RECEIVED

Mar 20 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON CERTIFICATION FROM THE 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; and JOEL ANDERSON, in his official capacity as Interim Director of the South Carolina Department of Corrections,..... Defendants,

and

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina,..... Intervenor–Defendant.

BRIEF OF DEFENDANTS

Thomas T. Hydrick
Solicitor General
Joseph D. Spate
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, South Carolina 29201
(803) 734-3765
thomashydrick@scag.gov
josephspate@scag.gov

Counsel for Attorney General Wilson

Daniel C. Plyler
Austin T. Reed
Frederick N. Hanna, Jr.
SMITH | ROBINSON
3200 Devine Street
Columbia, SC 29205
(803) 254-5445
Daniel.Plyler@SmithRobinsonLaw.com
Austin.Reed@SmithRobinsonLaw.com
Fred.Hanna@SmithRobinsonLaw.com

Counsel for Director Anderson
and Attorney General Wilson

Wm. Grayson Lambert
Chief Legal Counsel
Erica W. Shedd
Deputy Legal Counsel
Tyra S. McBride
Deputy Legal Counsel
Cameron R. Cox
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov
ccox@governor.sc.gov

Thomas A. Limehouse, Jr.
LIMEHOUSE LLC
174 East Bay Street, Suite 100 (P.O. Box 338)
Charleston, South Carolina 29401 (29402)
(843) 823-3833
Thomas@LimehouseLaw.com

Counsel for Governor McMaster

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Legislative Acts and Materials

Other Authorities

CERTIFIED QUESTIONS

I. Does information that is publicly available constitute "identifying information" under S.C. Code Ann. § 24-3-580(A)(2)?

II. If information is publicly available, can a person "knowingly disclose" that information for purposes of S.C. Code Ann. § 24-3-580(C)?

INTRODUCTION

This Court has many hard cases on its docket. This case—which raises two questions about the scope of the Shield Statute—is not one of them.

The General Assembly enacted the Shield Statute to keep confidential information just that: confidential. The legislature made plain that its aim was to "ensure the absolute confidentiality of the identifying information." S.C. Code Ann. § 24-3-580(I). But if information isn't confidential, the Shield Statute's text and context (and common sense too) confirm that the Statute doesn't prohibit anyone from speaking about that information. After all, what's already public cannot be made "absolutely confidential" again. Simple enough.

The ACLU interprets the Shield Statute differently, and according to the ACLU's interpretation, this Court has violated the Shield Statute. That's right: The ACLU has marked a published opinion from this Court confidential because it contains (so the ACLU says) identifying information that no one can knowingly disclose. *See* App.2 (row 32). But, as told by the ACLU, it's more than just this Court's opinion. The ACLU also interprets the Shield Statute as prohibiting it from speaking about a public letter from two U.S. Senators to the U.S. Attorney General, *see* App.3 (row 40), a law review article from 1994, *see* App.2 (row 24), and public filings on federal court dockets, *see* App.1–2 (multiple rows), to name just a few more examples.

If that sounds like an "absurd result" that "[t]he Court must reject," *State v. Taylor*, 436

S.C. 28, 34, 870 S.E.2d 168, 171 (2022), it's because it is. But the Court doesn't have to reach the absurdity canon to reject the ACLU's argument. The text and context confirm that the ACLU is wrong. For instance, on the text, "identifying information" is defined as "any record or information that *reveals*" an execution-team member's identity. S.C. Code Ann. § 24-3-580(A)(2) (emphasis added). To "reveal" something is "to make (something secret or hidden) publicly or generally known." Merriam-Webster, *Reveal* (2025), https://tinyurl.com/5h4xfs64. So if information is already public, there's nothing left to "reveal." It therefore cannot be identifying information.

Or look to context. The Shield Statute requires that identifying information "shall be confidential" and prohibits individuals from "knowingly disclosing" that information. S.C. Code Ann. § 24-3-580(B), (C). But if information is already public, it cannot be "confidential." And if to "disclose" means "to make known or public," Merriam-Webster, *Disclose* (2025), https://tinyurl.com/y82cyabs, no one could face civil or criminal liability for "disclo[sing]" already public information, S.C. Code Ann. § 24-3-580(C).

Defendants, in other words, are not asking the Court to "fix" or "add" anything in the Shield Statute. They are just asking the Court to interpret the text.

The Statute's scope is no longer being litigated in federal court, where the specter of a different answer from this Court looms and speech could still be chilled. Instead, the case now sits in the Court that gets the definitive word on the Statute's meaning. And rather than advocate for an interpretation that allows the ACLU to speak about every document it possesses and provides the clarity that the ACLU claims to seek (not to mention that faithfully adheres to the text, as Defendants explain), the ACLU is pushing the most speech-restrictive interpretation possible. At this point, it's fair to ask why.

Whatever the answer to that question, the Court should reject the ACLU's interpretation.

The Court should instead apply its well-established rules of statutory interpretation and answer each certified question "no."

STATEMENT OF THE CASE

A. The Shield Statute.

South Carolina first adopted a shield law in 2010. *See* 2010 S.C. Acts No. 203, § 1. That initial statute prohibited someone from "knowingly disclos[ing] the identity of a current or former member of an execution team or disclos[ing] a record that would identify a person as being a current or former member of an execution team." *Id.* But it nevertheless permitted such a disclosure "upon a court order under seal for the proper adjudication of pending litigation." *Id.* Someone whose identity was wrongly disclosed had a civil right of action against the discloser. *Id.*

The South Carolina Department of Corrections was unable, however, to obtain lethal injection drugs under this original shield law. *See Owens v. Stirling*, 443 S.C. 246, 257–58, 904 S.E.2d 580, 586 (2024); *see also Glossip v. Gross*, 576 U.S. 863, 869–70 (2015) (discussing this problem nationwide). During the litigation challenging the State's amended methods-of-execution statute, this Court initially remanded the case for more discovery on "the State's efforts to procure the drugs for lethal injection and the process it undertook to determine the drugs were not 'available' in South Carolina." *Owens v. Stirling*, 438 S.C. 352, 361, 882 S.E.2d 858, 863 (2023).

But before that discovery took place and while the proceedings on remand were stayed, the General Assembly enacted the Shield Statute. *See* 2023 S.C. Acts No. 16. This new Shield Statute affords additional protections. The "execution team" is broadly defined to include an entity that "manufactures" or "compounds" the "drugs . . . utilized in the execution of a death sentence." S.C. Code Ann. § 24-3-580(A)(1). "[A]ny identifying information" about an execution team member "shall be confidential." *Id.* § 24-3-580(B). "[I]dentifying information" is a "broad[]" term that

includes "any record or information that reveals a name, date of birth, social security number, personal identifying information, personal or business contact information, or professional qualifications." *Id.* § 24-3-580(A)(2). And the Statute "shall be broadly construed by the courts of this State 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." *Id.* § 24-3-580(I). Speaking of courts, the Shield Statute removed the prior exception that allowed identifying information to be disclosed under seal in litigation. *Id.* § 24-3-580(B).

The Shield Statute protects identifying information in multiple ways. For starters, it uses both civil and criminal penalties, so a person who "knowingly disclose[s]" identifying information may face a civil action from the person identified, in addition to up to three years in prison. *Id.* § 24-3-580(C). And the Shield Statute protects identifying information from disclosure by a state agency under FOIA. *Id.* § 24-3-580(G).

The Shield Statute exempts the purchase of drugs (and other supplies) from the State's procurement code, *id.* § 24-3-580(D), though the purchase of drugs from another country must comply with federal regulations, *id.* § 24-3-580(J). And it exempts the out-of-state purchase of drugs from various regulations from state agencies and boards, *id.* § 24-3-580(E), and any pharmacist who supplies, manufactures, or compounds drugs from similar regulations, *id.* § 24-3-580(F).

This new statute worked. With the benefit of the Shield Statute, SCDC secured pentobarbital. The State has since carried out seven executions, four by lethal injection at those inmates' election.

B. The ACLU challenges the Shield Statute.

The ACLU challenged the Shield Statute in federal court under various First Amendment

theories. In its amended complaint, the ACLU claimed to have "identifying information" that it would share but for the Shield Statute. Dist. Ct. ECF No. 52, ¶ 86. That was, to say the least, a significant allegation.

As the case progressed in discovery, a central focus was learning what information the ACLU claims to possess. Yet the ACLU repeatedly resisted telling the district court, Governor, Attorney General, and SCDC Director what that information was (or how the ACLU came to have it). *See, e.g.*, Dist. Ct. ECF No. 70-1, at 7 (ACLU's objection to interrogatory asking what "identifying information" it alleged to have). The ACLU then just generically described the information it claimed to have, without anything close to a document-by-document explanation. It eventually produced 2,999 pages of documents—every one of which is available from a public source. *See* App.1–3 (summary chart of ACLU's document production with the public source for each document).

This brought to a head an important question of the Shield Statute's scope: Does it cover that publicly available information? Given this question's significance to the federal litigation (including a threshold question of standing) and the fact that this Court had not yet had the chance to address this issue, the Governor, Attorney General, and SCDC Director moved to certify. The district court granted that motion, and the certified questions are now before this Court.

STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006).

ARGUMENT

I. The Court must approach the questions with the proper framework.

Before addressing the certified questions, two issues require brief attention. The first involves methodology. The second involves the questions' framing.

A. Statutory interpretation focuses on legislative intent based on text in context.

Given what courts do every day, it may seem silly to recount at any length how they interpret statutes. But it's important here. The ACLU has repeatedly insisted that it has the "textualist" interpretation that controls, but it makes that claim only after applying a caricature of that interpretive framework. Its myopic focus on the term "identifying information" ignores the statutory context, resulting in an interpretation divorced from the text and the legislature's intent. Properly understood and applied, this Court's rules of statutory construction confirm that Defendants have the correct reading of the Shield Statute.

So what are those rules? To start, "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). That has long been the rule in South Carolina. *See, e.g.*, *Rugge's Lessee v. Ellis*, 1 S.C.L. 107, 107 (1790) (looking to the "intention of the legislature"); *Peck v. Glover*, 10 S.C.L. 582, 582–83 (S.C. Const. App. 1819) ("the intention of the legislature ought always to prevail"); *Kecheley v. Cheer*, 15 S.C.L. 397, 399 (S.C. App. L. & Eq. 1827) (legislative intent is "the great leading rule" of statutory interpretation).

Discerning that intent "begins (and often ends) with the text of the statute." *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). But (and here's the critical part that the ACLU won't acknowledge) that text must be read in context. "A statute should not be construed," this Court has explained, "by concentrating on an isolated phrase." *S.C. State Ports Auth. v. Jasper*

Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Or as then-Judge Hill put it, "the text of the statute is often the best evidence of [legislative] intent," but that "text must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." *State v. Miles*, 421 S.C. 154, 161, 805 S.E.2d 204, 208 (Ct. App. 2017) (Hill, J.) (internal quotation mark omitted). Or as Justice Barrett put it just a few weeks ago, "[t]extualists—like all those who use language to communicate—do not interpret words in a vacuum." *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 672 (2026) (Barrett, J., concurring). "Instead, [textualists] use context, including background legal conventions, common sense, and constitutional structure, to ascertain a text's most natural meaning." *Id.* (internal quotation marks omitted).

Then-Judge Hill and Justice Barrett succinctly summarized the rule, but (respectfully) they didn't break any ground in doing so. "The fairest and most rational method to interpret the will of the legislator," William Blackstone explained in his seminal commentaries, requires exploring the "most natural and probable" signs of "his intentions at the time when the law was made." W. Blackstone, *Commentaries on the Laws of England*, Introduction § 2, *59. Foremost among "these signs" are "words" and "the context." *Id.* Thus, "[i]f words happen to still be dubious" viewed in isolation, "we may establish their meaning from the context." *Id.* at *60. In fact, even Blackstone wasn't innovative on this front. Edward Coke made the same point more than a century earlier when he explained that "it is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." 1 E. Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* § 728, at 381a (1628; 3d ed. 1633).

From the beginning of our Republic, American jurists have similarly interpreted words in

context. When construing the Constitution in *McCulloch v. Maryland*, Chief Justice Marshall called for "a fair construction of the whole instrument." 17 U.S. (4 Wheat) 316, 406 (1819). Or as Justice Story put it in his commentary, "every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." 1 J. Story, *Commentaries on the Constitution of the United States* § 451, p. 333 (Thomas M. Cooley ed. 1873) (1833).

The same rule applied to statutes. The rule was "familiar," Justice Harlan explained, that when interpreting a statute, "a passage will be best interpreted by reference to that which precedes and follows it." *Neal v. Clark*, 95 U.S. 704, 708 (1877). Justice Cardozo made the same point decades later, writing that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) (citing three majority decisions for this proposition). And Justice Robert Jackson explained that a court must "read [statutory] text in the light of context." *Sec. & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943).

Of course, courts still make this point today. "[R]easonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014) (cleaned up). In other words, "court[s] ha[v]e long refused to construe words 'in a vacuum.'" *Gundy v. United States*, 588 U.S. 128, 141 (2019) (plurality opinion) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Instead, they have "underst[ood] statutory interpretation as a 'holistic endeavor' which determines meaning by looking not to isolated words, but to text in context." *Id.* (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). As one federal appellate court recently put it, "in all interpretive enterprises, context is king."

United States v. Hernandez, 107 F.4th 965, 969 (11th Cir. 2024) (internal quotation mark omitted).

It's not as if this is some unique rule in federal court or old English courts. Far from it. Almost a century ago, this Court said reading statutes "as a consistent whole" (that is, reading them in context) was "that other cardinal and familiar rule of construction." *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, ___, 124 S.E. 761, 765 (1924). Thus, "this Court has repeatedly held that a statute shall not be construed by concentrating on an isolated phrase." *Laurens County Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992). Instead, "a statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 911 (2018); *accord, e.g.*, *Creech v. S.C. Pub. Serv. Auth.*, 200 S.C. 127, ___, 20 S.E.2d 645, 649 (1942); *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 691 (1996).

This rule about context makes sense, and people use context every day in the real world. Consider just one example. "Bank" can mean "the rising ground bordering a lake, river, or sea" or "an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds." Merriam-Webster, *Bank* (2025), https://tinyurl.com/mu7u8rm3. The South Carolina Code uses "bank" both ways. In one statute, the board of trustees of a firemen's pension fund must "select a bank or banks in which all monies shall be deposited." S.C. Code Ann. § 9-13-60. In another statute, boundaries in coastal counties are determined by "a series of points equidistant from the banks as delineated at mean high tide." *Id.* § 4-3-5(1). Neither statute defines "banks," but there's no doubt what "banks" means in each statute. That's because context makes it clear. Surely no one thinks that county lines are based on where financial institutions are built or that the board for the firemen's pension fund should bury

its cash on the beach.

Perhaps the ACLU shouldn't be faulted too much for its methodological error. Justice Scalia and Professor Garner commented that "no interpretative fault is more common than the failure to follow the whole-text canon." A. Scalia & B. Garner, *Reading Law* 167 (2012). The ACLU makes the mistake that Learned Hand cautioned against many years ago: a "sterile literalism which loses sight of the forest for the trees." *N.Y. Tr. Co. v. Comm'r of Internal Revenue*, 68 F.2d 19, 20 (2d Cir. 1933). But however common the ACLU's error, it's still error. A court must "consider the entire text, in view of its structure and of the physical and logical relation of many parts." A. Scalia & B. Garner, *supra*, at 167. Or to put it in this Court's language, if "[t]he text of a statute as drafted by the legislature is considered the best evidence of the legislative intent," *Transp. Ins. Co. v. S.C. Second Inj. Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010), and if "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute," *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895–96 (2008), context is critical in the pursuit of the legislature's intent.

Reading statutes in context therefore does nothing to "usurp" the General Assembly's legislative power. ACLU Br. 11. To the contrary, it ensures that the Court exercises its "judicial power" as courts have traditionally done. S.C. Const. art. V, § 1.

B. The Shield Statute focuses on confidentiality, not public availability.

The district court certified questions asking how the Shield Statute applies when information is "publicly available." Dist. Ct. ECF No. 117, at 10. Given the facts here, the district court's framing makes perfect sense. Everything that the ACLU has produced—all 2,999 pages—is publicly available. Most of the documents in the ACLU's production can be found on the internet already, and those that can't be found from a Google search can simply be requested from SCDC

(which is presumably how the ACLU got those documents). *See* App.1–3. So to the extent the Court is concerned merely with answering the certified questions in a way that allows the district court to resolve this underlying dispute, "publicly available" works well.

But if the Court is thinking more generally about the Shield Statute and the precedent it will set here, "publicly available" is not the best way to frame the question. *Cf. Peagler*, 368 S.C. at 157 n.1, 628 S.E.2d at 477 n.1 ("refin[ing] the issue" that a certified question raised). Instead, the question should focus on whether information is "confidential." That's the term that the General Assembly used in the Shield Statute. *See* S.C. Code Ann. § 24-3-580(B), (I). Although "publicly available" and "not confidential" overlap, they are not identical. For instance, an SCDC employee could tell his neighbor that Acme, Inc. supplies lethal injection drugs. That information would, at that point, no longer be confidential to SCDC. But it wouldn't really be "publicly available" because only the neighbor would know it. (More on this hypothetical later. *See infra* Part III.C.) The Shield Statute is concerned with the "confidential" / "not confidential" line, not whether the information is already available to the public generally. Analyzing the question through the "confidential" / "not confidential" distinction avoids any pesky line-drawing hypotheticals about how public is public enough to be "publicly available." *Cf.* ACLU Br. 9–11 (insisting that it's too hard to know what "publicly available" means). "Confidential" is a much simpler line to draw: Once the information goes beyond the people who the Shield Statute and SCDC authorize to have it, it is no longer "confidential," and a disclosure has happened.

Given the Shield Statute's language and the likelihood that the Court's decision will guide future judicial and executive decisionmaking, Defendants focus on the "confidential" / "not confidential" line. Because the ACLU's documents in this case are not only "not confidential" but also "publicly available," this case is easy to resolve even if the Court sticks with the "publicly

available" framework.

* * *

With this background, the case can turn to the two certified questions.

II. Nonconfidential information cannot be "identifying information" under the Shield Statute.

Only confidential (that is, nonpublic) information can be "identifying information" under the Shield Statute. The text and context make this clear, and this conclusion is consistent with the General Assembly's intent in enacting the Shield Statute. The ACLU offers nothing persuasive to the contrary.

A. This conclusion is clear from the text.

1. The General Assembly defined "identifying information." The term includes "any record or information that reveals a name, date of birth, social security number, personal identifying information, personal or business contact information, or professional qualifications." *Id.* § 24-3-580(A)(2). Yes, "identifying information" must "be construed broadly." *Id.* But it cannot be construed to cover any information that *contains* name, rank, and serial number for a member of the execution team. "Identifying information" is only that which "*reveals*" the execution team member's personal information. *Id.* (emphasis added).

"Reveal" means "to make (something secret or hidden) publicly or generally known." Merriam-Webster, *Reveal*.[1] The definition itself draws a sharp line between two mutually

[1] A current dictionary is the methodologically correct source because the General Assembly enacted the Shield Statute in 2023. But even if the Court looked to older dictionaries, "reveal" has meant the same thing for a long time. *See* S. Johnson, *A Dictionary of the English Language* (4th ed. 1773) (defining "reveal" to mean "To show; to discover; to lay open; to disclose a secret"); N. Webster, *An American Dictionary of the English Language* (1828) (defining "reveal" to mean "To disclose; to discover; to show; to make known something before unknown or concealed").

exclusive categories: information is either "secret or hidden," or it is "publicly or generally known." *Id.* It cannot be both. So the only way information can be "revealed" is if it is currently "secret or hidden." *Id.* And once information is no longer "secret or hidden," it has been revealed. At that point, the cat is out of the bag. There is nothing left to "reveal." Because the General Assembly defined "identifying information" as only information that "reveals" an execution team member's identity, identifying information can only be confidential information. Nonconfidential information—by definition—does not have the capability of "revealing" anything.

The General Assembly's word choice matters. *See Smith*, 419 S.C. at 556, 799 S.E.2d at 483. The legislature could have used "contains" instead of "reveals." Had it done so, there's no doubt that "identifying information" would include anything that included a name, birth date, address, or so on—no matter whether that information was locked in a file cabinet at SCDC or on the front page of *The State*. But the General Assembly chose "reveals."

The General Assembly knows the difference. It has used "contain" many times in statutes requiring certain reports to or from state officials. One statute requires that physicians submit a report to state officials "contain[ing] the name, age, sex, race, occupation, place where last employed if known, and the address" of a tuberculosis patient. S.C. Code Ann. § 44-31-10. Another statute directs the DMV to provide a monthly report to the State Election Commission that "contain[s] the name, social security number, date of birth, and date of death" of someone who the Social Security Administration reports is deceased. *Id.* § 7-3-70(b). And another mandates that lobbyists submit a semi-annual report to the State Ethics Commission that, among other things, "contain[s] the full name, address, and telephone number of the reporting lobbyist." *Id.* § 2-17-30(A)(1).

Contrast those examples with statutory uses of "reveal." The Department of Revenue, for

instance, "may not reveal facts contained in a report" about a controlled-substances dealer. *Id.* § 12-21-6040(A). (Doing so is a felony. *Id.* § 12-21-6040(B).) SLED must review the autopsy of a vulnerable adult to see if it "reveals" a cause of death from criminal conduct. *Id.* § 43-35-530(1). And any library records that "would reveal the identity of the library patron checking out or requesting an item from the library or using other library services are confidential information." *Id.* § 60-4-10.

These statutes demonstrate the difference in these two words. "Reveal" contemplates disclosing for the first time. "Contain" has no such limitation. When the General Assembly uses "contain," it is indifferent to whether the information is secret or public. Those statutes simply describe what data a document holds. On the other hand, when the General Assembly uses "reveal," it focuses on the effects of releasing a record that contains information that is not already publicly available. Thus, information can "contain" details about the execution team. But if that information is already public, disclosing it wouldn't "reveal" anything. Only if the information was confidential could it do so. The General Assembly's use of "reveals" therefore confirms that, as a textual matter, information that is no longer confidential cannot be "identifying information."

So contrary to the ACLU's suggestion, Defendants have not moved away from their position that the text is the "best evidence of what the Shield Statute provides." ACLU Br. 7 n.5.

2. The ACLU's textual argument to the contrary is unavailing. The ACLU insists that Defendants ask this Court to insert a "publicly available" information exception into the Statute. *See id.* at 7, 11. Defendants do no such thing. Reading statutes requires looking at what the words mean to determine what a statute means. There's no "forced construction" in doing that. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013).

In fact, courts do that all the time. And when they do, they aren't violating the rule against

"add[ing] words" to a statute that "[the legislature] omitted." ACLU Br. 7 (quoting *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951)). In *Yates v. United States*, 574 U.S. 528 (2015), for example, the U.S. Supreme Court had to decide whether a fish counted as a "tangible object" under the Sarbanes–Oxley Act. When the Court concluded that fish are not "tangible objects" in that statute, it was not "adding a [fish] exception" or engaging in "judicial lawmaking." ACLU Br. 9. It was simply recognizing that the statute never covered fish in the first place.

So too here. Concluding that publicly available information is not "identifying information" does not add an exception. It simply recognizes the limits of the words the General Assembly used. As Defendants have shown, the General Assembly's use of "reveals" is sufficient to exclude nonconfidential information from the Shield Statute's ambit. S.C. Code Ann. § 24-3-580(A)(2). The General Assembly did not have to—as the ACLU implies—exclude it explicitly.

B. Context confirms this conclusion.

If the definition in section 24-3-580(A)(2) wasn't clear on its own, reading the Shield Statute in its entirety removes any doubt that nonconfidential information is not "identifying information." Multiple aspects of the Shield Statute confirm that the General Assembly intended to keep only confidential information confidential. The legislature never intended to prohibit someone from speaking about nonconfidential information, including the publicly available information the ACLU has produced.

1. Start with the text of other subsections. Subsection (I) unequivocally declares the General Assembly's intent: "This section shall be broadly construed by the courts of this State 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." *Id.* § 24-3-580(I) (emphasis added). It's hard to

fathom a more direct statement than that. The General Assembly sought to keep "identifying information" completely protected because "absolute" means "having no restriction, exception, or qualification," Merriam-Webster, *Absolute* (2025), https://tinyurl.com/zseup4na, and "confidentiality" means "intended for or restricted to the use of a particular person, group, or class," Merriam-Webster, *Confidential* (2025), https://tinyurl.com/yvs8art3. Once information is no longer confidential, there's no way to keep it "absolute[ly] confidential[]" any longer. S.C. Code Ann. § 24-3-580(I). That simple fact eviscerates the ACLU's purpose argument based on subsection (I). *See* ACLU Br. 8–9. The statutory text does not permit an interpretation that promotes more limited exposure of information about execution team members in any and every situation. *Cf.* A. Scalia & B. Garner, *supra*, at 57 ("No text pursues its purpose at all costs."). To the contrary, the text is specific about absolute confidentiality.

Subsection (B) points in the same direction. Under that part of the Shield Statute and "[n]otwithstanding any other provision of law, any identifying information of a person or entity that participates in the planning or administration of the execution of a death sentence *shall be confidential*." *Id.* § 24-3-580(B) (emphasis added). In other words, no matter what other sections someone might find in the South Carolina Code, all "identifying information" must remain "confidential." *Id.*

There's more. Continue to subsection (C), the prohibition the General Assembly codified to keep identifying information "absolutely confidential." It forbids a person from "knowingly disclos[ing] the identifying information of a current or former member of an execution team." *Id.* § 24-3-580(C). The key word there is "disclose." That term means "to make known or public."

Merriam-Webster, *Disclose*.[2] Information can be "disclosed" only if it's confidential. Once it is no longer confidential, then it cannot be disclosed because it already has been.

The ACLU can't rely on some other concept of "disclose" to support its position. *See* ACLU Br. 13. If to "disclose" is merely to "make known," *id.*, then perhaps simply amplifying information to a broader audience is disclosing that information. But putting aside the incredible line-drawing problems this interpretation would bring (at what point is information disclosed enough such that its resharing isn't criminal?), that idea of "disclose" is incompatible with the rest of the Shield Statute, which provides a much brighter line.

2. The Shield Statute's structure also supports Defendants' reading. A "statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *State v. Henkel*, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015). Read as a whole, it's evident the General Assembly's aim in the Shield Statute was to (as the name implies) shield execution team members' identities (including the drug supplier's, *see* S.C. Code Ann. § 24-3-580(A)(1)) from public view, which means already public information was not the legislature's concern.

Look back at the subsections just discussed. Subsection (A) defines identifying information broadly as anything that *reveals* the identities of the execution team. Subsection (B) prohibits that information's *disclosure* by requiring that information to be confidential. And subsection (C) imposes civil and criminal liability for *disclosing* it.

[2] Again, a current dictionary is the right source, but "disclose" has maintained a consistent meaning for centuries. *See* S. Johnson, *A Dictionary of the English Language* (defining "disclose" to mean "To reveal; to tell; to impart what is secret"); N. Webster, *An American Dictionary of the English Language* (defining "disclose" to mean "To discover; to lay open to the view; to bring to light").

That's not all. The latter half of subsection (B) further restricts "identifying information" from public availability. There, the General Assembly provided that "identifying information shall not be subject to discovery, subpoena, or any other means of legal compulsion or process for disclosure to any person or entity." S.C. Code Ann. § 24-3-580(B). That's a change from the 2010 version of the Shield Statute. The original shield law allowed information to be disclosed "upon a court order under seal for the proper adjudication of pending litigation." 2010 S.C. Acts No. 203, § 1. So now, the General Assembly has stopped even that limited disclosure.

Other parts of the Shield Statute also "ensure the absolute confidentiality of . . . identifying information," *id.* § 24-3-580(I), by guaranteeing in subsections (D), (E), and (F) that the regular procurement and licensing processes don't reveal the identity of execution team. Subsection (G), for its part, exempts "identifying information" from FOIA. And subsection (H) requires the Treasurer and Comptroller General to keep any financial records in a "de-identified condition."

These provisions—like the rest of the statutory scheme—work toward a common goal: keeping confidential information confidential. This scheme only makes sense if "identifying information" is, in fact, confidential. It makes far less sense if that information has been the subject of a *Post & Courier* article or is in a landmark opinion of this Court. To be sure, other legal provisions or SCDC policy may still protect information even if it somehow leaked and put it beyond the Shield Statute's reach. But none of those fact-specific hypotheticals need distract from the point here: The Shield Statute's structure assumes that information is confidential. That means nonconfidential information is not covered by this law.

3. Finally, the 2023 act's title bolsters Defendants' conclusion. "It is," of course, "'proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.'" *Rhame v. Charleston Cnty. Sch. Dist.*, 412 S.C. 273, 277–78, 772 S.E.2d 159, 161 (2015) (quoting

Univ. of S.C. v. Elliott, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966)). The Shield Statute's title twice mentions confidentiality as the law's aim. *See* 2023 S.C. Acts No. 16. And (to the extent it matters) the title in the Code uses "confidential" too. *See* S.C. Code Ann. § 24-3-580 (2025) ("Execution team and drugs used to administer death sentence confidential"). None of that makes sense if the Shield Statute extends to nonconfidential information.

C. This conclusion tracks legislative intent.

The General Assembly enacted the Shield Statute to give SCDC the chance to obtain lethal injection drugs and make all three statutorily authorized methods of execution available. *See* S.C. Senate, Video of Hearing of Corrections and Penology Comm., 4:30–5:50 (Feb. 2, 2023) (Sen. Hembree), https://tinyurl.com/ardzaj7j; S.C. House of Representatives, Video of Floor Proceedings, 1:47:25–1:47:40 (Apr. 19, 2023) (Rep. W. Newton). In other words, the goal was to try to give a condemned inmate the opportunity to elect lethal injection. S.C. Senate, Video of Floor Proceedings, 1:49:00–1:49:55 (Feb. 22, 2023) (Sen. Hembree). The legislature "figure[d] . . . out" how to give SCDC the chance to obtain lethal injection drugs, *id.* at 2:08:20 (Sen. McElveen), and a broad shield law was the way. The Shield Statute thus "expand[ed]" the 2010 version to ensure that drug suppliers' identities were protected and not subject to disclosure under FOIA, S.C. Senate, Video of Hearing of Corrections and Penology Comm., 6:30–7:25 (Feb. 2, 2023) (Sen. Hembree); S.C. House of Representatives, Video of Hearing of House Judiciary Comm., 4:10 (Mar. 7, 2023) (Rep. Jordan), or through "backdoors" like financial records that could be used to decipher the drug supplier, S.C. Senate, Video of Floor Proceedings, 2:09:48 (Feb. 22, 2023) (Sen. Hembree). Even allowing disclosure of identities under a court order would be "wasting [the legislature's] time" because the information would no longer be confidential. *Id.* at 16:36; *see also* S. Journal No. 26, 125th Gen. Assemb. (Feb. 22, 2023) (tabling Amendment No.

5 to S. 120 that would have allowed a condemned inmate's attorney to be given the drug supplier's identity; withdrawing after debate Amendment No. 9 to S. 120 that would have allowed judicial order to disclose identifying information).

Based on this record, holding that "identifying information" under the Shield Statute includes only confidential information aligns with that legislative purpose. *Cf. Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 (the "cardinal rule" is "effectuat[ing] the intent of the legislature"). The only people who should have access to this information are certain SCDC employees and people authorized by SCDC or state law to have it. Protecting this information from disclosure under section 24-3-580(G) (which works as a specialized FOIA exemption) and criminalizing the knowing disclosure of that information under section 24-3-580(C) work together to accomplish two critical, related goals. One, it ensures that SCDC does not have to turn over identifying information to anyone who asks. And two, it disincentivizes leaks.

The Shield Statute thus provides the necessary comfort to potential suppliers that their identities will be protected. But extending criminal penalties to people who talk about nonconfidential information does not further the legislature's aim. If such a grasping chain of criminal prosecutions were necessary for a supplier to agree to provide lethal injections, that supplier would likely be too skittish to supply drugs reliably anyway.

D. The ACLU's remaining arguments to the contrary are wrong.

1. The ACLU invokes an overly generalized conception of the Statute's purpose. It's true that, under Defendants' interpretation, more people might learn information about the execution team because nonconfidential information can be shared. But the ACLU treats the Shield Statute's instruction that it be construed "broadly" as a talisman that automatically expands the Statute's reach to cover any dissemination of execution-team information—the rest of the Statute

notwithstanding—on the theory that anything else would fail to advance the overarching goal of protecting identifying information. ACLU Br. 8–9.

That reasoning gets the interpretive method backwards. The "purpose must be derived from the text." A. Scalia & B. Garner, *supra*, at 57. And the text shows that the Statute's purpose is narrower than the ACLU suggests. It protects the confidentiality of *confidential* information about execution-team members. Perhaps a law that extended to nonconfidential information would have been more effective in a general sense. But the legislature didn't go that far (and probably for good reason). Again, "[n]o text pursues its purpose at all costs." A. Scalia & B. Garner, *supra*, at 57. And nothing in the Shield Statute indicates that its purpose extends to protect information that is already nonconfidential. "Such a highly generalized purpose" as the one the ACLU invokes "is not relevant to genuine textual interpretation." *Id.* The governing principle remains the statutory text itself, and this Court should "reject the replacement or supplementation of text with purpose." *Id.* at 58.

2. The ACLU's charge that Defendants have interpreted the Shield Statute inconsistently is unconvincing for two reasons. *See* ACLU Br. 4–5, 17. For one, it doesn't refute Defendants' textual argument. And for another, it's wrong.

Defendants did not "name [SCDC's] custodians of records," *id.* at 4, because they are current members of the execution team. The Shield Statute prohibits Defendants from doing so. That's not an atextual "maximalist interpretation." *Id.* Rather, it's faithfully applying the text. After all, the Shield Statute removed the litigation exception that the 2010 version included. Disclosing SCDC's custodians, even under a confidentiality order, would have violated the Shield Statute.

The ACLU gets nowhere by pointing out that some SCDC employees' names were disclosed in court records more than 15 years ago. *Id.* (saying some custodians' names had likely

been made "public" before). But it does not follow that these people are still involved in executions today.

Nor does the ACLU's complaint about responses to a FOIA request move the needle here. *See id.* at 3–4. If the ACLU thinks it wasn't provided all the documents that it should have been, FOIA creates a private right of action for the ACLU to sue SCDC under state law. *See* S.C. Code Ann. § 30-4-100(A). That—not a federal lawsuit—is the appropriate forum to challenge a FOIA response.

Despite the ACLU's protestations, Defendants' position has been consistent: If identifying information has remained confidential, the Shield Statute precludes its disclosure. So if a former execution team member's identity has never been disclosed, the Shield Statute protects it. And any information that could be used, together with something else, to piece together the drug supplier's identity is protected. On the other hand, if some piece of information is no longer confidential (whether from an old news report, court filings, or self-disclosure), that information is no longer "absolutely confidential," so the Shield Statute does not protect it.

3. The Court need not fret over what counts as "publicly available," as the ACLU does. *See* ACLU Br. 9–11. For starters, while the certified questions focus on "publicly available," the Shield Statute uses "confidential." *See supra* Part I.B. That text, of course, is the starting point for interpreting the Shield Statute's scope. And that text makes the ACLU's supposedly hard cases easy. If information is available under FOIA, it's not confidential. It may not be public yet, but it's publicly available because SCDC would provide it upon request. Nothing that SCDC would provide could be confidential.

Or take the example of the attorney mistakenly filing something that wasn't redacted. In that case, it would be unfortunate, but the information would no longer be confidential, so it would

no longer be protected under the Shield Statute. (At the same time, that attorney would presumably lack the necessary mens rea to be convicted of violating the Shield Statute.) While not ideal, that's a more plausible outcome than telling someone that speaking about a public court filing is criminal.

Same with the Facebook example. Again, if someone is posting information on a website (whether to a private group or on a public feed) that includes anyone who is not authorized to have it, that information is no longer confidential. The Shield Statute therefore cannot protect it as "absolute[ly] confidential[]." S.C. Code Ann. § 24-3-580(I).

4. The ACLU cannot get past the absurdity doctrine. *See* ACLU Br. 7–8 n.6. "The Court must reject a statutory interpretation if it leads to an absurd result that could not possibly have been intended by the legislature or that defeats plain legislative intent." *Taylor*, 436 S.C. at 34, 870 S.E.2d at 171. Absurd is the only thing to call the results of the ACLU's interpretation.

Look no further than the documents it contends contain identifying information. There's a public letter from two U.S. Senators to the U.S. Attorney General. *See* Dist. Ct. ECF No. App.3 (row 40). There are public court filings in federal court (available on PACER) and from this Court (available on C-Track). *See* App.1–2 (multiple rows). There's a 1994 law review that mentions South Carolina when it discusses *Malloy v. South Carolina*, 237 U.S. 180 (1915), the State's then-sole authorized method of electrocution, and a 1990 newspaper story referencing South Carolina witnesses to a Florida execution. *See* App.2 (row 24).

And most curiously, there's this Court's decision in *Owens v. Stirling* from 2024. Put another way, under the ACLU's reading of the Shield Statute, this Court violated that law when it issued that opinion. Otherwise, there's no reason for the ACLU to have designated that opinion confidential in federal court as allegedly containing identifying information. *See* Dist. Ct. ECF No. 72, ¶ 3 (confidentiality order) (a document had to be marked confidential if it "contain[ed]

information protected from disclosure by statute"). Of course, nothing in that opinion violates the Shield Statute, so the ACLU's interpretation must be wrong.[3]

The Court should not adopt the ACLU's absurd interpretation, especially given the at least (but, really, far more) plausible interpretation that Defendants have offered. As Scalia and Garner recognize, "[s]ome absurd outcomes"—like this Court having already violated the Shield Statute—"can be avoided without doing real violence to the text." A. Scalia & B. Garner, *supra*, at 234.

5. At the end of its brief, the ACLU insists that Defendants' interpretation creates "constitutional problems." ACLU Br. 15. Once again, the ACLU is wrong.

The ACLU says that fair notice requires that the Court adopt the ACLU's sweeping interpretation to avoid confusion over what "publicly available" means. *See id.* at 15–16. As explained already, the ACLU has the wrong focus given the statutory text, but even if the Court could give the ACLU's worry any credence, the Court could still "construe[] the statute so as to answer [the ACLU's] vagueness challenge." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 534, 737 S.E.2d 830, 838 (2012). A decision from this Court would remove any uncertainty and provide sufficient notice. And if constitutional avoidance counsels toward any party's interpretation here, it's Defendants'. *See infra* Part III.C.

* * *

All told, the text and context confirm that publicly available information is not "identifying information" under the Shield Statute. And that conclusion aligns with the legislature's intent.

[3] The only way around this conclusion is to say that the ACLU lacked a good-faith basis to designate *Owens* as confidential. But Defendants do not accuse the ACLU of bad faith. To the contrary, Defendants have no reason to doubt that the ACLU has acted in good faith. The ACLU is simply incorrect about what the Shield Statute means, so its confidentiality designations were overbroad.

Defendants' interpretation therefore satisfies both of this Court's "cardinal rule[s]" of statutory construction. *See Crescent Mfg. Co.*, 129 S.C. at __, 124 S.E. at 765 (read statutes as a whole); *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 (effectuate legislative intent). The Court should therefore answer the first question "no."

III. A person cannot "knowingly disclose" nonconfidential information under section 24-3-580(C).

A. As a starting point, the text mandates this result. The Shield Statute does not prohibit "knowing disclosures" generally. It prohibits the "knowing disclos[ure] *of identifying information*." S.C. Code Ann. § 24-3-580(C) (emphasis added). And "identifying information" is information that "reveals" what the State seeks to keep "confidential." *Id.* §§ 24-3-580(A)(2), (B). Publicly available information therefore cannot be "knowingly disclosed" under subsection (C).

To be sure, words can have multiple definitions. When they do, courts must look to "context" and rely on "textual clues" to pick the right definition. *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 389 (2021). Here, those clues show that the ACLU has picked the wrong definition. *See* ACLU Br. 12–13. The Shield Statute addresses disclosure of "identifying information," which (as just explained, *see supra* Part II) is not public. But FOIA contemplates disclosing a "public record." S.C. Code Ann. § 30-4-30(A)(1). And adverse legal authority is also already public. *See* Rule 3.3(a)(2), RPC, 407, SCACR. So no matter what cases that the ACLU finds interpreting other statutes that use "disclose," the better definition for "disclose" in the Shield Statute emphasizes "mak[ing] known or public," Merriam-Webster, *Disclose* —something that can happen only once, given the Shield Statute's purpose to protect the "absolute confidentiality" of information. S.C. Code Ann. § 24-3-580(I). Merriam-Webster, *Disclose*.

That's also why the ACLU's focus on the recipient doesn't work. *See* ACLU Br. 15. The

Shield Statute seeks to protect identifying information completely. S.C. Code Ann. § 24-3-580(I). The focus is on the information, not who is receiving it. *See id.* ("ensur[ing] the absolute confidentiality of *the identifying information*" (emphasis added)). And once the information isn't fully shielded, then the confidentiality that the General Assembly sought to protect is gone. The Shield Statute's text (particularly the definition of "identifying information") and criminal penalties make the analysis here different from the federal FOIA-based analysis of people's privacy generally on which the ACLU tries to rely. *See* ACLU Br. 14–15 (citing *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 501 (1994)).

Not only is this bright-line rule faithful to the statutory text, but it also provides clarity for courts and the public. No one needs to worry about what the recipient may (or may not) know. All that matters is whether the information is still confidential.

These points aren't complicated, but they are crucial. After all, text matters. *See Smith*, 419 S.C. at 556, 799 S.E.2d at 483. Defendants' only-one-disclosure interpretation faithfully applies the words that survived bicameralism and presentment.

B. This "once disclosed, no longer confidential" rule comports with other areas of law that protect information absolutely, which undercuts the ACLU's argument about how the law already uses "disclose." *See* ACLU Br. 12–13. A prominent example is the attorney-client privilege. That privilege recognizes that "the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *State v. Doster*, 276 S.C. 647, 650–51, 284 S.E.2d 218, 219 (1981). And though the privilege survives even the client's death, *id.*, it can be waived by "[a]ny voluntary *disclosure* by a client to a third party," *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 46 (Ct. App. 1984) (emphasis added). And once

waived by voluntary disclosure, the privilege is waived as to all communications on that subject. *Id.* The privilege can't be waived again because disclosure has happened.

As a second example, there's the rule that allows a party to appeal immediately from an order to unseal a court record. This Court held that such an order was immediately appealable under section 14-3-330(1) because no remedy is available later. "[A]fter a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure" because "the cat" is already "out of the bag." *Ex parte Cap. U-Drive-It, Inc.*, 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006). In other words, once the information is unsealed for the world to see, there's no more unsealing to do—and no resealing that can undo the revelation.

The same logic applies here. Once information is disclosed, it is no longer confidential. It is publicly available for the world to see. And in that case, it cannot be "disclosed" again.

C. A hypothetical proves that information can be disclosed only once. Suppose an SCDC employee who was part of the execution team (and thus entitled to know identifying information) told his neighbor that Acme, Inc. supplied pentobarbital to SCDC for lethal injection. Then the neighbor told his brother-in-law, a freelance journalist, about Acme, Inc.'s role in South Carolina executions. Recognizing this scoop, the journalist wrote a story about Acme, Inc. and pitched it to the *Washington Post*. The *Post* published the story on its website. A few days after publication, an excited first-year law student, having just studied the Eighth Amendment in her constitutional law class, emailed the story to her roommate, a fellow law student.

Who made a knowing disclosure under the Shield Statute? Only the SCDC employee. Three things support that conclusion. *First*, section 24-3-580(C)'s text compels it. *See supra* Part III.A. If information is already public, it cannot be "disclos[ed]" again. It doesn't matter who made it public or when it was made public. All that matters is that it was no longer confidential. Anyone

who speaks about something that is already public cannot have violated subsection (C)'s plain text.

Second, the First Amendment requires it. When the *New York Times* and the *Washington Post* obtained the Pentagon Papers that detailed America's history in Vietnam, the Supreme Court refused to let the federal government prohibit those newspapers from publishing the records. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). If the federal government couldn't stop the Pentagon Papers from being published, it's hard to see how South Carolina could stop a paper from publishing information about execution team members.[4] *Cf. Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (incorporating freedom of the press); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating freedom of speech). It's hard to conceive that the General Assembly's intent was to enact a law that ran headlong into cases like *N.Y. Times*. At the very least, the doctrine of constitutional avoidance allows this Court to adopt an interpretation that keeps a statute's constitutionality from being called into question. *See Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2d 412, 417 (2009).

Third, common sense demands it. Does the ACLU really contend that the General Assembly intended for the first-year law student to be subject to three years in prison for sending the link to her roommate? There's no logical break in the hypothetical to say the *Washington Post* violated the Shield Statute but the law student did not. Similarly, trying to draw the line before the *Washington Post* because its disclosure was broader makes no sense. How many people had access to a particular disclosure is not a principled distinction. The Shield Statute does not take into

[4] One important caveat here: Defendants assume in this hypothetical that the newspaper lawfully obtained the information. *See Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001) (the First Amendment protects disclosing information when the person "who made the disclosures did not participate in the [unlawful] interception"). If the hypothetical newspaper, however, was involved in a break-in at SCDC to rummage through records (or, in a more contemporary sense, a computer hack to scour electronic files), the First Amendment may not apply.

account the size of a newspaper's circulation or the number of social media followers someone has.

Rather, the question under subsection (C) is whether information was disclosed, not how broadly it was disseminated. The ACLU seeks to avoid these issues by interpreting the Shield Statute to criminalize each party in the hypothetical. But that's as atextual as it is illogical. The only logical conclusion is that once information has been disclosed to anyone beyond what the Shield Statute or SCDC policy permits, no one else can disclose it. In other words, only one person (or a group, if there were a conspiracy) can be charged when information is disclosed—that's it. That means information that is publicly available cannot be "knowingly disclosed" under section 24-3-580(C).

The Court should therefore answer the second question "no."

CONCLUSION

For these reasons, the Court should answer both certified questions "no."

Respectfully Submitted,

s/Thomas T. Hydrick
Thomas T. Hydrick (S.C. Bar No. 103198)
Solicitor General
Joseph D. Spate (S.C. Bar No. 103734)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, South Carolina 29201
(803) 734-3765
thomashydrick@scag.gov
josephspate@scag.gov

Counsel for Attorney General Wilson

s/Daniel C. Plyler
Daniel C. Plyler (S.C. Bar No. 72671)
Austin T. Reed (S.C. Bar No. 102808)
Frederick N. Hanna, Jr. (S.C. Bar No. 104659)
SMITH | ROBINSON
3200 Devine Street
Columbia, SC 29205
(803) 254-5445
Daniel.Plyler@SmithRobinsonLaw.com
Austin.Reed@SmithRobinsonLaw.com
Fred.Hanna@SmithRobinsonLaw.com

Counsel for Director Anderson
and Attorney General Wilson

s/Wm. Grayson Lambert
Wm. Grayson Lambert (S.C. Bar No. 101282)
Chief Legal Counsel
Erica W. Shedd (S.C. Bar No. 104287)
Deputy Legal Counsel
Tyra S. McBride (S.C. Bar No. 103750)
Deputy Legal Counsel
Cameron R. Cox (S.C. Bar No. 107824)
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov
ccox@governor.sc.gov

Thomas A. Limehouse, Jr. (S.C. Bar No. 101289)
LIMEHOUSE LLC
174 East Bay Street, Suite 100 (P.O. Box 338)
Charleston, South Carolina 29401 (29402)
(843) 823-3833
Thomas@LimehouseLaw.com

Counsel for Governor McMaster