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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.

PLAINTIFF'S REPLY BRIEF

Jonathan E. Spratley
Steven M. Cady
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5256
jspratley@wc.com

Meredith Dyer McPhail, #104551
D. Allen Chaney, Jr., #104038
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA
P.O. Box 1668
Columbia, SC 29202
(843) 259-2925
mmcphail@aclusc.org

Attorneys for Plaintiff

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INTRODUCTION

ACLU-SC wants to (1) publish information about the death penalty in South Carolina and (2) not get arrested for doing so. To that end, it seeks to "fully understand[] what the statute does and does not prohibit." Op. Br. at 2 n.2.

Defendants' newest interpretation satisfies that end. Under their "only-one-disclosure interpretation," Resp. Br. at 26, ACLU-SC can never violate the statute. Rather, as soon as it possesses "identifying information," "the confidentiality that the General Assembly sought to protect is gone." *Id*. Thus, ACLU-SC (and any other person or press entity not already authorized to have the information) is free to reveal or disclose any information it possesses to whomever it wishes—period.

But at the risk of seeming ungrateful, ACLU-SC must point out two flaws with Defendants' new position. First, Defendants have never applied or enforced this interpretation of the statute. *See infra*, Part II.A. Second, and relatedly, the "only-one-disclosure" interpretation strays far from the statute's text and legislative intent. *See infra*, Part I. That is not merely an academic point: because the law facially criminalizes vast swaths of protected speech, the chill emanating from the remaining text risks transcending the Court's clarifying guidance. *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.").

In sum: the "only-one-disclosure" interpretation—if clearly articulated and dutifully followed—assuages ACLU-SC's harm and ensures that members of the press and public can write, speak, and publish without fear. That said, the Court cannot endorse a bespoke rule for ACLU-SC. If it chooses to follow Defendants' lead, it should do so strongly and clearly so that no future speakers need wonder—as ACLU-SC has—whether core First Amendment activities may trigger incarceration.

ARGUMENT

I. Defendants' new "only-one-disclosure" interpretation shares some flaws with their previous arguments.

In October 2025, Defendants moved to certify two questions of state law. ECF No. 99[1] (Motion to Certify). Both questions focused on whether the Secrecy Statute covers "publicly available" information. *Id.* at 1. The district court granted the motion, ECF No. 117, and this Court accepted review.

Defendants now contend that "'publicly available' is *not* the best way to frame the question," and that the Court should instead focus on "whether information is 'confidential.'" Resp. Br. at 10–11 (emphasis added); *see also id.* at 12 (arguing why "[n]onconfidential information cannot be 'identifying information'"). In some sense, the impulse is reasonable: the term "confidential"—unlike "publicly available"—at least appears in the statute. But beyond that, the significance is less clear. Plaintiff sees two problems:

1. Like the phrase "publicly available," *see* Op. Br. at 9–11, the word "confidential" is hardly the epitome of clarity. *See, e.g.*, *Flanagan v. Flanagan*, 41 P.3d 575, 576–77 (Cal. 2002) ("resolv[ing] th[e] disagreement" over "the meaning of the critical term 'confidential communication,'" despite the presence of a statutory definition).[2] That ambiguity is not resolved by Defendants' reliance on the term "reveal." *See* Resp. Br. at 12–14. "Reveal" is synonymous with "disclose" and is

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[1] All ECF citations refer to the docket in the federal case ACLU-SC v. Wilson, No. 3:25-cv-537-JFA.

[2] *See also Clarke v. Ruffino*, 819 S.W.2d 947, 951 (Ct. App. Tex. 1991) ("[T]he new rules are much more expansive in defining what is confidential.") (acknowledging the potential validity of differing definitions of "confidential"); *E.E.O.C. v. Coughlin, Inc.*, No. 2:21-cv-99-wks, 2022 WL 1568529, at *1, 3 (D. Vt. May 18, 2022) (resolving an "outstanding dispute" regarding "the definition of 'confidential information'"); *Fowler v. New Werner Holding Co., Inc.*, No. 1:13-CV-126, 2013 WL 5934607, at *1 (Nov. 5, 2013) ("Of course, the terms 'proprietary' and 'confidential' are vague terms, falling short of properly demarcated categories.").

vulnerable to the same problems raised in Plaintiff's brief—namely, that whether one is making a "disclosure" depends on the knowledge *of the recipient*, Op. Br. at 13–15. *See, e.g.*, *Disclose*, Black's Law Dictionary (12th ed. 2024) (defining "disclose" in part as "to reveal"); *see also Nondisclosure*, Black's Law Dictionary (12th ed. 2024) ("The failure or refusal to reveal something that either might be or is required to be revealed.").

2. The text and purpose of the Secrecy Statute present another set of problems. The text commands that the statute "shall be broadly construed . . . to ensure the absolute confidentiality of identifying information," S.C. Code Ann. § 24-3-580(I); but Defendants use the term "confidential" to dramatically narrow the statute's reach. Defendants resolve this tension by zooming in on the way "absolute" modifies "confidentiality" and concluding that once "identifying information" has been "disclosed" to a single person, the State's interest in suppressing proliferation of that information evaporates.

As a constitutional matter, this is undoubtedly the better result; but it is also at odds with the text of the statute and its legislative intent. *See* Op. Br. at 5–9. To borrow Defendants' hypothetical: the State's access to pentobarbital is not jeopardized by a random neighbor finding out that Acme, Inc. is the State's supplier (which would be prohibited under the State's reading). By contrast, there is no question that an article in the Washington Post (which would not be prohibited) would arm "the inquiring press and inquiring people" with the information necessary to cut off the flow of drugs. *See* 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* ECF No. 32 (Defendants explaining that "South Carolina adopt[ed] the Shield Statute so it could obtain lethal injection drugs"). Given that, it is strange that Defendants now argue that the statute is interested exclusively in the former, and not at all in the latter.

II. If the Court adopts the State's "only-one-disclosure" interpretation, it must do so clearly and definitively.

ACLU-SC agrees that Defendants' "only-one-disclosure" interpretation (if fully embraced by the Court) allays the First Amendment harms it currently faces under Section 24-3-580(C).[3] But because of the chill that emanates from a facially content-based criminal statute, the Court's opinion must be sufficiently clear for members of the public to know that their First Amendment rights are free from criminal[4] and civil penalties.

A. The State has never followed its new argument.

Plaintiff's fears are perhaps best embodied in the State's own behavior. Despite now *advocating* for this supposedly "obvious" reading of the statute, the State has spent the last few years unapologetically enforcing an expansive interpretation of the statute.

Under the "only one-disclosure" interpretation, once a document is disclosed, even once (such as in a prior FOIA response or in a court filing), it is "no longer 'confidential,'" and loses any protection from the Secrecy Statute. *See, e.g.*, Resp. Br. at 11. But in October 2024, SCDC cited the Secrecy Statute as grounds for not providing several previously disclosed documents under FOIA. *See* ECF No. 79-16.

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[3] The "only-one-disclosure" interpretation would not, however, resolve the constitutional issues raised by Plaintiff's claims that Section 24-3-580(G) violates the First Amendment by impermissibly restricting access to information. *See* ECF No. 52 (Plaintiff's First Amended Complaint) at ¶¶ 113–37.

[4] Defendants complain that ACLU-SC "repeatedly resisted telling the district court, Governor, Attorney General, and SCDC Director what that information was." Resp. Br. at 5. But Defendants' account omits a critical detail: ACLU-SC resisted disclosing the documents containing identifying information *until the Parties reached a conditional immunity agreement that would protect ACLU-SC's counsel and employees from criminal liability*. *Cf.* ECF No. 72 (Confidentiality Order) at ¶ 12 (acknowledging that "the South Carolina Attorney General . . . grant[ed] conditional immunity"). Once that agreement was in place, ACLU-SC produced responsive documents within two days. *See* ECF No. 79 at 1.

Later, in discovery, Defendants refused to identify document custodians, ECF No. 80-6, even though many of those individuals had already been publicly identified as members of the execution team, *see* ECF No. 98 at 7.

Likewise, under the "only-one-disclosure" interpretation, "[o]nce 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." Resp. Br. at 11. Put another way: if ACLU-SC has information, then *ipso facto* it isn't "confidential." But in February 2025, Defendants warned that if ACLU-SC published the information in its possession—even under the protection of a preliminary injunction—its "disclosure would be 'wilful' and thus trigger punitive damages." ECF No. 32 at 29.

If the statute is narrow, the State must apply it narrowly. It can't finagle a narrowing construction to skip out on civil liability then revert back to using the statute to stonewall document requests and suppress First Amendment activities.

B. Without a clear and definitive ruling, the text of the statute will chill protected expression.

In laws restricting speech, clarity is a constitutional imperative.[5] The "twin concerns of inadequate notice and arbitrary or discriminatory enforcement are especially pronounced" when a regulation implicates speech "because ambiguity inevitably leads citizens to steer far wider of the unlawful zone than if the boundaries were clearly marked, thereby chilling protected speech." *Edgar v. Haines*, 2 F.4th 298, 316 (4th Cir. 2021) (quoting *United States v. Miselis*, 972 F.3d 518, 544 (4th Cir. 2020) (cleaned up)); *see also Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 781 (4th Cir. 2023); *Village of Hoffman Estates v. Flipside*,

[5] That remains true regardless of what body enacted the statute or what court interprets it. *Contra* Resp. Br. at 2 ("The Statute's scope is no longer being litigated in federal court, where . . . speech could still be chilled.") (arguing that the danger of chill exists only in federal court).

455 U.S. 489, 499 (1982). In those cases, "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976) (quoting *Smith v. California*, 361 U.S. 147, 151 (1959)). Defendants themselves acknowledge as much. *See* Resp. Br. at 17 (decrying "incredible line-drawing problems"), 28 ("How many people had access to a particular disclosure is not a principled distinction.").

That is especially true here due to gulf between Defendants' previous interpretations and the statutory text, *see supra*, Part I, and their current proposed reading. *See Loper Bright*, 603 U.S. at 434 (Thomas, J., concurring). Moreover, final and authoritative clarity is constitutionally required—not only for ACLU-SC, but also for all South Carolinians. Absent a statutory rewrite by the General Assembly, only an authoritative and fully binding decision by this Court can provide the constitutionally necessary guidance.

C. There is precedent for the Court to narrowly interpret the Secrecy Statute to avoid constitutional problems.

Though a threat of chill based on the unchanged statutory text may remain even after an opinion narrowing the statute, this Court has taken similar action before. For example, S.C. Code Ann. § 16-17-430(A)(1) makes "[i]t is unlawful for a person to . . . use in a telephonic communication or any other electronic means, any words or language of a profane, vulgar, lewd, lascivious, or an indecent nature, or to communicate or convey by telephonic or other electronic means an obscene, vulgar, indecent, profane, suggestive, or immoral message to another person[.]" In 1980, the South Carolina Supreme Court heard a challenge to the statute on overbreadth and vagueness grounds. *State v. Brown*, 274 S.C. 506, 507, 266 S.E.2d 64, 64 (1980). Rather than striking down the statute, the Court "construe[d] the quoted portion of the statute as proscribing only calls initiated by one with the intent and sole purpose of conveying an unsolicited obscene, imminently threatening and/or

harassing message to an unwilling recipient" and held that, "[a]s so construed, the statute is neither vague nor overbroad." *Id.* at 508, 65. The *Brown* Court's interpretation imposed wholly atextual *mens rea* and content restrictions to narrow the scope of the statute and ameliorate constitutional concerns. That path is available to the Court here as well.

III. If the Court sticks with the State's original "publicly available" framing, Plaintiff's reading must prevail.

If the Court does "stick[] with the 'publicly available' framework," Resp. Br. at 11–12, it is worth noting that Defendants offer essentially no counterargument to the substance of Plaintiff's Opening Brief.[6] *See* Resp. Br. at 11 ("focus[ing] on the 'confidential' / 'not confidential' line"). In fact, Defendants themselves now concede that, under the public availability framework, "[h]ow many people had access to a particular disclosure is not a principled distinction." Resp. Br. at 28.[7] That concession is fatal to Defendants' prior argument that the Secrecy Statute protects only non-"publicly available" information because "[w]here a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter." *See Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2d 412, 417 (2009).

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[6] The Court will be hard-pressed to discern any actual difference between Defendants' soliloquy on statutory interpretation and the rule articulated by Plaintiff. *Compare, e.g.*, Resp. Br. at 6 (citing *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017)) *with* Op. Br. at 19 (same); Resp. Br. at 6–7 (emphasizing legislative intent) *with* Op. Br. at 8 (same). Regardless, for as much ink as Defendants spill on ACLU-SC's supposed "methodological error," Resp. Br. at 10, far less is expended on how Plaintiff's supposed error affects the analysis.

[7] Indeed, Defendants go as far as to admit that the First Amendment would not permit a broader interpretation either. Resp. Br. at 28 ("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." Any such law would "run headlong into cases like *N.Y. Times*.").

CONCLUSION

This Court's guidance regarding the proper interpretation of the Secrecy Statute is sorely needed. Should the Court adopt the State's March 2026 "only-one-disclosure" interpretation as the authoritative reading of the Secrecy Statute, that ruling would clarify the scope of the statute for the Parties and all South Carolinians and likely resolve portions of the current dispute.

/s/ *Meredith McPhail*

Meredith Dyer McPhail, #104551
David Allen Chaney, Jr., #104038
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA
P.O. Box 1668
Columbia, SC 29202
(843) 259-2925
mmcphail@aclusc.org

Jonathan E. Spratley
Steven M. Cady
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5256
jspratley@wc.com

April 9, 2026 *Attorneys for Plaintiff*