UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA FOUNDATION, *Plaintiff*, v. ALAN WILSON, in his official capacity as South Carolina Attorney General; BRYAN STIRLING, in his official capacity as Director of the South Carolina Department of Corrections, *Defendants*.	Case No. 3:25-cv-00537-JFA

PLAINTIFF'S AMENDED MOTION FOR A PRELIMINARY INJUNCTION
(Oral Argument Requested)

Table of Contents

INTRODUCTION

Seldom in American history has a political issue been more vigorously debated than the death penalty. Central to that debate has been the conscionability and legality of various execution methods. In the lethal injection era, those concerns have created intense public scrutiny—from both supporters and critics of the death penalty—of the companies making the lethal injection drugs; how the drugs are made; how the drugs are procured; and how the drugs are tested, maintained, and administered. These details inform public debate and shape how the public views the morality, efficacy, and legality of lethal injection.

South Carolina has found that political oversight and debate inconvenient. So, the state silenced it. South Carolina's recently enacted Secrecy Statute bans the disclosure—by anyone—of a wide swath of information related to administration of the death penalty and punishes violators with up to three years' imprisonment. This extraordinary suppression of speech is necessary, state officials claim, because drugmakers do not like the public scrutiny associated with selling lethal injection drugs, which makes it harder for the state to acquire the drugs. Our Constitution does not permit that censorship.

If public scrutiny makes it difficult for the state to secure the drugs, the state must respond with "more speech, not enforced silence." *Whitney v. California*, 272 U.S. 357, 377 (1927) (Brandeis, J., concurring). The state could have worked to convince its critics (or at least the drugmakers) of the rightness of its view—that is, "to get it[] accepted in the competition of the market." *United States v. Alvarez*, 567 U.S. 709, 728 (2012) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Alternatively, the state could have offered to pay drugmakers more or developed the capacity to make the drugs in-house. But, under well-settled First Amendment principles, the state's solution cannot be to criminalize the speech it disfavors. Thus, this Court should preliminarily enjoin criminal enforcement of the unconstitutional Secrecy Statute.

FACTUAL BACKGROUND

The death penalty has existed in South Carolina since its founding. *Owens v. Stirling*, 904 S.E.2d 580, 585 (S.C. 2024). For much of South Carolina's history, executions were carried out by hanging. *Id.* But in the early twentieth century, South Carolina joined a national trend and adopted electrocution as a more humane manner of execution. *Id.* At the close of the century, similar concerns led South Carolina to change its execution method once again: this time, making lethal injection the default method. *Id.*

Whether lethal injection has lived up to its billing as a more humane and legal method of execution has been subject to vigorous debate. Using information about how lethal injection works—who makes the drugs, how the drugs are made, how the drugs are procured, and how the drugs are maintained and administered—scientists, doctors, scholars, lawyers, and advocates have studied and debated the question. For their part, the pharmaceutical companies who manufacture the drugs have taken strong positions against the use of their drugs in executions and have imposed sweeping distribution controls to prevent such use. *See, e.g.*, Br. of Amicus Curiae Ass'n for Accessible Medicines, *Bucklew v. Precythe*, No. 17-8181, 2018 WL 3572366, *15, 18–19 (U.S. July 23, 2018).

By the late 2000s, this combination of public scrutiny and pharmaceutical companies' policy choices had made it "increasingly difficult" for South Carolina to acquire lethal injection drugs. *Owens*, 904 S.E.2d at 586. As an initial workaround, South Carolina obtained drugs from unregulated overseas pharmacies. Compl. ¶¶ 31 n.6, 48. But that was short-lived: foreign companies also soon refused to sell lethal injection drugs to states on moral, legal, and economic grounds. *Id.* ¶ 49. Subsequently, South Carolina and other states began experimenting with a loosely regulated gray market source known as compounding pharmacies. Unlike pharmaceutical companies, compounding pharmacies are not regulated by the FDA; nor are they subject to rigorous development, testing, safety, effectiveness, or quality measures. *See* Jennifer Gudeman et al., *Potential Risks of Pharmacy Compounding*, 13 DRUGS IN R&D 1, https://tinyurl.com/59v2exxj.

As states including South Carolina increasingly turned to compounders, "the inquiring press and inquiring people" more closely scrutinized these companies and their practices. *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. What they found was startling. Some states were acquiring drugs from compounders that had scores of safety and cleanliness violations. *See* Chris McDaniel, *Missouri Fought for Years to Hide Where It Got Its Execution Drugs. Now We Know What They Were Hiding*, BUZZFEED NEWS (Feb. 20, 2018), https://tinyurl.com/mry9fjxj. Others were buying drugs with short shelf-lives and high failure rates. *Id*. Some of the drugs were made by compounders with slipshod practices repeatedly linked to tainted drugs, deadly outbreaks, and other grave safety concerns. *Id.* Far from isolated episodes, one investigation revealed that 1 in 5 drugs created by compounders failed to meet basic standards. *Id.* (citing annual reports published by the Missouri Division of Professional Registration's Board of Pharmacy). Multiple executions had to be called off because of specific concerns about the quality of compounded drugs. *Id.* Other executions went on and were botched. *Id.*

As a result of these findings, public pressure grew on both states and compounders to stop performing executions with sketchy drugs and practices. In this environment, many compounders decided that supplying lethal injection drugs was bad for business. Compl. ¶¶ 53–54. South Carolina thus struggled to find compounders who thought the public scrutiny and criticism were worth the price the state was willing to pay. When South Carolina's remaining lethal injection drugs expired in 2013, the South Carolina Department of Corrections (SCDC) was unable to acquire more at a price it was willing to pay. *See* Sarrita Chourey, *SC Looks to Keep Injection Drug Suppliers Secret*, AUGUSTA CHRON., 2016 WLNR 6813039 (Feb. 19, 2016).

Defendant Stirling, the Director of SCDC, thus determined to find a way to eliminate the public scrutiny that the state and compounders faced. His first approach was to ask South Carolina's Attorney General, Defendant Wilson, to render an opinion expansively interpreting a limited preexisting law to cover the identities (and all sorts of additional information) of the

companies that make lethal injection drugs. *See Regarding the Interpretation of Section 24-580 of the South Carolina Code*, Op. Att'y Gen. S.C., 2015 WL 4699337, at *1 (S.C.A.G. July 27, 2015). The preexisting statute was designed to protect individual executioners from having their identities revealed absent certain exceptions but said nothing about the companies involved. S.C. Code Ann. § 24-3-580 (2010).[1]

Nevertheless, Defendant Wilson's office acquiesced to Defendant Stirling's request and issued an opinion stretching the preexisting shield law to cover "an individual or company providing or participating in the preparation of chemical compounds intended for use by the Department of Corrections for 'carrying out an order of execution by lethal injection.'" Op. Att'y Gen. S.C., *supra*, 2015 WL 4699337, at *4. Compounders were unpersuaded and continued to believe that the prospect of public scrutiny made the costs outweigh the benefits of supplying lethal injection drugs to SCDC. Thus, even with the expansive interpretation in-hand, SCDC was unable to obtain lethal injection drugs from compounders at a price it was willing to pay.

When the expansive-interpretation method failed, Defendant Stirling began lobbying the General Assembly to enact a new statute that would sufficiently suppress the public scrutiny that compounders wanted to avoid. From the beginning, Defendant Stirling was transparent about the statute's purpose. As he told it, critics of the death penalty had been "very successful" at obtaining information about the creators and supplies of lethal injection drugs and then convincing those companies not to sell them to SCDC. Chourey, *supra*, 2016 WLNR 6813039. The Secrecy Statute was thus needed, he claimed, so that critics would no longer be able to lobby those companies against supplying the drugs. *Id*. Similarly, Governor McMaster blamed "the

[1] The relevant part of that statute provided, "A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team. However, this information may be disclosed only upon a court order under seal for the proper adjudication of pending litigation. Any person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a wil[l]ful violation of this section, punitive damages." S.C. Code Ann. § 24-3-580 (2010).

inquiring press and inquiring people" for persuading companies not to sell SCDC the drugs. McMaster, *supra*, at 1:55. The Secrecy Statute's legislative sponsors echoed this rationale. *See* Meg Kinnard, *S. Carolina Advances Bill to Shield Execution-Drug*, ASSOCIATED PRESS WIRE (March 17, 2015), https://tinyurl.com/ycxprvpt.

At its core then, the Secrecy Statute was intended to silence scrutiny and criticism by the "inquiring press and inquiring people." After years of Director Stirling's advocacy, the General Assembly passed the Secrecy Statute and Governor McMaster signed it into law on May 12, 2023.[2]

As enacted, the Secrecy Statute provides that a "person shall not knowingly disclose the identifying information of a current or former member of an execution team." S.C. Code Ann. § 24-3-580(C) (the "Universal Disclosure Ban"). The "execution team" is expansively defined as "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." *Id.* § 24-3-580(A)(1). And "identifying information" covers any information that "reveals a name . . . personal or business contact information, or professional qualifications." *Id.* § 24-3-580(A)(2). Additionally, the state has interpreted the Secrecy Statute to cover a vast swath of information related to execution-related drugs and equipment, including whether the drugs are manufactured or compounded; when the drugs were manufactured, or compounded, or expire; procurement; repairs and maintenance done *after* acquiring the drugs or equipment; protocols; risk mitigation measures; compliance with state and federal regulations; and costs. *See* Reply Br. Defs. Bryan Stirling, SCDC, and Henry McMaster at 20–22, No. 2022-001280 (S.C. Sup. Ct. Jan. 8, 2024); Compl. ¶¶ 75–76.

[2] Prior to passing the Secrecy Statute, the General Assembly also revised South Carolina's capital punishment statutory scheme to allow condemned individuals to choose between electrocution (the default method), a firing squad, and lethal injection (if available). *Owens*, 904 S.E.2d at 586. The South Carolina Supreme Court upheld the constitutionality of each method. *Id.* at 591–603

Notably, the Secrecy Statute includes a criminal prohibition that makes violations of the Universal Disclosure Ban punishable by up to three years imprisonment. S.C. Code Ann. § 24-3-580(C). State officials hoped that the criminal prohibition in particular would give the Secrecy Statute the teeth needed to suppress the oversight and criticism that SCDC had found inconvenient. Putting the pieces together then, the Secrecy Statute makes it a crime for anyone to disclose any "identifying information" (including names or qualifications) of the entities currently or previously involved at any stage of SCDC's administration of the death penalty.

The Secrecy Statute's Universal Disclosure Ban—and particularly the specter of criminal enforcement—has had its intended chilling effect. Shortly after the Secrecy Statute was enacted, SCDC was able to acquire pentobarbital to use in executions. *See* Jeffrey Collins, *After Unintended 12-Year Pause, South Carolina Secures Drug to Resume Lethal Injections*, ASSOCIATED PRESS (Sept. 23, 2023), https://tinyurl.com/msxhw9dr. Yet, given the threat of criminal prosecution, no reporter, whistleblower, conscientious objector, or anyone else has disclosed "identifying information" about the entities involved.

This is no accident. Numerous individuals and organizations—including reporters, advocates, state officials, and employees at private companies—have access to information covered by the Secrecy Statute. Indeed, ACLU-SC possesses such information, which it would disclose were it not for the threat of criminal prosecution. Ex. 1 (Chaney Decl.) at ¶¶ 10–12. In practice then, as designed, the Secrecy Statute's Universal Disclosure Ban has chilled speech.

ACLU-SC seeks to enjoin Defendant Wilson (and his agents and employees) from criminally enforcing the Universal Disclosure Ban. This relief is sought based exclusively on ACLU-SC's first, second, third, and fourth causes of action. *Id.* ¶¶ 94–111.[3]

[3] In its complaint, ACLU-SC brings two additional causes of action. *Id.* ¶¶ 112–31. But it does not seek a preliminary injunction based on those causes of action, and they are irrelevant to this motion.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction must show that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In the First Amendment context, the likelihood of success on the merits is the dominant factor because it is "inseparably linked" to the other factors. *W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quotes omitted).

ARGUMENT

I. ACLU-SC is likely to succeed on the merits of its claims.

The state "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790–91 (2011) (quotes omitted). That principle flows from the First Amendment's commitment to the "profound" principle that "debate on public issues should be uninhibited, robust, and wide-open." *Overbey v. Mayor of Balt.*, 930 F.3d 215, 223–24 (4th Cir. 2019) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). By silencing speech the state disfavors and backing that decree of silence with criminal sanctions, the Secrecy Statute runs headlong into those core First Amendment principles. In case after case, the Supreme Court has struck down similar (if less draconian) efforts to restrict speech. Straightforward application of these well-settled principles resolves this case. ACLU-SC is thus likely to succeed on the merits.

A. The Universal Disclosure Ban is an unconstitutional content-based restriction on speech.

1. *The Universal Disclosure Ban is a content-based restriction that must satisfy strict scrutiny.*

The First Amendment protects the right to "distribute" information. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality) (citing cases); *accord Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756

(1976). "Premised on mistrust of governmental power," the First Amendment "stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). It protects speech as the citizenry's "means" to hold its government "accountable." *Id.* at 339. The founders recognized that without such protections, our attempt at popular government would be a "farce or a tragedy; or perhaps both." *Pico*, 457 U.S. at 867 (quoting 9 Writings of James Madison 103 (G. Hunt ed. 1910)). For a people can only hope to govern themselves if they are armed with the "power which knowledge gives." *Id.* (quoting Madison, *supra* at 103).

It is thus only in the rarest circumstances where the government is permitted to outlaw the exchange of information. To be sure, the government has some leeway in regulating the time, place, and manner of speech. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). But *content*-based regulations are "presumptively unconstitutional" and may be upheld only if the government proves they pass strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–65 (2015); *Am. Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159, 165–66 (4th Cir. 2019), *aff'd sub nom. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610 (2020).

A statute is content-based if its text distinguishes between speech based on "content or subject matter." *Am. Ass'n.*, 923 F.3d at 165 (citing *Reed*, 576 U.S. at 165–66). The Secrecy Statute is a quintessential content-based restriction on speech. On its face, the statute outlaws the disclosure of particular information concerning lethal injection drugs. S.C. Code Ann. § 24-3-580(C). Determining what speech the statute covers requires looking at the speech's content: specifically, whether the speech includes "identifying information" of any "execution team" member. *Id.* This is the type of subject-matter regulation that the Supreme Court has pointed to as "obvious" content-based regulation. *Reed*, 576 U.S. at 163; *see also Soderberg v. Carrion*, 999 F.3d 962, 969 (4th Cir. 2021) (state prohibition on broadcasting court recordings was a content-based restriction).

Because the Universal Disclosure Ban is a content-based restriction, it is invalid unless the state shows that it satisfies strict scrutiny. *Reed*, 576 U.S. at 163–65.

2. *The Universal Disclosure Ban flunks strict scrutiny.*

In practice, strict scrutiny is "virtually impossible to satisfy." *Wash. Post v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019). The conclusion that a statute is content-based is generally "all but dispositive" of its invalidity. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). To overcome the strong presumption of unconstitutionality, the state must prove that its restrictions involve "the most extraordinary circumstances." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816–17 (2000) (government's burden). Specifically, the state must prove that it (1) has a compelling interest "of the highest order," *Fla. Star v. B.J.F.*, 491 U.S. 524, 537 (1989), and (2) its regulation is "narrowly tailored" to advance that interest, *Playboy*, 529 U.S. at 803. The state cannot satisfy either prong here.

i. The state's interest is not compelling.

State officials have repeatedly justified the Secrecy Statute as advancing its interest in obtaining the drugs necessary to carry out lethal injections. *See supra* pp. 3–6. According to the state, it must suppress public oversight and criticism so that it can obtain and use lethal injection drugs. But if public scrutiny makes it difficult to secure the drugs, the state's answer must be "more speech, not enforced silence." *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). For "if there is any fixed star in our constitutional constellation," it is that the government "may not interfere with an uninhibited marketplace of ideas." *303 Creative LLC v. Elenis*, 600 U.S. 570, 584–85 (2023) (cleaned up). "However pernicious an opinion may seem, we depend for its correction not on [legal regulation] but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). That is true even when the government considers the speech "deeply misguided," or likely to cause "anguish" or "incalculable grief." *303 Creative*, 600 U.S. at 586 (first quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995); then quoting *Snyder v. Phelps*, 562 U.S. 443, 456 (2011)). That remains true even if the

speech would undermine fundamental government objectives such as protecting military secrets, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), promoting national unity, *Johnson*, 491 U.S. 397, or collecting debt owed to the government, *Barr*, 591 U.S. 610.

Applying these principles, the Supreme Court has held time and again that the government's interests in the functioning of the criminal justice system or institutional integrity of courts are insufficient to support content-based restrictions on speech. In *Cox*, the Court emphasized that public scrutiny over judicial proceedings was vital to "the administration of justice." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Thus, damages could not be recovered against a newspaper for publishing the names of rape victims. *Id.* at 491.

Following *Cox*, the Court unanimously struck down a statute criminalizing the disclosure of information regarding confidential disciplinary proceedings against judicial officials. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978). The Court assumed that the criminal sanctions advanced the state's interest in "maintaining the institutional integrity of its courts," but concluded that interest was insufficient to justify the criminal prohibition. *Id.* at 841.

Affirming these principles once more in *Daily Mail*, the Court held that statutes that "punish the publication of truthful information seldom can satisfy constitutional standards," regardless of whether the information is obtained from the government or through other "reporting techniques." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102–03 (1979). The state argued that protecting the anonymity of juvenile offenders was vital to its interest in achieving the central aims of its criminal justice system. Disclosing juvenile offenders' names, the state maintained, would frustrate its interest in rehabilitation. *Id.* at 104. But that interest, the Court held, was wholly insufficient to justify imposing a criminal penalty. *Id.*

Together, this line of cases defeats any argument that the state's interest in obtaining lethal injection drugs is compelling enough to justify the Secrecy Statute's criminal prohibition. *See also N.Y. Times*, 403 U.S. 713 (protection of military and diplomatic secrets insufficient interest to bar publication of Pentagon Papers); *Johnson*, 491 U.S. 397 (promoting national unity insufficient interest to bar flag burning); *Barr*, 591 U.S. 610 (collection of debt owed to the

government insufficient interest to support robocall exception). "That the State finds expression too persuasive does not permit it to quiet the speech." *Sorrell*, 564 U.S. at 578. It is not for courts nor "the [South Carolina] General Assembly" to choose "between the dangers of suppressing information, and the dangers of its misuse if it is freely available . . . the First Amendment makes [that choice] for us." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770.

ii. The Universal Disclosure Ban's criminal penalty is not narrowly tailored to the state's interest.

Even if the state had a sufficiently compelling interest, the Secrecy Statute still could not pass constitutional muster because its sweeping criminal prohibition is not "narrowly tailored" to advance its interest. *Playboy*, 529 U.S. at 813. A restriction is only "narrowly tailored" if it is the "least restrictive means" to achieve the compelling interest. *Id.* (quotes omitted). Restrictions that are "overinclusive" are not narrowly tailored. *Ent. Merchs. Ass'n*, 564 U.S. at 804–05. The Secrecy Statute fails narrow tailoring several times over.

For starters, the Secrecy Statute does not just forbid disclosure; it makes it a *crime* punishable by up to three years in prison. S.C. Code Ann. § 24-3-580(C). Bans on speech backed by criminal sanctions are especially repugnant to the First Amendment. *See Daily Mail*, 443 U.S. at 101–06 (emphasizing the criminal nature of the prohibition); *Landmark*, 435 U.S. at 836–41 (same). The Secrecy Statute is no exception.

Tellingly, many other states have been able to acquire lethal injection drugs without criminal prohibitions. True, some of these states have enacted shield laws that prevent disclosure of information regarding their procurement of lethal injection drugs.[4] But only two states other than South Carolina appear to provide for *criminal* liability, and even those states provide for

[4] Death Penalty Info. Ctr., *Behind the Curtain, Secrecy and the Death Penalty in the United States* (2018), https://dpic-cdn.org/production/documents/pdf/SecrecyReport-2.f1560295685.pdf?dm=1683576587 (noting that thirteen states have enacted new secrecy statutes since 2011).

less severe punishment.[5] All lethal injection states have the same interest that South Carolina purports to have. And yet the vast majority are able to advance that interest without criminalizing speech. Plainly then, South Carolina's criminal prohibition cannot be the least restrictive means. *Landmark*, 435 U.S. at 841 (criminal sanction not necessary to advance state interest where many other states "having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions"); *Daily Mail*, 443 U.S. at 105 (criminal sanction not necessary to advance state interest where "all but a handful" of other states "have found other ways of accomplishing the objective.").

Additionally, the state has alternatives that place no burden on speech. Compounders are businesses. Basic economics dictates that they will sell the drugs for a high enough price. If the state finds it difficult to obtain drugs at the price it is offering, it could offer a higher price, or devote the resources necessary to develop the drugs itself, rather than resort to banning disfavored speech.

What's more, the statute's Universal Disclosure Ban is vastly overinclusive. It applies to both current and former members of the execution team and contains no carveout for *self*-identification. It is not limited to lethal injection, though it was conceived and passed for that purpose, but rather applies to information related to all methods of execution, including firing squad and electrocution. It applies to any disclosure of "identifying information," regardless of whether it is used to lobby companies to avoid supplying lethal injection drugs. The disclosure bar prevents journalists from investigating the procurement process, doctors from evaluating the drugs' efficacy, and citizens from debating whether this method of lethal injection is humane. Such an overinclusive statute is not narrowly tailored. *See Ent. Merchs. Ass'n*, 564 U.S. at 804–05.

[5] Under Georgia and South Dakota law, disclosure is a misdemeanor, Ga. Code Ann. § 42-5-36(f); S.D. Codified Laws § 23A-27A-31.2, which carries a maximum term of 12 months imprisonment, Ga. Code Ann. § 17-10-3(a); S.D. Codified Laws § § 23A-27A-31.2. By contrast, South Carolina's secrecy statute authorizes imprisonment for up to three years. S.C. Code Ann. § 24-3-580(C).

In sum, the Universal Disclosure Ban is a content-based restriction on speech. The state will not be able to prove that it has a compelling interest justifying its uniquely draconian ban on political speech, let alone that its ban is narrowly tailored to achieve whatever interest it has. Accordingly, ACLU-SC is likely to succeed on the merits of its First Amendment claim.

B. The Universal Disclosure Ban is also an unconstitutional *viewpoint*-based restriction on speech.

Putting its facial content discrimination aside, the Universal Disclosure Ban is also unconstitutional because it is a viewpoint-based restriction on speech. A statute constitutes viewpoint discrimination if it targets "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The state has been unabashedly clear that it enacted the Secrecy Statute to stifle disfavored views: namely, lethal injection-critical speech directed at companies who manufacture, compound, and distribute the drugs. *See supra*. That is the very purpose of the statute, and the statute cannot be justified without reference to the viewpoints it suppresses. Put simply, the state found the expressions of disfavored views inconvenient, so it banned them.

Such viewpoint discrimination is "poison to a free society," *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019) (Alito, J., concurring), and so antithetical to the First Amendment that it is per se unconstitutional, *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (collecting cases). States may never "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.*; *accord Matal v. Tam*, 582 U.S. 218, 234 (2017). Viewpoint discrimination thus must be "immediately invalidate[d]." *Taxpayers for Vincent*, 466 U.S. at 804.

The Court has repeatedly reaffirmed this principle. In *Rosenberger*, the Court explained that the First Amendment "forbid[s] the State" from engaging in "viewpoint discrimination" and thus the state "must abstain" from regulations that are justified by the speaker's perspective. 515 U.S. at 829. Likewise, *Iancu* reiterated that the government "may not discriminate against speech based on the ideas or opinions it conveys," 588 U.S. at 393, and thus a statute's prohibition on

"immoral or scandalous" trademarks was viewpoint discrimination that "must be invalidated," *id.* at 398. There is thus no need to conduct strict scrutiny before invalidating viewpoint discrimination. *Id.* (not conducting strict scrutiny).

To be sure, some courts have analyzed viewpoint discrimination as a type of content-based regulation subject to strict scrutiny. *Reed*, 576 U.S. at 163–64. But that makes no difference: viewpoint discrimination never satisfies strict scrutiny. That's because an interest in suppressing particular views "is not [a] valid, let alone [a] substantial" interest. *Moody v. NetChoice, LLC*, 603 U.S. 707, 740 (2024); *see also Fusaro v. Cogan*, 930 F.3d 241, 255 (4th Cir. 2019) (observing that the Supreme Court has concluded that "viewpoint discrimination . . . contravenes the First Amendment" in every context "thus far addressed"). So, regardless of the analytical approach selected, the result is the same. Viewpoint-based restrictions on speech are never permitted.

Because the Universal Disclosure Ban is a form of viewpoint discrimination, it is per se unconstitutional and "must be invalidated." *Iancu*, 588 U.S. at 398. ACLU-SC is also likely to succeed on the merits of its viewpoint discrimination claim.

C. ACLU-SC has standing to enjoin criminal enforcement of the Universal Disclosure Ban.

ACLU-SC has standing to enjoin criminal enforcement of the Universal Disclosure Ban based on its as-applied and facial claims.

1. *ACLU-SC has been injured by the Universal Disclosure Ban's criminal penalty, and the requested injunction would remedy that injury.*

A plaintiff has standing if it has suffered an injury-in-fact that is fairly traceable to the challenge conduct of the defendant and that injury is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). First Amendment cases present unique considerations that "tilt dramatically toward a finding of standing." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quoting *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010)). That leniency "most commonly" manifests itself in the injury-in-fact element. *Id.*

The Universal Disclosure Ban injures ACLU-SC by invading its First Amendment right to disseminate information. At its core, the First Amendment protects the "freedom to think as you will and to speak as you think." *303 Creative*, 600 U.S. at 584 (quotes omitted). It is axiomatic that citizens' right to "inquire, to hear, to speak, and to use information" to engage in debate is a "precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. Currently, ACLU-SC possesses information covered by the Secrecy Statute. Ex. 1 at ¶ 10. And it would publish that information in its advocacy and education speech but for the threat of criminal enforcement under the Secrecy Statute's Universal Disclosure Ban. *Id.* at ¶ 11–12. Thus, ACLU-SC has suffered an injury-in-fact.[6]

2. *The Universal Disclosure Ban's criminal penalty is also overbroad.*

In the First Amendment context, the overbreadth doctrine is an exception to the general rule that a plaintiff only has standing to vindicate its own constitutional rights. *Taxpayers for Vincent*, 466 U.S. at 796; *United States v. Hansen*, 599 U.S. 762, 769 (2023). Under the overbreadth doctrine, a statute is facially invalid if a "substantial number" of its applications are unconstitutional, judged in relation to its "plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quotes omitted). Such a showing "suffices to invalidate all enforcement of that law." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). This "expansive" remedy is necessary because the "threat of enforcement" of an overbroad law may "deter or chill" constitutionally protected speech—especially when the overbroad statute "imposes criminal sanctions." *Id.* (quotes omitted).

[6] It is "not necessary" for a plaintiff to "first expose himself to actual arrest or prosecution to be entitled to challenge [a] statute that he claims deters the exercise of his constitutional rights." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quotes omitted). Pre-enforcement challenges are appropriate where, as here, a plaintiff has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (quotes omitted); *see also Cooksey*, 721 F.3d at 237; *N. Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999).

Because the Universal Disclosure Ban is a viewpoint-based restriction on speech, it has no "plainly legitimate sweep." It is unconstitutional in all its applications. *See supra* pp. 12–13.

Viewpoint discrimination aside, the Universal Disclosure Ban's facial content-based restrictions do not have *any* "plainly legitimate sweep" either. *See supra* pp. 8–12 (no compelling interest nor narrow tailoring). Even if it were possible to imagine scenarios where the Universal Disclosure Ban could be constitutionally applied, those would be dwarfed by its unconstitutional applications. Few issues are of greater public concern than whether and how we impose the death penalty. By criminalizing the disclosure of information about the entities that manufacture, compound, test, distribute, and administer lethal injection drugs, the statute hinders the public's ability to investigate, debate, and engage in political speech about the efficacy, morality, and legality of lethal injection. The consequences are jarring. The journalists who have investigated and written about compounders' shoddy histories of safety, efficacy, and quality:[7] *criminals*. The advocates who have publicly criticized compounders or lobbied them against suppling lethal injection drugs:[8] *criminals*. The doctors and scientists who have evaluated the particular methods used to compound and administer the drugs:[9] *criminals*. Former corrections officers telling their stories:[10] *criminals* too.

None of these applications would pass strict scrutiny. *See supra* pp. 8–12. Thus, the "substantial number" of unconstitutional applications renders the Universal Disclosure Ban overbroad and facially invalid.

The injury to ACLU-SC's First Amendment right to distribute information is directly traceable to the Universal Disclosure Ban and redressable by enjoining its criminal enforcement. It is the threat of criminal prosecution that keeps ACLU-SC (and other speakers) quiet. Ex. 1 at ¶¶ 10–12; *see also* Compl. ¶¶ 86–88. That chilling effect is ongoing and will continue to infringe on ACLU-SC's First Amendment rights absent an injunction. Ex. 1 at ¶¶ 10–13. An injunction

[7] *E.g.*, Compl. ¶¶ 43, 51 & n.7.
[8] *E.g.*, Compl. ¶¶ 44, 49.
[9] *E.g.*, Compl. ¶¶ 5, 42, 49.
[10] *E.g.*, Compl. ¶ 43.

would redress that injury by eliminating the "chilling of speech and threat of prosecution." *Cooksey*, 721 F.3d at 238. ACLU-SC, thus, "easily satisfies" the traceability and redressability requirements. *Id.*; *see also Overbey*, 930 F.3d at 230 (summarily concluding that traceability and redressability satisfied).

To recap: ACLU-SC is likely to succeed on the merits because the Universal Disclosure Ban unconstitutionally restricts speech based on viewpoint and content, and ACLU-SC has established standing for its as-applied and facial claims.

II. Without preliminary injunctive relief, ACLU-SC will suffer irreparable harm.

Without a preliminary injunction, the threat of criminal prosecution will continue to chill the speech of ACLU-SC, thereby violating ACLU-SC's right to disseminate information on timely questions of significant public concern. That loss of First Amendment freedom, even for a "minimal" period of time, "unquestionably constitutes irreparable injury." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *accord Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury.").

The irreparability of the ACLU-SC's injury is particularly pronounced given that the state will continue to execute individuals by lethal injection under a decree of silence while ACLU-SC litigates its First Amendment right to speak on that very issue.[11] Without preliminary relief,

[11] On September 20, 2024, South Carolina executed Freddie Owens—the first person the state had executed in over a decade. Jeffrey Collins, *After Holiday Pause, South Carolina Begins Scheduling Executions Again*, AP News (Jan. 3, 2025), https://apnews.com/article/south-carolina-execution-marion-bowman-d974bee6d57aabf72a713915907af9a5. Six weeks later it executed Richard Moore. *Id.* The South Carolina Supreme Court paused issuance of death warrants through January 3, 2025, for the holidays. *Id.* On January 3, 2025, the Court issued a death warrant for Marion Bowman Jr. *Id.* He is scheduled to be executed tonight. *Id.* The Court previously indicated that it would space out executions in five-week intervals. Skylar Laird, *SC Supreme Court Will Wait 5 Weeks Between Death Notices, Sets Order for Executions*, S.C. Daily Gazette (Aug. 30, 2024), https://scdailygazette.com/2024/08/30/sc-supreme-court-will-wait-five-weeks-between-execution-notices-sets-order-for-next-to-die/. Currently, there are three

ACLU-SC will continue to be denied its right to disseminate information about the administration of the death penalty, thereby stymieing its right to engage in political speech on significant time-sensitive issues. Time is of the essence.

III. The balance of equities and public interest favor a preliminary injunction.

The balance of equities and public interest "merge" when the government is the opposing party. *Pierce v. N. Carolina State Bd. of Elections*, 97 F.4th 194, 225 (4th Cir. 2024). The equities favor preliminary relief because a state "is in no way harmed" by a preliminary injunction that prevents it from "enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc) (quotes omitted). Likewise, it is "well-established that the public interest favors protecting constitutional rights." *Id.* Thus, both the equities and public interest support an injunction protecting ACLU-SC's First Amendment rights.

Beyond the merits, the public interest and equities further favor preliminary relief. ACLU-SC does not seek a preliminary injunction prohibiting the state from carrying out executions while this litigation is pending.[12] On the other hand, there is substantial public interest in being able to have a well-informed debate about the merits of lethal injection *before* those executions take place.

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prisoners, in addition to Marion Bowman Jr., who have exhausted appeals and will presumably have execution dates set in succession. *Id.*

[12] Presumably, SCDC has already acquired the drugs to conduct executions by lethal injection through the near future. And, even if it hasn't, enjoining the criminal prohibition would not necessarily cut off its supply. Many states have acquired lethal injection drugs without criminal secrecy statutes. *Supra* p. 11 & n.4. Moreover, the state could always obtain the drugs by paying more or creating them itself. But even assuming it would be impossible for the state to secure these drugs without the criminal prohibition, it could still carry out executions by electrocution or firing squad. S.C. Code Ann. § 24-3-530(a); *Owens v. Stirling*, 443 S.C. 246 (2024).

CONCLUSION

ACLU-SC respectfully asks the Court to preliminarily enjoin Defendant Wilson, and his agents and employees, from criminally enforcing the Universal Disclosure Ban. ACLU-SC respectfully requests oral argument on this motion.

Dated: January 31, 2025

Respectfully submitted,

/s/ Meredith McPhail
Meredith D. McPhail
Allen Chaney
ACLU OF SOUTH CAROLINA
P.O. Box 1668
Columbia, SC 29202
(843) 259-2925
mmcphail@aclusc.org

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

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA FOUNDATION, *Plaintiff*, v. ALAN WILSON, in his official capacity as South Carolina Attorney General; BRYAN STIRLING, in his official capacity as Director of the South Carolina Department of Corrections, *Defendants*.	Case No. 3:25-cv-00537-JFA **Declaration of David Allen Chaney Jr. In Support of Preliminary Injunction**

I, David Allen Chaney Jr., certify under penalty of perjury that the following statements are true and correct pursuant to 28 U.S.C. § 1746.

1. My name is David Allen Chaney Jr., and I go by "Allen." I am older than eighteen years of age and am licensed to practice law in this State and in this District. The statements in this declaration are based upon my own personal knowledge.

2. I am the Legal Director of the American Civil Liberties Union of South Carolina Foundation ("ACLU-SC"), and have direct knowledge of the organization's mission, vision, and activities.

3. ACLU-SC is a nonprofit organization registered in South Carolina. ACLU-SC is an affiliate of the American Civil Liberties Union ("ACLU").

4. ACLU-SC's vision is "a just South Carolina where We the People means all of us." To bring this vision to life, ACLU-SC advocates, litigates, educates, and mobilizes to defend and advance the civil rights and civil liberties of all South Carolinians.

5. ACLU-SC works on many different issue areas, including death penalty abolition and First Amendment rights.

6. ACLU and its affiliates routinely engage in First Amendment litigation, including in cases asserting ACLU's own First Amendment rights. *See, e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002); *American Civil Liberties Union of Md., Inc. v. Wicomico County*, 999 F.3d 780 (4th Cir. 1993); *American Civil Liberties Union Foundation of S. Carolina v. Spartanburg County*, Case No. 7:17-cv-01145-TMC, 2017 WL 5589576 (D.S.C. Nov. 17, 2017).

7. In addition to litigation, ACLU-SC also regularly engages in public messaging about, and in support of, our issues-related work. This includes publishing materials designed to advocate against the death penalty.

8. ACLU-SC's public advocacy work is led by its communications director, Paul Bowers. Mr. Bowers is an experienced and decorated journalist. Other members of ACLU-SC's staff are also involved in communications efforts, including by writing articles, giving interviews, and posting on social media.

9. ACLU-SC's communications work includes issuing press releases, publishing blogs, writing op-eds, and creating and posting social media content.

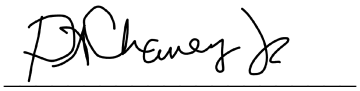
10. ACLU-SC is in possession of information covered by the Secrecy Statute. S.C. Code Ann. § 24-3-580(A)(2), (C).

11. But for the Secrecy Statute, ACLU-SC would disclose and disseminate this information as part of its political advocacy.

12. However, the threat of criminal punishment under the Secrecy Statute is sufficient to deter ACLU-SC from exercising its First Amendment right to speak.

13. Thus, rather than risk criminal prosecution, ACLU-SC has filed a pre-enforcement action in federal court.

Date: January 29, 2025



Allen Chaney
S.C. Bar No. 104038, Fed. I.D. No. 13181
ACLU OF SOUTH CAROLINA
Post Office Box 1668
Columbia, SC 29202
(864) 372-6881
achaney@aclusc.org