring experts to “*disclose*” the “facts or data” “underlying” their opinions when asked on cross-examination) (emphasis added). That it is commonplace in South Carolina law to require “disclosure” of information that is already known by at least some group of people undercuts any other interpretation of the Secrecy Statute.

interpret the exact same language to mean two entirely different things depending on which other statutory provision applies.

- B. Even if the General Assembly intended to depart from that tradition, the plain meaning of “disclose” focuses on the knowledge of the recipient, not the knowledge of the abstract “public.”

“Disclose” means to “make (secret or new information) known” or to “allow (something) to be seen, especially by uncovering it.” *Disclose*, Oxford Languages Dictionary (last accessed March 1, 2026).¹⁰ Accordingly, a “disclosure” is “[t]he act or process of making known something that was previously unknown; a revelation of facts[.]” *Disclosure*, Black’s Law Dictionary (12th ed. 2024). A communication falls into those definitions when the information was previously unknown or unseen by *the recipient* himself, not by *any* person.

Other courts interpreting analogous statutory uses of ‘disclosure’ have similarly relied on that common understanding. The federal Privacy Act, for example, forbids agencies to “disclose any record which is contained in a system of records by any means of communication” absent consent or enumerated exceptions. 5 U.S.C. § 552a(b). The District of South Carolina, along with other courts, has held that “[w]hile the Act does not specifically define the term ‘disclosure,’ common sense requires that this term be taken to denote the imparting of information which in itself has meaning and which was previously unknown *to the person to whom it is imparted.*” *Harper v. United States*, 423 F. Supp. 192, 197 (D.S.C. 1976) (emphasis added); *see also Pellerin v. Veterans Admin. of U.S. Gov.*, 790 F.2d 1553, 1556 (11th Cir. 1986); *Quinn v. Stone*, 978 F.2d 126, 134 (3d Cir. 1992). Similar determinations have been made by courts in other contexts. *See United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020) (determining whether a criminal defendant’s pre-sentence report was “disclosed” to him) (Under the Black’s Law definition of “disclose” at the

¹⁰ *See also Disclose*, Oxford English Dictionary (3d ed. 2025) (“To make openly known; to reveal (esp. new or secret information)”) (emphasis added); *Disclose*, Cambridge Dictionary (2026) (“to make something *known* publicly, or to show something that was hidden”) (emphasis added).

time of the statutory enactment, “disclosing information just requires making it *known to a person*[.]” (emphasis added); *State v. Polashek*, 646 N.W.2d 330, 336 (Wis. 2002) (“To ‘disclose’ information . . . *the recipient* must have been previously unaware of the information at the time of the communication.”) (emphasis added).

C. The statute’s intent focuses on the recipient’s knowledge.

Courts should consider an “undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.” *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm’n*, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010) (citations omitted). Here, the purpose of the Secrecy Statute is to chill the proliferation of information that might stir “the inquiring press and inquiring people” against use of the death penalty in South Carolina. If “knowingly disclose” were limited to “publicly available” information, a speaker could dig up purportedly “publicly available” information—perhaps an old FOIA disclosure or obscure court documents—and broadcast that information widely, even if that broadcast revealed brand-new information to thousands of South Carolinians. That simply does not comport with the State’s purpose.

Take a hypothetical: if an execution team member’s information was provided in a pre-Secrecy Statute FOIA request, accidentally left unredacted in an exhibit to a court filing, or even shared among a small group of people, that individual’s interest—and the State’s purported interest—in reducing the further dissemination of that information does not simply disappear. “Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files” and “archives” and “a computerized summary located in a single clearinghouse of information.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764 (1989) (analyzing the privacy exemption to federal FOIA). Therefore, “[a]n individual’s interest in controlling the dissemination of information regarding

personal matters does not dissolve simply because that information may be available to the public in some form.” *Fed. Labor Rels. Auth.*, 510 U.S. at 500 (same).

In fact, this entire case originates in ACLU-SC’s desire to disclose covered information—not merely for the fun of it, but to inform people about the death penalty in South Carolina using information those people do not already possess. That is exactly the type of speech the Secrecy Statute was designed to restrict: communication that would spread information that the State wants to be “absolute[ly] confidential[].” S.C. Code Ann. § 24-3-580(I).

III. A strained interpretation of the Secrecy Statute creates its own constitutional problems.

There may be an understandable impulse to narrow the Secrecy Statute when its breadth creates First Amendment problems. But injecting an extratextual “publicly available” exception creates its own constitutional problems.

The Due Process Clause guards against any law that “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The demand for clarity is especially acute for laws, like the Secrecy Statute, that regulate speech. *See Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 781 (4th Cir. 2023); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982); *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976). Here, the strained interpretation Defendants seek would trigger both Due Process concerns: it both lacks sufficient notice and encourages arbitrary and discriminatory enforcement.

A. A strained interpretation would not provide constitutionally adequate notice.

Statutory interpretation must hew closely to the text, lest the public be

denied fair notice of what conduct is being criminalized. *See, e.g., Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 434 (2024) (Thomas, J., concurring) (“[T]extualism serves as an essential guardian of the due process promise of fair notice.”); Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 542 (2009) (“Textualism’s emphasis on the primacy of the statutory text . . . suggest[s] that much of the methodology is motivated by the long-recognized requirement that laws are legitimately enforced when their subjects have fair notice of them.”); *cf. Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) (“It is axiomatic that statutory interpretation begins (and often ends) with the text.”). Adding an atextual limitation to the statute that would make it harder to ascertain what constitutes a violation—essentially, “forc[ing individuals] to speculate, at peril of indictment, [about] whether [their] conduct is prohibited,” *Dunn*, 442 U.S. at 112—would undermine the fair notice that is “[p]erhaps the most basic of due process’s customary protections.” *Dimaya*, 584 U.S. at 177 (Gorsuch, J., concurring in part) (citing *Connally*, 269 U.S. at 391). That problem is twofold here: even if a reader correctly guessed that “publicly available” limited the statute, it would still be completely unclear what “publicly available” actually means. *See supra*, Part I.C.1.

B. It would also encourage arbitrary and discriminatory enforcement.

A law is unconstitutionally vague when it enables arbitrary and discriminatory enforcement by providing insufficient guidance for law enforcement in the form of “unfettered” discretion, imprecise terms, “inherently subjective” standards, or a complete absence of “explicit standards.” *Papachristou*, 405 U.S. at 168, 170; *City of Chicago v. Morales*, 527 U.S. 41, 60, 62 (1999); *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Especially given the sensitive First Amendment context, *see Carolina Youth Action Project*, 60 F.4th at 781, the Secrecy Statute must have a

finite meaning; it cannot morph at the State’s will, expanding and contracting to suit Defendants’ needs at any particular moment. Yet, Defendants have already proven their willingness to expand and contract the Secrecy Statute to fit the State’s vagaries.

Specifically, SCDC’s own shape-shifting interpretations illustrate the danger of Defendants’ approach. The State has interpreted the Secrecy Statute broadly when a broad interpretation suits the State’s objective, and narrowly when that approach better serves the State’s interest. Time and again, before the Secrecy Statute’s passage and after, and throughout the pendency of this case, Defendants have insisted that all execution-related information—any tidbit that could expose “more puzzle pieces,” Defs.’ Reply in Supp. of Mot. to Dismiss at 10, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (March 19, 2025), ECF No. 36—must be afforded the utmost secrecy. SCDC has construed that statutory language to cover procurement records, execution protocols, and a host of additional information. *See* Ex. 16 to Pl.’s Opp. to Defs.’ Mot. to Compel, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Aug. 15, 2025), ECF No. 79-16 (denying access to the requested documents as a “[m]atter[] specifically exempted from disclosure by statute or law,” S.C. Code Ann. § 30-4-40(a)(4), citing the Secrecy Statute). Defendants have also explained that the statute “protects former execution team members” as well as current members. Defs.’ Consolidated Joint Mot. to Dismiss & Resp. in Opp’n to Pl.’s Mot. for Prelim. Inj. at 19–20, *ACLU-SC v. Wilson*, No. 3:25-cv-537-JFA (Feb. 21, 2025), ECF No. 32. (“Protection tomorrow is therefore necessary for participation (and protection) today.”).

Accordingly, SCDC denied ACLU-SC’s FOIA request for documents regarding “Requests for Proposal or other procurement documents” and “SCDC policies, protocols, directives, orders, internal memos, and correspondence that relate to execution of SCDC prisoners” on the grounds that the requested documents were

“specifically exempted from disclosure by” the Secrecy Statute—even though documents containing the requested information had been made “public” before. Reply in Supp. of Pl.’s Mot. to Confirm Confidentiality Designation at 7, ACLU-SC v. Wilson, No. 3:25-cv-537-JFA (Sept. 24, 2025), ECF No. 98.

Now, in an attempt to undermine Plaintiff’s standing, *see* Pl.’s Mot. to Confirm Confidentiality Designation at 2, ACLU-SC v. Wilson, No. 3:25-cv-537-JFA (Sept. 3, 2025), ECF No. 86, Defendants seek to shrink the purview of the Secrecy Statute. Though the Secrecy Statute, by its own terms, “shall be broadly construed . . . to ensure the absolute confidentiality of the identifying information,” S.C. Code Ann. § 24-3-580(I), Defendants have asked the federal court—and will now ask this Court—to insert a wholly atextual exception that would significantly narrow the statute’s reach. That interpretation would leave ACLU-SC and all other South Carolinians wholly clueless as to the true meaning of the Secrecy Statute and undoubtedly chilled from speaking. This Court should reject that proposition.

CONCLUSION

The Secrecy Statute leaves room for only one reasonable interpretation: that “publicly available” information may constitute “identifying information,” and that a person may “knowingly disclose” allegedly “publicly available” information. Any contrary interpretation would functionally rewrite the work of the General Assembly.

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