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

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| Justice 360,<br><br>Plaintiff,<br><br>*v.*<br><br>Bryan P. Stirling, Director of the South Carolina Department of Corrections; and Alan Wilson, South Carolina Attorney General,<br><br>Defendants. | Civil Action No. 3:20-03671-MGL |

**COMBINED REPLY BRIEF IN SUPPORT OF JUSTICES 360'S MOTION FOR A TRO AND PRELIMINARY INJUNCTION AND OPPOSITION TO MOTION TO DISMISS**

Defendants mischaracterize the nature of Justice 360's request for a TRO and a preliminary injunction. Justice 360 is not asking this Court to "essentially serve as an appellate court for a state-level" decision or to "effectively nullify [any] order of [a] state court." Stirling Opp. 1, 5. Rather, Justice 360 asks this Court to invalidate under the First Amendment the interpretation of the South Carolina Identity Statute (S.C. Code § 24-3-580) as applied by *Defendants* to Justice 360. Defendants have invoked the Identity Statute to deny access to information about the execution methods Justice 360 sought in its capacity as counsel for prisoners on death row. It is true that Justice 360, both as an organization and counsel for Mr. Richard Moore, did initiate state court proceedings, also seeking access to the same information, on different legal theories having nothing to do with the First Amendment, including Due Process, the Eighth Amendment, and South Carolina's Freedom of Information Act. But there is no doctrine compelling compulsory joinder of claims in the same case, and there are no ongoing state court proceedings at this point.

Defendants' true argument is one of "claim preclusion," and any "abstention" Defendants seek is rooted in that misconception and must be rejected.

Furthermore, Defendants' attempts to spin this case as seeking access to information as some sort of "constitutional FOIA" fails. Justice 360 seeks access to information it was historically given, in its capacity as government-appointed attorneys until the passage of the Identity Statute, which then cut off access to that information. The basis for the suit, then, is the government deprivation enacted by the Identity Statute. Nor does Justice 360 seek this information pursuant the First Amendment "right of access" to judicial records, unlike the plaintiff-inmates in the other cases Defendants cite (some of which were successful). Rather, the theory of professional speech Justice 360 articulates has not been argued in any death penalty case, though it is common in prisoner and legal services cases and has been endorsed by the U.S. Supreme Court and Courts of Appeals around the country. Defendants also ignore Justice 360's claim of content and viewpoint discrimination, and this alone disposes of the case. That is because the legislative history (as well as Defendants' own admissions) shows the statute was passed to deprive death penalty attorneys of information, which subjects the statute to strict scrutiny.

Finally, Defendants do not contest a single fact in the record—which means Justice 360 has carried its factual burden on its motion for a TRO or preliminary injunction. *See Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 259 n.7 (4th Cir. 2003) (rejecting a public school's factual assertion as there was no evidence on the record to support it). That means the sole question for the Court is whether the legal theory is proper. It is, and this Court should declare that Justice 360 is likely to succeed on the merits that the Identity Statute, as-applied, is unconstitutional and executions should be enjoined while a preliminary injunction is in place.

## I. Defendants Have No Real Answer To The Professional Speech Theory

Defendants have no real answer to the merits of Justice 360's First Amendment argument. Instead, Defendants attempt to distract the court with inapplicable procedural doctrines and citations to readily-distinguishable cases involving different types of plaintiffs asserting different types of rights. Defendants do not (and cannot) dispute that the First Amendment protects Justice 360's existing right to engage in professional speech. Like the lawyers in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001), Justice 360 is paid by the government to "facilitate private speech" by representing Justice 360's clients. Defendants are intruding on that government-created professional relationship via the Identity Statute by cutting off access to previously available information that goes to the heart of Justice's 360 ability to counsel clients, consult experts, and subject the execution protocols to meaningful adversarial testing. *See* Pl. Br. 16–27. In doing so, Defendants are impermissibly interfering in an existing professional relationship between government-appointed attorneys and their clients and are censoring not only Justice 360's ability to speak on matters of deep constitutional import, but also engaging in content and viewpoint discrimination by suppressing certain types of speech Defendants disfavor. *See Velazquez*, 531 U.S. at 542; *see also* Pl. Br. 27–29. This deprivation threatens not only Justice 360's First Amendment rights, but also intrudes on the province of the judiciary. *Velasquez*, 531 U.S. at 546. Each of Defendants' arguments purportedly to the contrary misses the point by a wide margin.

**A. Justice 360 Does Not Argue For A Constitutional FOIA Or A Right Of Access**

First, Defendants argue that that statute does not "infringe[] the [] Plaintiff's rights" because it "does not prohibit any of the Plaintiff's actions." Stirling Opp. 12. Not so. The statute, as interpreted and applied by Defendants to Justice 360, Vann Dec. Ex. C (citing S.C. Code § 24-3-580), affirmatively cuts off access to information Justice 360 was historically given in its capacity as counsel to death row inmates, *see* Pl. Br. 5–6, and imposes penalties for disclosure of

the information to the Court or with expert witnesses, even if, for example Justice 360 were to receive this information pursuant to a confidentiality order, such as the one Defendants proposed, § 24-3-580. Even were Defendants interpretation correct (which it is not), they offer no support for the theory that only government conduct that directly, affirmatively suppresses speech can amount to a constitutional violation. No such authority exists. Both direct and indirect forms of censorship can violate the First Amendment. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (finding statute barring independent corporate expenditures violates the First Amendment); *Jordan v. Hutcheson*, 323 F.2d 597, 606 (4th Cir. 1963) (finding that government harassment and intimidation of public interest lawyers implicates lawyers' free speech rights).

For instance, in *NAACP v. Button*, the Court did not find a solicitation ban to be unconstitutional as-applied to the NAACP because it straightforwardly forbade the NAACP from making Fourteenth Amendment arguments in Court. *See* 371 U.S. 415, 430–31 (1963). Rather, the court found the solicitation ban to be unconstitutional because it dampened the cooperative, organizational activity that made the NAACP's First Amendment right to enforce constitutional rights through litigation meaningful. *See id.* at 437–38. In other words, the relevant constitutional question is not whether the restriction at issue expressly prohibits protected speech; the relevant question is whether the restriction has the *practical effect* of suppressing protected speech. *Id.*; *see also Hutcheson*, 323 F.2d 597, 604 ("[N]either ingenuous nor enginous devices to interfere with the exercise of these [First Amendment] rights will be tolerated . . . ."). Here, Defendants' interpretation of the statute, which has the practical effect of denying access to information, impermissibly obstructs Justice 360's ability to advise its clients and advocate its position in court.

Next, Defendants argue, "[t]he First Amendment does not mandate an unqualified 'right of access to government information or sources of information within the government's control.'" Stirling Opp. 12 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion)). Crucially, the right of access establishes a *public right*, usually associated with the media, to access information based on the so-called experience and logic test. *Houchins*, 438 U.S. at 15–16. That is simply not the right Justice 360 asserts, which is keyed to the sacred attorney-client relationship, and the attorneys' ethical obligations of competent and diligent representation. *See* Pl. Br. 9–10; 17–20. Further, Defendants' own cases show an as-applied challenge is a "permissible course" when the statute "denies access to persons who wish to use the information for certain speech purposes." *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 41–42 (1999) (Scalia, J., concurring) (emphasis removed).

In addition, since the restriction is content based, it violates the First Amendment. *See Fusaro v. Cogan*, 930 F.3d 241, 245 (4th Cir. 2019). In *Fusaro*, the Fourth Circuit explained that despite the ruling in *Houchins*, content-based restrictions on disclosure of government-controlled information "can run afoul of the Free Speech Clause, giving rise to a viable constitutional claim." *Id.* at 253; *accord Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994). In *Fusaro*, a Maryland statute that imposed conditions on access to the state's voter-registration list gave rise to a cognizable First Amendment claim because (1) the list was "closely tied to political speech"; (2) the statute imposed "content- and speaker-based conditions on access to and use of the [l]ist"; and (3) "Supreme Court precedent indicates that suspect conditions on access to government information may be subject to First Amendment scrutiny." *Fusaro*, 930 F.3d at 250. Analogously, here, the information sought has "obvious practical utility to political expression," *id.* at 251, because Plaintiff is an organization of public interest attorneys who engage in mission-

driven litigation as a "form of political expression," *In re Primus*, 436 U.S. 412, 428 (1978) (internal quotation marks omitted) (quoting *NAACP*, 371 U.S. at 429).

The government has also imposed content-based conditions on access to the information, including because it has provided the information for some executions and not others, and has offered to provide information for certain purposes but not others. See Vann Decl., Ex. I at 2 (agreeing to provide the information "for the sole purpose of advising Richard Bernard Moore with regards to his election of execution method"—not for other inmates or for use in an Eighth Amendment challenge, and not for expert witnesses); *see also Fusaro*, 930 F.3d at 253 (determining restrictions to government-controlled information were content-based because they "single[d] out specific subject matter for differential treatment."). And finally, the circumstances of the restriction "indicat[e] improper interference with protected speech" because Defendants are limiting disclosure for the stated purpose of insulating itself and its drug suppliers from scrutiny. *Fusaro*, 930 F.3d at 255; *see* Stirling Opp. 8 (admitting that the State's interest in shrouding execution process in secrecy is to silence those who "target those who participate in a state's execution process").

If Defendants fear backlash to SCDC's own practices—which should be substantiated in a non-conclusory declaration submitted by a person with personal knowledge to this Court, not by a citation to cases outside of this jurisdiction and other records, Fed. R. Evid. 602—this cannot outweigh the compelling interest Justice 360 has established in its own speech, *see* Pl. Br. 31, nor is the remedy narrowly tailored as, for example, by proposing an alternative means like redacting certain pieces of information. *See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 879–80 (9th Cir. 2002) (finding no evidence in record to support security claim and also determining

remedy of having "execution team members wear[ing] surgical garb[s] to conceal their identit[y] from the witnesses" was appropriate despite legitimate interest in prison safety).

**B. Defendants' Cases Of Inmates Invoking Other Doctrines Are Irrelevant**

Defendants' remaining cases are likewise irrelevant to the dispute at hand. As Defendants themselves admit, the execution secrecy cases they cite involve different parties and different constitutional rights—including Due Process, Supremacy Clause, and Eighth Amendment claims which in these cases lost not related to inmate's First Amendment rights, but on other aspects of doctrine. Stirling Opp. 1-2 ("[C]ourts reviewing similar claims by *inmates themselves* hold that an *inmate* . . . does not have such a right.") (emphases added). While it is true that *some*—and certainty not all, *see Hamm v. Dunn*, 2:17-cv-02083- KOB, 2018 WL 2431340, at *4 (N.D. Ala. May 30, 2018), *aff'd sub nom. Comm'r, Ala. Dep't of Corr. v. Advance Local Media*, LLC, 918 F.3d 1161 (11th Cir. 2019)—courts have denied inmates' claims, these claims were ultimately not based on an inmate's inability to effectively represent themselves in court absent access to information. Rather, they were based on other constitutional doctrines that alleged affirmative rights violations because, for example, they (1) violated the public's right to know;[1] or (2) would have required the affirmative expenditure of capital to provide resources to prisoners;[2] or (3)

[1] *See, e.g.*, *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1266–7 (11th Cir. 2014) (rejecting inmate's First Amendment right of access claim, which "turn[d] on the public's, rather than the individual's, need to be informed"); *Owens v. Hill*, 758 S.E.2d 794, 805 (Ga. 2014) (same on the basis that the "experience" prong under the right of access did not apply because "although there has been a tradition of allowing at least some public access to execution proceedings, there has also been a longstanding tradition of concealing the identities of those who carry out those executions").

[2] *See Lewis v. Casey*, 518 U.S. 343, 367–85 (1996) (Thomas, J., concurring) (rejecting due process challenge to prison libraries, which, unlike here, sought to impose an "affirmative obligation[] on the State[] to finance and support prisoner litigation")

ultimately because, unlike here, they did not introduce adequate evidence that there could be a substantial risk of severe pain,[3] unlike Justice 360's experts, who clearly establish this is a real possibility in this case. *See generally* Waisel Decl.; Ruble Decl.; Wikswo Decl.; Vann Decl.

**C. Defendants Fail To Address Content and Viewpoint Discrimination**

Finally, Defendants do not even attempt to address Plaintiff's argument that Defendants' application of the Identity Statute amounts to content and viewpoint discrimination, nor should they have the opportunity to do so on reply. Again, Defendants admit that the State's interest in shrouding execution process in secrecy is to silence those who "target those who participate in a state's execution process." Stirling Opp. 8. This justification refers to the content of the speech affected—not to the time, place, or manner in which it is spoken. *See* Pl. Br. 27–29. This is alone dispositive, as the evidence indicates the state is attempting to regulate content and viewpoint of speech, which is subject to strict scrutiny. *Id.* Because strict scrutiny requires the government to show that its regulation is narrowly tailored and justified by a compelling interest, Defendants' reading of the Identity Statute cannot stand. Pl. Br. 30-33. Their policy is the opposite of narrowly tailored, and they have yet to articulate any government interest in non-disclosure, much less a compelling one.

[3] *In re Lombardi*, 741 F.3d 888, 895–97 (8th Cir. 2014) (rejecting Eighth Amendment claim by prisoner that the State must "change its method" of execution because there is a substantial risk of severe pain when, with access to the lethal injection protocol, there is an alternative that is less painful and where plaintiffs made no allegation that the "Director, in the exercise of his discretion, has employed anything other than the most humane method of execution available"); *Whitaker v. Livingston*, 732 F.3d 465, 466–68 (5th Cir. 2013) (rejecting Eighth Amendment claim because there was no "liberty interest" in the 14th Amendment "that goes beyond what [the Eighth] Amendment itself protects" and rejecting Eighth Amendment argument because the inmate "need[ed] more time" to demonstrate the "risk of potentially excessive pain" and failing to offer "proof that the state's own process—that its choice of pharmacy, that its lab results, that the training of its executions, and so forth, are suspect" based on available information).

## II. *Rooker-Feldman* Is Inappropriate

Defendants' assertion that this Court lacks subject matter jurisdiction due to *Rooker-Feldman* abstention similarly demonstrates a fundamental misunderstanding of the doctrine. Stirling Opp. 4-5. As the Supreme Court of the United States has made clear, *Rooker-Feldman* abstention is an extraordinarily narrow doctrine that the Court itself has only invoked in the two cases that give rise to its name to find lack of jurisdiction, *Lance v. Dennis*, 546 U.S. 459, 463 (2006), and it has been carefully "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries cause by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also Thana v. Bd. of License Comm'rs*, 827 F.3d 314, 319 (4th Cir. 2016) (recognizing that the Supreme Court in *Saudi Basic* "corrected" the Court of Appeals, including the Fourth Circuit's, "misunderstanding" of the doctrine and admonishing the lower federal courts that "expansive construction of the doctrine" threatens congressional conferral of federal court jurisdiction and supersedes ordinary application of preclusion doctrines).

The doctrine's limited reach, as defined in *Saudi Basic*, renders it clearly inapplicable here. First, Justice 360's suit was commenced in this Court before there was any state court litigation of any kind on behalf of its client Richard Moore, represented by Justice 360 attorneys. *Compare* ECF No. 1 *with* Stirling Opp. Exs. A-E. Second, this action does not attack any state court judgment, nor allege that any injury to Justice 360's First Amendment right of professional speech was abridged by any decision of the South Carolina Supreme Court or any other state court. *See infra* III.a. Rather, Justice 360's injuries were caused by, and solely by, Defendants' refusal to

provide information regarding how it intends to execute Justice 360's clients to which it is entitled under the First Amendment. *See supra* I. Third, even assuming Richard Moore's filings in the original jurisdiction of the South Carolina Supreme Court are somehow relevant to this action brought by Justice 360, which is doubtful,[4] both the legal theories Moore advanced and the South Carolina Supreme Court's refusal to hear the cases renders *Rooker-Feldman* inapplicable. Moore advanced no First Amendment argument at all in his state court pleadings for the obvious reason that he is not an attorney and thus has no First Amendment right of professional speech. *See* Stirling Opp., Ex. B. His arguments were instead grounded in his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right not be deprived of his right to life, under the Due Process Clauses of the state and federal constitutions, to make an informed election by the two statutorily authorized modes of election. *Id.* And, perhaps more importantly, the South Carolina Supreme Court did not render a judgment on the merits of even those claims. Stirling Opp., Ex. D. Rather, it simply declined to hear the claims in its original jurisdiction. That is clear from the plain language of the order: "Petitioner asks this Court, in our original jurisdiction, for a declaratory judgment, a writ of certiorari, or a writ of mandamus. The requests are denied." *Id.*; *see also Carpenter v. S.C. Dept. of Corr.*, 848 S.E.2d 346, 353 (S.C. Ct. App 2020) (holding that an original jurisdiction "denial order was not based on the merits"). Thus,

[4] In *Lance v. Dennis*, *supra*, the Supreme Court reversed a decision of a three-judge panel from the District of Colorado dismissing, under *Rooker-Feldman*, a suit challenging Colorado's congressional redistricting after the 2020 census. The three-judge panel found that the Plaintiff, who was not a party to prior state court litigation attacking the redistricting, was in "privity" with the state court loser. 546 U.S. at 460. The Court noted that whatever the impact of privity principles as it relates to questions of preclusion, they were not applicable in the *Rooker-Feldman* context. *Id.* at 466. Since Justice 360 was not a party to the state court litigation (with the exception of the FOIA litigation discussed in Part III.A) brought by one of its clients, the principle articulated by the Supreme Court in *Lance* is applicable here.

in sum, no state court judgment, much less a state court judgment on the merits of Justice 360's First Amendment claims, is being challenged in this lawsuit.

In fact, the main case cited by Defendant Stirling establishes beyond a shadow of a doubt that *Rooker-Feldman* abstention does not deprive this Court of jurisdiction to hear and pass on the merits of Justice 360's claims arising under the First Amendment. In *Skiner v. Switzer*, 562 U.S. 521, 529 (2011), the Supreme Court of the United States granted certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit recharacterizing (and then dismissing) a death sentenced inmate's section 1983 action requesting DNA testing as a second or successive habeas petition. Skinner, the death sentenced inmate, had sought, on several occasions, DNA testing under a Texas law, enacted after his conviction, allowing post-conviction DNA testing under limited circumstances. 562 U.S. at 527–28. On each occasion he was rebuffed by the state courts. *Id.* He then filed a federal action for injunctive relief under section 1983 alleging that Texas violated his right to due process by refusing to provide for the DNA testing he requested. *Id.* at 529. In the Supreme Court, the Respondent/Defendant (the District Attorney Skinner sued in federal court), maintained that the action was jurisdictionally barred by *Rooker-Feldman*. *Id.* at 531. Again, noting *Rooker-Feldman*'s very narrow and limited applicability, the Court held that Skinner's litigation "encounters no *Rooker-Feldman* shoal." *Id*. at 532. Because Skinner filed an "'independent claim,' it [was] not an impediment to the exercise of federal jurisdiction that the 'same or a related question' was earlier aired by between the parties in state court." *Id.* (quoting *Saudi Basic*, 544 U.S. at 292–93). Thus, even if the South Carolina Supreme Court's denial of Moore's requests is construed by this Court to be a merits adjudication, which it was not, it would be of no moment. The Court concluded that Skinner was not challenging the adverse state court decisions themselves, but rather that he was attacking as unconstitutional the Texas statute the

state courts had authoritatively construed. And the Court then made clear that regardless of those prior state court decisions, a state "statute or rule governing the decision may be challenged in a federal action." 562 U.S. at 532. If *Rooker-Feldman* did not apply in *Skinner*, where there had been state court litigation decided adversely to the plaintiff on the merits requesting the same relief prior to filing the federal action, then it is definitely not applicable here. Respondents have "misperceived the narrow ground occupied by *Rooker-Feldman*." *Saudi Basic*, 544 U.S. at 284. There is no subject matter jurisdiction bar to Plaintiff's suit.

## III. *Younger* Abstention Is Inappropriate

### A. *Younger* abstention is inappropriate because the present suit does not seek to enjoin state court proceedings

*Younger* is inapposite because the present suit does not seek to enjoin any pending state court proceedings. Defendants argue that that Justice 360 is required to litigate two separate issues—FOIA and the First Amendment—together. Stirling Opp. 7. But it is blackletter law that under Federal Rule of Civil Procedure Rule 18(a), plaintiffs have the option not to join separate legal claims in the same lawsuit. Fed. R. Civ. P. 18(a); *see also Dionne v. Mayor & City Council of Baltimore*, 40 F.3d 677, 685 (4th Cir. 1994) ("A federal rule applying claim preclusion would not be consistent with traditional claim preclusion principles."). This rule is doubly true when a case involves a § 1983 action that "might be brought in either state or federal court" where a "state's exhaustion requirement[s] presumably would still prevent joinder with the § 1983 claim of non-constitutional state-law" claims. *See Davenport v. N.C. Dep't of Transp.*, 3 F.3d 89, 96 (4th Cir. 1993); *see also Patsy v. Bd. of Regents*, 457 U.S. 496, 506–07 (1982) (explaining that the legislative intent of § 1983 was to provide dual forums). Thus, a plaintiff may bring a legal claim

under FOIA in state court, and a separate legal claim under the First Amendment in federal court. *See Pittson Co. v. United States*, 199 F.3d 694, 705 (4th Cir. 1999) (constitutional claim separate).[5]

Defendants, under the inappropriate guise of *Younger* abstention, which expresses the "national policy forbidding federal courts [from] stay[ing] or enjoin[ing] pending state court proceedings except in special circumstances," *Younger v. Harris*, 401 U.S. 37, 41 (1971), would have this Court believe otherwise. Defendants contend that the FOIA suit constitutes an "ongoing state proceeding" that "provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 165 (4th Cir. 2008); *see also* Stirling Opp. 7 (claiming the FOIA suit "presents South Carolina § 24-3-580 for review and potential construction by a state court"). Defendants' selective quotation of the *Younger* standard illustrates its inapplicability. Under the first prong, the requested relief must "interfere" with "an *ongoing* judicial proceeding, instituted *prior to any substantial progress in the federal proceeding*." *United States v. South Carolina*, 720 F.3d 518, 526–28 (4th Cir. 2013) (emphasis added) (quoting *Laurel Sand*, 519 F.3d at 165). Here, this case was filed on October 19, 2020, ECF No. 1, and on November 9, the Attorney General filed a motion to dismiss, ECF No. 14. The FOIA case, on the other hand, was not even filed until November 12, 2020, Stirling Opp. Ex. A. Further, the state suit has already concluded, *Justice 360 v. S.C. Dep't of Corr.*, No. 2020-CP-40-05306 (S.C. Ct. Com. Pls. Nov. 24, 2020), and since the First Amendment

[5] Here, the two claims are distinct: Under the claim advanced in this suit, Justice 360 seeks to strike down a law that is being invoked to deny Justice 360 access to information requested in Justice 360's capacity as counsel for ten death row prisoners, including Mr. Moore. *See* Vann Decl., ¶ 3 & Exs. B-C. On the other hand, in the FOIA suit, Justice 360 requested identical information in Justice 360's capacity as a member of the public since, under South Carolina law, FOIA is designed "to protect the public by providing a mechanism for the disclosure of information by public bodies." *Sloan v. Friends of the Hunley, Inc.*, 630 S.E.2d 474, 478 (S.C. 2006); *see also* Stirling Ex. A, and the statute makes the information available to any member whomsoever of the public.

was not part of the pleadings, Stirling Opp. Ex. A, it is barred from appellate review in the FOIA lawsuit, *see Murphy v. Hagan*, 271 S.E.2d 311, 339 (S.C. 1980), unlike Defendants suggestion that it may still be raised on appeal, Stirling Opp. 9. Thus, there is no "ongoing" state court proceeding to abstain to, and "there exists no adequate opportunity" for Justice 360 to raise its claims in state court. *See Stuart Circle Par. v. Bd. of Zoning Appeals of City of Richmond, Va.*, 946 F. Supp. 1225, 1229 (E.D. Va. 1996).

Thus, there is no need for *Younger* abstention because it would not occur *before* "a state court has had the opportunity to review an agency's decision," *Laurel Sand*, 519 F.3d at 166, and it would not "ensure that state courts may construe state law in a way that avoids unwarranted determinations of federal constitutional questions," *id.* (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987))—the essence of the *Younger* doctrine. Because in no way does Justice 360 seek to "terminat[e] the state judicial process prematurely—forgoing the state appeal to attack the trial court's judgment in federal court," *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 369 (1989), or do something even more radical like "enjoin a plaintiff who has prevailed in a trial in state court from executing the judgment in its favor pending appeal of that judgement to a state appellate court," *Pennzoil Co.*, 481 U.S. at 3, *Younger* is simply inapposite.[6]

**b. *Younger* Abstention Is Inappropriate Because This Case Involves Imminent Irreparable Injury And Defendants' Own Clear Interpretation of the Statute**

But even assuming that Defendants' *Younger* theory is correct (which it is not), *Younger* abstention is disfavored in cases where there is an imminent threat of irreparable injury or where

[6] Defendants cite an unpublished Fourth Circuit case where a party "sought to have South Carolina's Freedom of Information Act . . . declared unconstitutional as applied to it as a purportedly public corporation" as precedent for abstention here. *See S.C. Ass'n of Sch. Adm'rs v. Disabato*, 460 F. App'x 239, 240 (4th Cir. 2012). But in this case, the plaintiff had "already obtained the relief it sought with this federal suit through its participation in an earlier-filed state suit." *Id.* at 244. Such is not the case here.

the state statute is not subject to multiple interpretations. As the Supreme Court has made clear, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *United States v. South Carolina*, 720 F.3d at 526–28 (internal quotation marks omitted) (quoting *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976)). Indeed, "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Id.* (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)); *see also Martin v. Stewart*, 499 F.3d 360, 363–64 (4th Cir. 2007) ("Abstention doctrines constitute 'extraordinary and narrow exception[s]' to a federal court's duty to exercise the jurisdiction conferred on it.") (alterations in original). And as *Younger* itself states: "[W]hen absolutely necessary for protection of constitutional rights, courts of the United States have the power to enjoin state officers." *Younger*, 401 U.S. at 45.

Indeed, the Fourth Circuit has been quite clear that "*Younger* does *not* bar the granting of federal injunctive relief when a state criminal prosecution is expected and imminent." *South Carolina*, 720 F.3d at 526–28 (citing *Age of Majority Educ. Corp. v.* Preller, 512 F.2d 1241, 1243 (4th Cir.1975) (en banc)). The Court went on to clarify that there is a difference between the "commencement 'of formal enforcement proceedings'" versus "the period of time when there is only 'threat of enforcement'" when *Younger* does not apply. *Id.* (citing *Telco Commc'ns, Inc. v. Carbaugh,* 885 F.2d 1225, 1229 (4th Cir.1989), *cert. denied*, 495 U.S. 904 (1990)). Because South Carolina has issued an execution order that is stayed, this qualifies as an "expected and imminent" "threat of enforcement" against Mr. Richard Moore that would allow this Court to enjoin not the state court, but the Attorney General and Director of Department of Corrections from taking action to pursue the execution until the pending case is resolved according to the stipulation Justice 360 proposed to this Court, which would prevent Defendants from alerting the state court that they

have acquired lethal injection drugs. *See id.* Other execution dates may soon be set for Justice 360 clients, and they will be placed in the same predicament. *See* Vann Decl. ¶ 4 n.3. To do otherwise would mean that Justice 360's as well as its client's "constitutional rights [would be placed] in limbo." *South Carolina*, 720 F.3d at 527 (quoting *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 2013). Indeed, the Fourth Circuit plainly held, *Younger* abstention does not require a plaintiff to "live under a cloud of 'prolonged uncertainty' as to their rights." *Id.* at 528. The same is true here.

Furthermore, as here, where "a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of the federal court to decide the federal question when presented to it." *Zwickler v. Koota*, 389 U.S. 241, 250–55 (1967). This is because "[a]ny other course would impose expense and long delay upon the litigants without hope of its bearing fruit" and "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Id.* (internal citations omitted). Crucially, as here, in *Zwickler* the plaintiff sought a declaratory judgment that the "state statute underlying" the criminal prosecution he was being threatened with "was unconstitutional." *Id.* And "potential interference in the administration of its criminal laws is of a lesser dimension when an attack is made upon the constitutionality of a state statute as applied" since it will not affect the statute's general enforcement. *Steffel v. Thompson*, 415 U.S. 452, 474 (1974).[7]

[7] *Steffel v. Thompson* equally held that the attack need not necessarily be facial, it can be as applied where a "federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute" because "[t]he solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others." *Id.* at 474–75. Indeed, a plaintiff such as Justice 360 that seeks "a declaration of partial unconstitutionality," is less threatening to issues of comity raised by *Younger* because the "declaration does not necessary bar [enforcement] under the statute as a broad injunction would."

Thus, so too is abstention improper here because Defendants themselves have currently advanced an interpretation of the Identity Statute in both a letter to Justice 360, Vann Decl. Ex. C at 1, and more importantly, during the FOIA proceedings themselves, Ex. A, a position that was accepted by the Court of Common Pleas, Ex. B. Under the doctrine of "judicial estoppel" recognized by the United States Supreme Court, Defendants cannot now argue—out of the other side of their mouths—that the statute should be interpreted narrowly. *See* Stirling Opp. 10 ("Here, all of the claims for relief appear to hinge on a broad construction of South Carolina Code § 24-3-580. But that statute has never been conclusively addressed by any South Carolina court; it has only been the subject of an opinion from the Attorney General, and the Plaintiff disagrees with that opinion.").

Respectfully, Justice 360 has taken no such position and has merely said the statute should not be applied to Justice 360 because it violates the First Amendment. Defendants' argument that the statute should be narrowly construed violates the Supreme Court's maximum that prevents a party from "gain[ing] an advantage by litigation on one theory, and then seek[ing] an inconsistent advantage by pursuing an incompatible theory," in its opinion *New Hampshire v. Maine*, 532 U.S. 742, 749–56 (2001) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981)). The case laid out three factors that courts consider when determining whether a party is estopped from advancing an inconsistent position: whether (1) "a party's later position must be 'clearly inconsistent' with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or

*Id.* at 470. Here, although Justice 360 seeks a TRO to preserve the status quo while this case is litigated, ECF No. 23, the ultimate relief it seeks is a declaration that the state statute is unconstitutional. ECF. No. 1 at 21–23.

the second court was misled,'"; (3) "the party seeking to assert an inconsistent position would derive an unfair detriment on the opposing party if not estopped." *Id.*

Here, Defendants meet all three criteria. As the letter by counsel for Defendant Stirling to Lindsey Vann establishes, Defendants viewed the Identity Statute as the source of law that prohibited them from sharing the information Justice 360 sought. Specifically, counsel wrote:

> Information about suppliers/and or compounders of the lethal injection drugs and information about security and medical personnel is not to be released given SCAG Opinion, 2015 WL 4699337. S.C. Code Section 24-3-580 prohibits the disclosure of the execution team member's identity or identifying information. The Attorney General opinion clarifies the meaning of "member of an execution team" *broadly construing* those terms and protecting the identities of individuals and companies involved in the process of an execution via lethal injection. We do not agree that you are entitled to the information you have requested.

Vann Decl., Ex C at 1 (emphasis added). Further, in the FOIA litigation, SCDC submitted an affidavit by Mr. Colie Rushton, the "Director of Security and Emergency Operations" to the Court of Common Pleas. Ex. A. Mr. Rushton took the position, in litigation, that

> S.C. Code Ann. § 24-3-580 prevents any person from disclosing the identify of any member of an execution team. The South Carolina Office of the Attorney General has opined that said statute applies also to any individual or company providing or participating in the preparation of chemical compounds intended for use by SCDC in carrying out a Court-Ordered execution. See Exhibit A (S.C.A.G. July 27, 2015 Opinion).
>
> The detailed information in SK-22.03 could be used by persons to narrow down who may be a member of any given execution team, and could potentially compromise the statutorily provided confidentiality the execution team members have been given.

*Id.* The Court of Common Pleas, in turn, agreed with this position and concluded:

> Additionally, most of the documents and information requested by Plaintiff in the October 13, 2020 letter are prohibited from disclosure pursuant to state statutes. See e[.]g., S.C. Code Ann. 24-3-580 (prohibits the identity of a member of the execution team). While the names of the persons serving on the execution team may not have been requested, the information requested about these persons could reveal their identity or other personal identifying information. Further, the

> composition of the team and their qualifications may be subject to change. Such information is specific to a particular execution.[8]

Stirling Opp., Ex. E. These positions are "clearly inconsistent" with the position adopted now by Defendants that the statute should not be "broad[ly] construe[ed]," Sterling Opp. 10, because it has not been construed by a court, when indeed, it has been, *see* Stirling Opp., Ex. E. Just as in *New Hampshire v. Maine*, "considerations of equity" mean that "judicial estoppel is appropriate" because "having convinced" the Court of Common Pleas to "accept one interpretation" of the Identity Statute, and "having benefited from that interpretation," Defendant now cannot "urge[] an inconsistent interpretation to gain an additional advantage at [Justice 360's] expense." 532 U.S. at 755. In other words, Defendants are precluded from arguing in this or any subsequent litigation that the statute is subject to a different interpretation "without undermining the integrity of the judicial process." *Id.* As in *New Hampshire v. Maine*, "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests," but in that case the shift Defendants should take affirmative action to rewrite the Attorney General opinion letter, which would amount to "a change in public policy." *Id.*

## IV. *Pullman* Abstention Is Inappropriate

As noted above, abstention doctrines are "extraordinary and narrow exception[s]" to a federal court's jurisdiction. *Martin v. Stewart*, 499 F.3d 360, 363 (4th Cir. 2007) (alterations in original) (internal quotation marks omitted). Moreover, abstention is discretionary and "involves . . . [the] exercise of a court's equity powers" and are "only [appropriate] when the state

[8] The Court noted, contrary to the Defendants' letter to Justice 360, *see* Vann Decl. Ex C, that under the Director's discretion in a different opinion by the Attorney General not invoked in the denial letter, "SCDC can provide information regarding lethal information to the inmate and his/her counsel. . . The same applies to the operation of the electric chair." *Id.* (citing William R. Byars, Jr., 2011 WL 1740735 (S.C.A.G.) April 21, 2011). This other AG opinion was not raised by plaintiffs in their pleadings nor defendants in theirs and has not been raised in the present case.

law is 'far from clear.'" *Shell Island Inv. v. Town of Wrightsville Beach*, 900 F.2d 255 (4th Cir. 1990) (collecting Supreme Court precedent). *Pullman* abstention is improper for three reasons.

First, as discussed above, no unclear issue of state law exists when, as here, "no one [is] litigating the issue which . . . might somehow be found unclear." *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 175 (4th Cir. 1983). Thus, this Court should not abstain because Justice 360 has not asked the Court to interpret state law—Defendants themselves have provided their own interpretation. *See Stuart Circle Parish*, 946 F. Supp. at 1230–31; *Fralin & Waldron, Inc. v. Henrico Cnty.*, 474 F. Supp. 1315, 1318 (E.D. Va. 1979); Vann Decl. Ex. C. If Defendants believe the state law should be narrowly applied, they should say as much—but that would effectively vitiate the stance they've taken in the letter to Justice 360, *id.*

Second, and perhaps more importantly, this Court should not order abstention because it would cause significant delay to an extraordinarily time sensitive matter that could compromise constitutional rights. *See Anderson v. Babb*, 632 F.2d 300, 306 n.3 (4th Cir. 1980) (citing *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 229 (1964)); *Nissan Motor Corp. v. Harding*, 739 F.2d 1005, 1011 (5th Cir. 1984) ("The kind of delay that argues against abstention is delay that might significantly impair constitutional rights, for example, where lengthy state proceedings will chill first amendment rights." (internal citations omitted)). This Court should be particularly reluctant to abstain here, where a delay will cause First Amendment rights to suffer—which qualifies as irreparable harm. *City of Houston v. Hill*, 482 U.S. 451, 467–68 (1987); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 n.1 (4th Cir. 1999). Indeed, the Ninth Circuit has held, in a case on all fours with this one, that *Pullman* abstention "is generally inappropriate when first amendment rights are at stake" because of the possible chilling effect due to delay—a factor that applies "to both facial and as-applied challenges." *Porter v. Jones*, 319 F.3d 483, 492–94 (9th Cir. 2003). As

noted in Justice 360's opening brief, time is of the essence for Justice 360's clients who face death, especially when the State now claims that Mr. Moore has waived his right to an election even in the absence of sufficient information. *See* Pl. Br. 29-30; Vann Supp. Decl., Ex. C (stay of execution proceedings). Because there are no current state court proceedings likely to resolve this issue, delay would likely be substantial.

Finally, in the alternative, if this Court determines *Pullman* abstention is proper (which it is not), the correct course of action is for the court to stay the proceedings and certify the question to the South Carolina Supreme Court to interpret the Identity Statute to resolve any issues of statutory construction. Certified questions "cover[] territory once dominated by . . . '*Pullman* abstention.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). While *Pullman* abstention is costly for the parties, as they now have to go through a full round of state court litigation, certification "reduce[s] the delay, cut[s] the cost, and increase[es] the assurance of gaining an authoritative response." *Id.* at 76.

South Carolina allows any federal court to certify questions to the State Supreme Court. S.C. R. App. P. 244. While a federal court may still decide to abstain, even when a certified question is available, doing so would be inappropriate in this case. There is no need to develop a new record in the state court to answer this state law question, as it is purely one of statutory interpretation. And the expediency benefits that a certified question provides are especially relevant here since Justice 360's clients are on death row and have limited time to make these decisions and appeals. *See Arizonans for Official English*, 520 U.S. at 76 (noting the benefits of a certified question over Pullman abstention). Certified questions would promote federalism and also allow federal courts to save time, energy, and resources. *Id.* at 77.

## V. Justice 360 Has Standing As To Both Defendants Because Justice 360 Has Suffered An "Injury in Fact" And That Injury Is Redressable Via A Court Order

Defendants contend that Justice 360 has not suffered an "injury in fact." But Defendants have no real answer to the new allegations Justice 360 made in its amended complaint, which justifies discovery as to the extent of the involvement between the Mr. Wilson and Mr. Stirling. And, as explained in the opening brief, loss of First Amendment rights "for even minimal periods of time" constitutes "per se" irreparable harm, which is sufficient for the purposes of conveying standing. Pl. Br. 29 (internal quotation marks omitted). Defendants' vague assertions to the contrary do not make it otherwise and it is indeed harder to imagine a clearer injury than inability to carry out one's own profession in the context of death penalty lawyering. Indeed, Justice 360's brief explains the doctrine of organizational standing and how Justice 360 as an organization has been harmed by having to devote resources to this case, and that is sufficient for standing purposes, even if the Attorney General's opinion is merely "persuasive" because it is being invoked by courts and by Defendants to deny access to the information. *See* ECF No. 22 3-5; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). This frustration of mission must be "measured against a group's ability to operate as an organization, not its theoretical ability to effectuate its objectives in its ideal world." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 239 (4th Cir. 2020) (emphasis removed), *reh'g en banc granted*, 2020 WL 7090722 (4th Cir. Dec. 3, 2020).

Finally, Mr. Wilson's own case citations prove his undoing, and a close reading of his principal case, *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 559–61 (2011), proves it favors Justice 360. To contextualize the case, the plaintiff sued a school district in Charleston under a South Carolina Act seeking to hold the Act unconstitutional, and the Court there while noting the Attorney General's reading of the act was advisory, was completely untroubled by this fact. *Id.* It went on to hold, as this Court should here, that the school district had "stated a sufficient

cause of action challenging the constitutionality of [the a]ct" to withstand a motion to dismiss even accounting for this fact because AG opinions have "persuasive" value. *Id.*

Despite the fact that the opinion is only "persuasive," this Court is free to order Mr. Wilson under § 1983, to refrain from filing for an execution date, and to invalidate Mr. Wilson's interpretation of the Identity Statute. Indeed, in a case where the state advanced a similar argument here, the U.S. Supreme Court roundly rejected it, noting declaratory relief is proper in just such circumstances, where there is a constitutional challenge to a state law, as applied to a defendant, so long as there is a "genuine threat" of enforcement of the statute. *Steffel*, 415 U.S. at 474–75. As the Identity Statute has already been applied to Justice 360 to deny it access to information, Vann Decl., Ex. C, the threat is not hypothetical.

RESPECTFULLY SUBMITTED:

Dated: December 14, 2020

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