IN THE SUPREME COURT OF MISSOURI

JOAN BRAY, **Plaintiff-Respondent,** **THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION AND CHRISTOPHER S MCDANIEL,** **Plaintiffs-Respondents,** **GUARDIAN NEWS AND MEDIA LLC, ET AL.,** **Plaintiffs-Respondents** **v.** **GEORGE LOMBARDI, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MISSOURI DEPARTMENT OF CORRECTIONS, MATT BRIESACHER, IN HIS OFFICIAL CAPACITY AS DEPUTY COUNSEL OF THE MISSOURI DEPARTMENT OF CORRECTIONS AND MISSOURI DEPARTMENT OF CORRECTIONS,** **Defendants-Appellants.**	**Cole County Circuit Court Nos.:** **14AC- CC00044** **14AC- CC00251** **14AC- CC00254** **Court of Appeals Nos.:** **WD 79893 Consolidated with WD 79894 and WD 79895** **Supreme Court No.**

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion _____ or after opinion ✓

The date the record on appeal was filed July 22, 2016

The date the Court of Appeals opinion was filed February 14, 2017

The date the motion for rehearing was filed n/a

and ruled on n/a

The date the application for transfer was

filed in the Court of Appeals March 1, 2017

and ruled on March 28, 2017

Party	**Applicant**	**Attorney of Record**
Guardian News & Media, LLC, The Associated Press, Cypress Media, LLC, Gannett Missouri Publishing, Inc., and The St. Louis Post-Dispatch LLC Plaintiffs-Respondents	✓	Bernard J. Rhodes LATHROP & GAGE LLP 2345 Grand Blvd., Suite 2400 Kansas City, MO 64108 (816) 292-2000 brhodes@lathropgage.com
Joan Bray Plaintiff-Respondent	✓	Elizabeth Unger Carlyle CARLYLE PARISH LLC 6320 Brookside Plaza #516 Kansas City, MO 64113 (816) 525-6540 Elizabeth@carlyle-law.com
Reporters Committee for Freedom of the Press, American Civil Liberties Union of Missouri Foundation and Christopher S. McDaniel Plaintiffs-Respondents	✓	Anthony E. Rothert ACLU OF MISSOURI FOUNDATION 906 Olive Street, Suite 1130 St. Louis, MO 63101 (314) 652-3114 Gillian R. Wilcox ACLU OF MISSOURI FOUNDATION 406 West 34th Street, Suite 420 Kansas City, MO 64111 (816) 470-9933

Party	Applicant	Attorney of Record
George A. Lombardi, Matthew Briesacher and Missouri Department of Corrections, Defendants-Appellants		Daryl Hylton ASSISTANT ATTORNEY GENERAL P.O. Box 899 Jefferson City, MO 65102 Daryl.Hylton@ago.mo.gov

Question Meriting Transfer

This case presents a question of exceptional interest and importance to the citizens of this state: whether a 2007 amendment to the Missouri execution statute, Mo. Rev. Stat. § 546.720.2—which allows the Director of the Missouri Department of Corrections ("DOC") to shield the identities of persons who either "*administer* legal gas or lethal chemicals" or "who provide *direct support for the administration* of lethal gas or lethal chemicals" (emphases added)—permits the DOC to conceal from persons requesting information under the Missouri Sunshine Law the names of commercial entities that supply and test drugs used by the state for lethal injections, when those entities neither administer the lethal chemicals, nor provide direct support for their administration.

Any resolution of this question directly affects the ability of the public to exercise effective oversight, through the Missouri Sunshine Law, Mo. Rev. Stat. § 610.010, *et seq*., over the single most consequential administration of state government power.

Answering that question in the affirmative, as the Western District has done, (a) creates a split with the contrary conclusion of several federal courts, (b) renders unavoidable a pending constitutional challenge to the 2007 amendment by many of these same litigants, and (c) is incorrect on the merits.

Accordingly, Respondents respectfully move this Court to transfer this matter so that it may clarify the scope of § 546.720.2 for state and federal courts and the public, in accord with this Court's unique role in supervising executions.

Statement of Pertinent Facts

In 2007, the Missouri legislature amended Missouri's execution statute to enable the Director of the Missouri Department of Corrections (DOC) to shield the identities of those who either "administer lethal gas or lethal chemicals" or "who provide direct support for the administration of lethal gas or lethal chemicals." H.B. 820, *codified at* Mo. Rev. Stat. § 546.720.2. From 2007 to 2013, no one, including DOC, contended that the amendment permitted DOC to shield the identities of its lethal drug suppliers in response to Sunshine Law requests. Indeed, DOC openly disclosed Morris & Dickson and Mercer Medical as sources of its propofol as recently as October 2013. Tr. at 14; LF at 282-83 ¶ 3. Yet, on October 28, 2013, with no intervening legislation, DOC unilaterally changed its execution protocol by expanding the definition of "execution team" to include the suppliers of lethal drugs, shielding their identities from the public.

Between November, 2013, and May, 2014, Respondents submitted Sunshine Law requests to DOC seeking information about Missouri's lethal injection drugs, including their source. After DOC refused to produce responsive records, Respondents filed these Sunshine Law actions. Some Respondents also alleged that DOC violated the public's constitutional right of access to government proceedings and records under the First and Fourteenth Amendments of the United States Constitution, agreeing to reserve the claim for future resolution if the courts conclude that the information need not be disclosed under the Sunshine Law. The

circuit court held that DOC may not withhold responsive records under § 546.720.2 and, accordingly, never reached the constitutional claim.

The Western District Court of Appeals reversed the circuit court's decision. For the reasons below, the Respondents respectfully request that this Court transfer this matter so that it may definitively construe the scope of § 546.720.2.

I. Transfer should be granted so that this Court may resolve competing federal and state interpretations of § 546.720.2.

The Western District's conclusion that § 546.720.2 permits DOC to withhold identities of the state's lethal injection drug suppliers is contrary to federal court decisions. Recently, in *Missouri Department of Corrections v. Jordan*, No. 16-MC-09005-SRB (W.D. Mo. July 14, 2016), Judge Bough agreed with the circuit court in this case, holding that § 546.720.2 does not extend to lethal injection drug suppliers. Noting that his job was to predict how this Court would resolve the issue, Judge Bough not only referred to the circuit court's conclusion, but also conducted an independent analysis of § 546.720.2. *Id.* at 12-13. Based on that analysis, Judge Bough denied the DOC's motion to quash a subpoena issued to DOC on behalf of two Mississippi inmates for the identity of the supplier of pentobarbital for executions. The Eighth Circuit granted DOC's petition for mandamus and quashed the subpoena on other grounds, but never addressed the scope of § 546.720.2, and—most importantly—did not disturb Judge Bough's analysis of the statute. *In re Missouri Dept. of Corrections*, 839 F.3d 732 (8th Cir. 2016).

In *Zink v. Lombardi*, No. 12-CV-4209-NKL, 2013 WL 11762149 (W.D. Mo. Dec. 16, 2013), Judge Laughrey entered discovery orders requiring DOC to disclose the identities of its drug suppliers. She subsequently denied DOC's motion to stay the orders, concluding that § 546.720.2 does not protect the identity of drug suppliers. *Id*. at *2. On appeal, a majority of the Eighth Circuit, sitting *en banc*, reversed on other grounds, holding that the plaintiffs' Eighth Amendment claim was insufficient to withstand a motion to dismiss, and that the requested information was not relevant to the claims that would survive a motion to dismiss. *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014) (en banc). Three dissenting judges, however, did reach the § 546.720.2 issue, and concluded that this Court would likely construe § 546.720.2 not to conceal Missouri's drug suppliers. *Id.* at 901 (Bye, J., dissenting).

In sum, until the Western District's decision below, there was a unanimous consensus among all federal and state judges to have considered the issue that § 546.720.2 does not permit DOC to conceal the identities of its execution drug suppliers. The Western District's decision to the contrary breaks the consensus among these judges and creates considerable uncertainty over the correct construction of the statute.

Adding to the uncertainty, the lower court's decision conflicts with the permissible makeup of the "execution team" this Court implicitly sanctioned in *Middleton v. Missouri Department of Corrections*, 278 S.W.3d 193 (Mo. banc 2009). There, this Court described the "execution team," as set forth in the

relevant execution protocol, as permissibly "consisting of DOC employees and medical personnel" involved in "preparing syringes and the proper quantities of injection chemicals" and "supervising their administration." *Id.* at 195-96. This Court's gloss, though dicta, strongly suggests that, at least as of 2009, this Court did not understand § 546.720.2 to permit DOC to include the suppliers of lethal drugs as members of the execution team.

As the final arbiter of Missouri law, Mo. Const. art. V, § 2, only this Court can resolve the divergence between the Western District's decision and the decisions of the federal judges who have considered the issue. While Federal courts are "bound by decisions of the Supreme Court of Missouri," they are not "bound by decisions of intermediate appellate courts." *Lancaster v. Am. & Foreign Ins. Co.*, 272 F.3d 1059, 1062 (8th Cir. 2001). Respondents respectfully submit that this case be transferred to this Court so that it can resolve the important statutory question at issue.

II. Transfer is appropriate so that this Court may definitively construe the scope of a statute that directly affects the functioning of executions.

Imposing the death penalty is perhaps the most significant exercise of state government power. Courts have repeatedly held that among criminal penalties, "death is different." *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Missourians have granted this Court exclusive appellate jurisdiction in cases imposing it, Mo. Const. art. V, § 3, to

ensure that this Court oversees the resolution of these particularly "important cases," *Garrett v. State*, 481 S.W.2d 225, 228-29 (Mo. banc 1972) (Finch, J. concurring); *see* Laura Denver Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 Mo. L. Rev. 711, 717-18 (2009) (explaining that the purpose of the Supreme Court's exclusive jurisdiction over issues like the death penalty is to ensure that that court resolves "key issues"). Accordingly, this Court plays a special role in overseeing cases involving executions.

Missouri's Sunshine Law provides that governmental records are presumed to be open and that other statutes should be construed in light of this principle. Mo. Rev. Stat. § 610.011. The public needs access to information to exercise democratic oversight over executions and to ensure that they are carried out in accordance with the Missouri and United States Constitutions. In the case of lethal injections, this information includes the quality, composition, and source of lethal chemicals.

Six states have turned to black-market dealers to acquire lethal injection drugs, *see* Whitaker, *The Execution of Joseph Wood*, CBS News (Nov. 29, 2015), http://www.cbsnews.com/news/execution-of-joseph-wood-60-minutes/, and other states have attempted to illegally import them from foreign manufacturers, *see* Chris McDaniel, *This Is The Man In India Who Is Selling States Illegally Imported Execution Drugs*, BuzzFeed News (Oct. 20, 2015), https://perma.cc/W2PF-V8JF. Because these incidents raise important concerns about the execution process,

transparency is critical for the public to maintain trust in the manner in which executions are carried out in this state. Given this Court's special, constitutionally enshrined role in monitoring executions in Missouri, it is in the best position to resolve this issue of immense public interest.

III. This Court should transfer this case to comply with principles of constitutional avoidance.

In addition to alleging violations of the Sunshine Law, the Guardian Respondents' petition alleged that the DOC's construction of the § 546.720.2 violated the public's constitutional right of access to government proceedings and records under the First and Fourteenth Amendments of the United States Constitution. The parties and the circuit court agreed to sever the First and Fourteenth Amendment claims from the statutory claim, for if the requested records were open records under the Sunshine Law, the First and Fourteenth Amendment claims would not need to be addressed. However, the Western District's holding that DOC's construction of § 546.720.2 does not violate the Sunshine Law now makes the First and Fourteenth Amendment claims ripe. Upon remand, the circuit court will need to address those claims, which were previously dismissed without prejudice as moot.

As the United States Supreme Court has recognized, the public has a constitutional right to access information about proceedings that "have historically been open to the press and general public" and where "public access plays a significant positive role in the functioning of the particular process in question."

Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986). Executions possess both of these characteristics. Executions in Missouri have always been open to the public, as evidenced by Mo. Rev. Stat § 546.740, which provides that "at least eight reputable citizens" must be invited "to witness the execution." In addition, "[a]n informed public debate is critical in determining whether execution by lethal injection comports with 'the evolving standards of decency which mark the progress of a maturing society.'" *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Accordingly, if § 546.720.2 permits the DOC to conceal the identities of execution drug suppliers, the Guardian Respondents submit that it is inconsistent with the First Amendment. *See, e.g.*, *id.*; *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 WL 5551668, at *5 (D. Ariz. Oct. 7, 2013) (holding that the public enjoys a First Amendment right of access to specific information about the drugs that are inextricably intertwined with the process of putting the condemned inmate to death).

The Missouri Constitution vests this Court with exclusive appellate jurisdiction over cases concerning the validity of state statutes. Mo. Const. art. V, § 3. Therefore, any later appeal of the Guardian Respondents' First and Fourteenth Amendment claims would go directly to this Court. In that appeal, this Court will be guided by the long-standing principle of constitutional avoidance. *See, e.g.*, *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985) (explaining that a court should "avoid the decision of a constitutional question" if "the case can be fully determined without reaching it"); *State*

Highway Comm'n v. Spainhower, 504 S.W.2d 121, 125 (Mo. 1973) ("[I]f a statute may be so construed as to avoid conflict with the Constitution, this will be done"). As a result, this Court—before addressing the constitutionality of the DOC's interpretation of § 546.720.2—will necessarily have to address the question of whether the requested records are open records under the Sunshine Law. Thus, judicial efficiency counsels in favor of transferring this case now, both because if Respondents prevail it would obviate the need for unnecessary litigation and because even if they do not, this Court will have already addressed the interaction between the Sunshine Law and § 546.720.2.

IV. This case warrants review because the Western District's decision is incorrect on the merits.

Contrary to the Western District's decision, § 546.720 does not permit the DOC to conceal the identities of its lethal drug suppliers or testers. The statute does specify that DOC's director "shall select an execution team" whose identities shall be kept confidential. Mo. Rev. Stat. § 546.720.2. But the statute does not, as the Western District concluded, indiscriminately "protect the identities of those who are imperative to carrying out executions, as determined by the DOC." Op. at 10. The statute explicitly limits the authority of the DOC's director in designating members of the execution team; two—and only two—types of individuals may be added: (1) "those persons who *administer* lethal gas or lethal chemicals," and (2) "those persons, such as medical personnel, who provide *direct* support *for the administration* of lethal gas or lethal chemicals." Mo. Rev. Stat. § 546.720.2

(emphases added). Because suppliers and testers of execution drugs perform neither of these functions, the director has no authority to include them as members of the execution team.

The Western District's decision ignores the express limits the Missouri legislature placed on DOC's authority by failing to apply the plain meaning of a statute as this Court requires: "The seminal rule of statutory construction is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 665 (Mo. banc 2010). "The plain meaning is found in the dictionary." *Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 356 (Mo. banc 1995) (citing *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. banc 1993)).

The decision of the Western District examined neither "the language used" in the statute nor the dictionary definitions that establish the plain and unambiguous meaning of that language. Below, Respondents established the plain meaning of § 546.720 through the dictionary definitions of its terms, which confirm that the statute conceals records only as they pertain to (1) individuals who actually administer the lethal drugs, or (2) those who closely assist them "without any intervening agency, instrumentality, or influence." This is the same plain reading that has been affirmed by every federal judge who has considered the meaning of § 546.720. *See supra* at pp. 3-5. It is also the interpretation supported by the legislative history of § 546.720 and DOC's own interpretation of

the statute at the time of its enactment, both of which confirm that § 546.720 was never intended to extend to entities that supply or test Missouri's execution drugs.

The Western District ignored the plain text of the statute and its legislative history to conclude that § 546.720 places "no limits" as to who can be added to the execution team. Indeed, it effectively re-wrote the statute to grant DOC's director unlimited discretion to conceal the identity of any individuals and entities whom the director considers "imperative to carrying out executions." Not only does this standard have no basis in the statute—which does not use, let alone define, the term "imperative"—but it also offers no guidance to explain who counts as "imperative." The Missouri legislature has already decided whose identities it considers imperative to protect. As the text, legislative history and DOC's own prior interpretation of § 546.720 make clear, it covers those individuals who administer lethal drugs and those who provide direct support for their administration. Because drug suppliers and testers do neither, their identities may not be concealed from the public under the Sunshine Law.

The Western District further erred by ignoring this Court's decisions making clear that courts defer to agencies' own statutory interpretations only when statutes are silent or ambiguous. *See, e.g.*, *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579, 592 (Mo. banc 2014); *see also Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 669 n.9 (Mo. banc 2010). Here, because the law is neither silent nor ambiguous on the boundaries of the Director's discretion, the Western District ignored this Court's admonition that "[t]he plain and

unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988).

Respectfully submitted,

/s/Bernard J. Rhodes

Bernard J. Rhodes – MO #29844
Lathrop & Gage LLP
2345 Grand Blvd., Ste. 2400
Kansas City, MO 64108-2684
Tele: (816) 292-2000
Fax: (816) 292-2001
Email: brhodes@lathropgage.com
Attorneys for Plaintiffs-Respondents Guardian News & Media LLC; The Associated Press; Cypress Media, LLC; Gannett Missouri Publishing, Inc.; and the St. Louis Post-Dispatch LLC

David A. Schulz
John Langford
Allison Douglis (law student intern)
Eric Brooks (law student intern)
Delbert Tran (law student intern)
Media Freedom and Information Access Clinic
Abrams Institute for Freedom of Expression
Yale Law School*
P.O. Box 208215
New Haven, CT 06520

* This brief was prepared in part by the Media Freedom and Information Access Clinic, a program of the Abrams Institute for Freedom of Expression at Yale Law School. The brief does not purport to express the School's institutional views, if any.

/s/Elizabeth Unger Carlyle
Elizabeth Unger Carlyle – MO #41930
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, MO 64113
Tele: (816) 525-6540
Fax: (816) 764-1249
Email: elizabeth@carlyle-law.com
Attorneys for Plaintiff-Respondent Joan Bray

/s/Anthony E. Rothert
Anthony E. Rothert - MO #44827
ACLU of Missouri Foundation
906 Olive Street, Suite 1130
St. Louis, Missouri 63101
Tele: (314) 652-3114
Fax: (314) 652-3112

Gillian R. Wilcox - MO #61278
ACLU of Missouri Foundation
406 West 34th Street, Suite 420
Kansas City, Missouri 64111
Tele: (816) 470-9933
Attorneys for Plaintiffs-Respondents ACLU of Missouri Foundation, Reporters Committee for Freedom of the Press, and Christopher McDaniel

Adam A. Marshall
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Tele: (202) 795-9308
Attorney for Reporters Committee for Freedom of the Press

Nabiha Syed
BuzzFeed, Inc.
11 East 18th St., 13th Floor
New York, NY 10003
Tele: (646) 660-9617
Attorney for Christopher McDaniel

Bruce D. Brown
Katie Townsend
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Tele: (202) 795-9300
Of Counsel for Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was filed via CaseNet and served by electronic mail this 12th day of April, 2017, on the following counsel of record:

Daryl Hylton
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Daryl.Hylton@ago.mo.gov

/s/Bernard J. Rhodes
An Attorney for Plaintiffs-Respondents

In the Missouri Court of Appeals Western District

JOAN BRAY,

Respondent,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION AND CHRISTOPHER S MCDANIEL,

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GEORGE LOMBARDI, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MISSOURI DEPARTMENT OF CORRECTIONS, MATT BRIESACHER, IN HIS OFFICIAL CAPACITY AS DEPUTY COUNSEL OF THE MISSOURI DEPARTMENT OF CORRECTIONS AND MISSOURI DEPARTMENT OF CORRECTIONS,

Appellants.

WD79893 Consolidated with WD79894 and WD79895

OPINION FILED:

February 14, 2017

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

Before Division Two: Lisa White Hardwick, Presiding Judge, Karen King Mitchell, Judge, Anthony Rex Gabbert, Judge

Introduction

George Lombardi, in his official capacity as Director of the Missouri Department of Corrections ("the DOC") appeals the judgment of the Circuit Court of Cole County, Missouri ("trial court") in favor of Joan Bray which awarded attorney's fees to Bray, pursuant to Section 610.027, RSMo Cum. Supp. 2013, specifically due to the trial court's conclusion that the DOC violated the Sunshine Law. On appeal, the DOC argues that: (1) the trial court erred in granting partial summary judgment and ordering disclosure of records that are protected by Section 546.720.2, RSMo Cum. Supp. 2013; (2) the trial court erred in awarding attorney's fees because the DOC did not knowingly or purposely violate the Sunshine Law; (3) the trial court erred in ruling the DOC violated the Sunshine Law by failing to produce records in existence at the time of the records request, but not records existing between the date of the request and the DOC's response; and (4) the trial court erred in finding the DOC violated the Sunshine Law, purposely or otherwise, by not producing records in the public domain previously filed in federal court because such records are closed by Section 546.720. We reverse.

Factual and Procedural Background

On August 28, 2007, House Bill 820 took effect. As enacted, the bill added the following subsection to Section 546.720:

> The director of the department of corrections shall select an execution team which shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals. The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential.

§ 546.720.2.

From 2007 to 2013, the execution protocol included medical personnel contracted by the DOC who were present at the executions. Also during this time period, the DOC released information about the source of the lethal injection drugs upon request. On October 18, 2013, the DOC revised the definition of the execution team in its protocol and added additional members to the execution team. The execution protocol now reads:

> The execution team consists of department employees and contracted medical personnel including a physician, nurse, and pharmacist. The execution team also consists of anyone selected by the department director… including individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure.

In this same October 18, 2013, revision, the DOC included pentobarbital as its execution drug. The DOC did so because their previous international supplier of propofol requested that all remaining supplies no longer be used and returned. The DOC was forced to search for pharmacists to provide pentobarbital. The only individuals willing to provide the lethal chemical required the assurance of confidentiality; therefore, the DOC revised its execution protocol to ensure that pharmacists providing lethal injection drugs were protected from exposure.

On November 5, 2013, Joan Bray submitted a Sunshine Law request, seeking records regarding "the drug pentobarbital, any of its precursors, and any and all other drugs that the department of corrections intends to utilize in executions." The request further included any and all records indicating the source of any of the specified drugs in the DOC's current inventory.

On November 18, 2013, Deputy Counsel for the DOC, Matthew Briesacher, responded to the request, but redacted information that could possibly reveal identities of the execution team members who supplied pentobarbital, citing Section 546.720.2. On January 31, 2014, Bray filed suit seeking to reveal the source of the suppliers of pentobarbital.

On April 15, 2014, Guardian US submitted a request to the DOC's custodian of records seeking access to certain public records relating to the State's use of lethal injection drugs in executions. Relevant here is their request for the source of the execution drugs and the chemical composition itself. The DOC acknowledged receipt of Guardian's request on April 17, 2014. On April 25, 2014, the DOC produced a one-page document containing the public portions of the execution protocol, and advised that some of the information requested is a closed record pursuant to Sections 217.075, RSMo 2000, 546.720, and 610.021 RSMo Cum. Supp. 2013.

On May 2, 2014, the Associated Press submitted a Sunshine Law request identical to the Guardian's April 15 request. One week later, on May 9, 2014, *The Kansas City Star*, *The St. Louis Post-Dispatch*, and *The Springfield News-Leader* submitted identical Sunshine Law requests to the DOC. On May 12, 2014, the DOC replied to each request with a response that was identical in all relevant aspects to what was given to the Guardian. The DOC cited to the same statutory provisions in its denial of the May 9 requests, attached the same one-page execution protocol, and did not release the documents containing information it believed to be protected.

On May 15, 2014, all of the media outlets, as Respondents, filed a petition in the Circuit Court of Cole County, alleging violations of the Sunshine Law and the public's constitutional right of access to government proceedings and records.

On December 3, 2014, Respondents moved for summary judgment on their Sunshine Law claims, and on December 19, 2014, the DOC cross-moved for summary judgment on the same claims. The DOC asserted that Section 546.720.2 authorized its withholding of some responsive documents under the Sunshine Law exemption that permits certain records being withheld because they are protected from disclosure by law per Section 610.021(14), RSMo. Cum. Supp.

2013. The DOC further argued that a law protecting "offender records" created grounds for withholding other responsive documents as "internal administrative reports or documents relating to institutional security."

On July 15, 2015, the trial court entered partial summary judgment upon a finding that the statutes cited by the DOC do not protect from disclosure any records relating to the source of the execution drugs. The trial court found that the DOC had a duty to produce records in existence at the time the DOC produced records, but were not in existence when the records request was made, even though the request sought documents relating to the "current inventory" of drugs. The court made a finding that the DOC violated the Sunshine Law when it listed the statutory exemptions on the same day it produced records.

Based on the summary judgment motions, the trial court concluded that the DOC knowingly failed to comply with the Sunshine law because the plain language of the statutes did not authorize closure of the records. The trial court cited the requirement in Section 610.011.1, RSMo Cum. Supp. 2013, that Missouri law be construed liberally in favor of disclosure and against secrecy. The trial court found DOC's interpretation of "direct support for the administration" of chemicals to be too broad and misplaced. The trial court further found a violation of the Sunshine Law when the DOC made "a frivolous claim that the request sought documents that fell within Section 217.075 RSMo."

On July 29, 2015, the trial court held a case review by conference call wherein Respondents sought immediate disclosure of the records not protected by statute. The DOC asked for a stay of disclosure until appellate review concluded. The trial court granted the stay, but ordered the DOC to produce a privilege log in thirty (30) days describing the withheld records.

In compliance with court orders, the DOC produced the privilege log. Respondents filed objections citing issue with the sufficiency of the DOC's log. Specifically, Joan Bray wanted the log to include records not in existence at the time of her November 5, 2013 request, and the Guardian objected that the log did not include records relating to the qualifications of the nurse and doctor on the execution team.

On September 17, 2015, the trial court conducted an evidentiary hearing to determine which individuals qualify as an execution team member under Section 546.720.2. At issue were eight entities whose identities the DOC asserted were protected by statute. This included three non-medical DOC personnel ("NM1", "NM2", "NM3"), a nurse who participates in executions ("M2"), an anesthesiologist who participates in executions ("M3"), a physician who prescribes lethal injection drugs ("M5"), and the pharmacists who provide the DOC with lethal injection drugs ("M6" and "M7"). Matthew Briesacher, in his capacity as Deputy Counsel for the DOC, testified about the roles each anonymous entity plays in the execution process. During his testimony, Briesacher testified that pharmacists "M6" and "M7" are not on-site at the correctional facility in Bonne Terre, Missouri during the executions, nor do they prepare the chemicals in the execution room of the facility. Briesacher noted that, to his knowledge, neither M6 nor M7 have ever visited the correctional facility.

On March 21, 2016, the trial court entered judgment in the three separate cases. The judgments incorporated the July 15, 2015 orders finding that records containing the identities of M6 and M7 are not protected by an exemption. The court found that M5, the doctor who writes prescriptions for the pentobarbital, while not present during the executions, does provide direct support for the administration of the lethal chemicals and is, therefore, properly included in the "execution team" under Section 546.720. The trial court found additional violations by the DOC

of the Sunshine Law in the judgments. In the Bray case, the court found that the DOC knowingly violated the Sunshine Law because Briesacher "failed to review fully the court's order of July 15 before providing the initial privilege log and omitted from the log documents that the court's order specified as responsive." In the Guardian matter, the trial court found that, "by refusing to disclose these documents already in the public domain, the DOC purposely violated the Sunshine Law."

On April 19, 2016, the DOC filed post-trial motions to amend the judgments, arguing that the trial court applied the wrong legal standard for purposeful violations under Section 610.027. The DOC further asserted that the trial court erred in its entry of summary judgment in favor of Respondents because the information pertaining to the sources of the execution drugs are protected by statute. The trial court denied these motions on July 18, 2016. The DOC appeals. On July 26, 2016, this Court granted the DOC's motion to consolidate the Guardian and Reporters Committee appeals with the Bray appeal.

Point I

In its first point on appeal, the DOC argues that the trial court erred in ordering the disclosure of records that could identify M6 and M7, because the records are protected from disclosure by Section 546.720.2.

Standard of Review

An appellate court's review of an appeal from summary judgment is essentially de novo. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "Summary judgment is appropriate where the moving party establishes a right to judgment as a matter of law and that no genuine issue of material fact exists." *United Mo. Bank, N.A. v. City of Grandview*, 105 S.W.3d 890, 895 (Mo. App. 2003). Whether summary judgment

should be granted is an issue of law, and "an appellate court need not defer to the trial court's order granting summary judgment. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

Discussion

We first address whether the identities of the sources of lethal injection drugs are protected by Section 546.720.2 as the DOC argues, because if such information is in fact exempted from disclosure, the trial court erred in finding that the DOC knowingly and purposefully violated the Sunshine Law by not providing such information.

"A court must carefully examine a statute in order to determine the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *Lonergan v. May*, 53 S.W.3d 122, 126 (Mo. App. 2001). When deciding whether a statute is clear and unambiguous so as to ascertain the intent of the legislature, the appellate court must consider whether the language is plain and clear to a person of ordinary intelligence. *Wheeler v. Bd. of Police Comm'rs of Kansas City*, 918 S.W.2d 800, 803 (Mo. App. 1996). Only when the language is ambiguous or if its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute. *Lonergan*, 53 S.W.3d at 126. Further, "the interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579, 592 (Mo. banc 2014). If an agency's interpretation of a statute is reasonable and consistent with the language of the statute, it is entitled to considerable deference. *Morton v. Missouri Air Conservation Com'n*, 944 S.W.2d 231, 236 (Mo. App. 1997).

We need only look to Section 546.720 because Section 610.021(14) of Missouri's Sunshine Law does not require production of "records which are protected from disclosure by law," and Section 546.720 clearly provides such protection for the records requested by

Respondents because it protects records that could potentially identify execution team members. Section 546.720.2 states, in relevant part:

> The director of the department of corrections shall select an execution team which shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals. The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law.

This statute is unambiguous. The Missouri legislature delegated authority to the DOC and its Director to exercise its own discretion in selecting an execution team by providing that "members of the execution team" be defined by the DOC in the execution protocol of the DOC. *Id.* The language selected by the legislature places no limits on the Director as to what individuals or professional titles can be selected for the execution team.

Here, the Director acted within the discretion granted by the legislature when he revised the execution protocol on October 18, 2013, to include pharmacists ("M6" and "M7") as execution team members. There is nothing within the language of the statute that suggests that the legislature intended for pharmacists to be excluded from the protections provided by the statute, or intended for courts to second-guess the wisdom of the DOC, unless it is apparent that the DOC abused the discretion granted by the legislature. We disagree with the trial court's characterization of the DOC's reading of the statute as a "gross misinterpretation."

Further, it is apparent that the intent of the legislature was to protect the identities of those individuals essential to the execution process so that the DOC may effectively carry out its

statutory duty of performing lawful executions.[1] It is a foreseeable consequence of releasing the identifying information of pharmacists supplying execution drugs that such pharmacists could face harassment, or even threats of violence, by those seeking to thwart executions via avenues which bypass the legislature. Releasing the identities of the drug suppliers could serve as a back-door means to frustrating the State's ability to carry out lawful executions by lethal injection.

The need for protection from exposure of the pharmacist supplier's identity is discussed in *In re: Missouri Department of Corrections,* 839 F.3d 732 (8th Cir. 2016). Here, two Mississippi death row inmates challenged their executions under the Eighth Amendment. The inmates served the Missouri Department of Corrections with a third party subpoena seeking information regarding the identity of the DOC's pentobarbital supplier. When the district court ordered that the identity be released, the DOC filed a writ of mandamus to prevent enforcement of that order. M7 also intervened. The U.S. Court of Appeals for the Eighth Circuit granted the writ after consideration of all relevant factors. In its findings, the Court directly cited to M7's statements that he or she intended to cease supplying lethal injection drugs if his or her identity was disclosed. Ultimately, the Court concluded that the harm to the DOC clearly outweighed the need for disclosure, and disclosure would represent an undue burden on the DOC's duty of carrying out lawful executions. The DOC's writ was granted and the District Court's order to reveal the identity was overruled.

The language of the statute is clear and unambiguous, and based on the plain and ordinary meaning of the language, we find that the legislature meant to protect the identities of those who are imperative to carrying out executions, as determined by the DOC. Therefore, we

[1] "When the Missouri Supreme Court issues an execution warrant, it shall be obeyed by the Director of the Department of Corrections." § 546.710, RSMo 2000.

find pharmacists "M6" and "M7" to be members of the execution team and their identities protected under Section 546.720. Point one is granted.

Point II & Point III

Because we find that the pharmacists' identities are protected pursuant to Section 546.720 and, as a result, the DOC was not in violation of the Sunshine Law, we need not discuss at length the DOC's second point on appeal disputing the court's award of attorney fees. Where there was no violation of the Sunshine Law, awarding attorney's fees was improper. Point two is granted.

We further find that the court erred in concluding that the DOC violated the Sunshine Law when it failed to produce records that came into existence after the date of Bray's November 5, 2013, records request for the DOC's "current inventory" of pentobarbital. The record reflects that the DOC responded to the request and provided records of its current inventory of pentobarbital as of November 5, 2013. The court found the DOC in violation of the Sunshine Law, however, because the DOC did not provide additional records that were in existence at the time the DOC actually produced the records on November 18, 2013. The court found it "irrelevant" that the DOC produced post-November 5, 2013, records in response to a different request which is, apparently, how Bray learned of their existence. Rather than irrelevant, we find that this supports that the DOC did not knowingly and purposefully violate the Sunshine Law because it suggests that, had the DOC been asked for post-November 5, 2013 records, they would have been produced. As Bray did not ask the DOC for these records in her request, we cannot conclude that a knowing and purposeful Sunshine Law violation occurred when the DOC failed to produce these records. Point three is granted.

Point IV

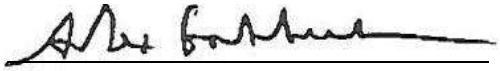
In its fourth point on appeal, the DOC asserts that the trial court erred in finding that the DOC violated the Sunshine Law by not producing records in the public domain that were previously filed in federal court because the requested records were closed under Section 546.720.

After Breisacher was made aware that certain records in a related federal case could be used to identify the supplier(s) of lethal chemicals on the DOC's execution team, he concluded that he could not provide certain requested records without revealing the identity of those persons. As discussed in point one, the identity of the pharmacists who supply the lethal injection drugs are protected under Section 546.720. Because Breisacher withheld the records at issue knowing that they could be used to identify current or former members of the execution team, he was not in violation of the Sunshine Law. The trial court erred in its finding that the DOC violated the Sunshine Law by not producing certain records, even if they were already in the public domain. Point four is granted.

Conclusion

We conclude, therefore, that the identities of pharmacists M6 and M7 are protected by Section 546.720 and the trial court erred in ruling that the identities be disclosed. Because the identities are protected by statute, the trial court also erred in finding that the DOC purposefully and knowingly violated the Sunshine Law when it refused to disclose identifying information. Because the DOC did not violate the Sunshine Law, the court erred in awarding attorney fees for Sunshine Law violations. Further, we find that the DOC was under no duty to provide records in its possession after November 5, 2013, and therefore the trial court erred in finding that the DOC knowingly and purposefully violated the Sunshine Law. Lastly, because the identities of the

suppliers of lethal injection drugs are protected by statute, the trial court erred in finding that the DOC violated the Sunshine Law by not producing records already in the public domain. The trial court's ruling is reversed.



Anthony Rex Gabbert, Judge

All concur.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOAN BRAY, et al.,	)	
	)	
Respondents,	)	
	)	
v.	)	Nos. WD79893
	)	WD79894
GEORGE LOMBARDI, et al.,	)	WD79895
	)	
Appellants.	)	

JOINT APPLICATION OF RESPONDENTS
FOR TRANSFER TO THE MISSOURI SUPREME COURT

This case presents a question of exceptional importance to citizens of this state: whether a 2007 amendment to the Missouri execution statute permits the Director of the Missouri Department of Corrections ("DOC") to conceal the identities of Missouri's lethal injection drug suppliers. Any resolution of this question directly affects the ability of the public to exercise effective oversight over the single most consequential administration of state government power. Answering that question in the affirmative, as this Court has done, (a) creates a split with the contrary conclusion of several federal courts, and (b) renders unavoidable a pending constitutional challenge to the 2007 amendment by some of these same litigants. For these reasons, Respondents respectfully move this Court, pursuant to Rule 83.02, to transfer this matter to the Missouri Supreme Court so that the state's highest court may clarify—for state and federal courts, the litigants, and the public—the scope of § 546.720.2.

I. Transfer should be granted so that the Missouri Supreme Court, as the final arbiter of state law, may resolve competing federal and state interpretations of § 546.720.2.

This Court's decision that § 546.720.2 covers the identities of the state's lethal injection drug suppliers is contrary to federal court decisions. For example, in *Missouri Department of Corrections v. Jordan*, No. 16-MC-09005-SRB (W.D. Mo. July 14, 2016), Judge Bough agreed with the Circuit Court in this case, holding that § 546.720.2 does not extend to lethal injection drug suppliers. Noting that his job was to predict how the Missouri Supreme Court would resolve the issue, Judge Bough not only referred to the Circuit Court's conclusion in this case, but also conducted an independent analysis of § 546.720.2. *Id.* at 12-13. Based on that analysis, Judge Bough denied the DOC's motion to quash a subpoena issued on behalf of two Mississippi inmates for the identity of the supplier of pentobarbital.

The Eighth Circuit granted the DOC's petition for mandamus and quashed the subpoena. But the court of appeals never addressed the scope of § 546.720.2. Instead, it found that the identity of Missouri's drug supplier was not relevant to the inmates' claims, and that the requested discovery was unduly burdensome to the DOC. The Eighth Circuit did not disturb Judge Bough's analysis of § 546.720.2. *In re Missouri Dep't of Corrections*, 839 F.3d 732 (8th Cir. 2016).

In *Zink v. Lombardi*, No. 12-CV-4209-NKL, 2013 WL 11762149 (W.D. Mo. Dec. 16, 2013), Judge Laughrey entered discovery orders requiring the DOC to disclose the identities of its drug suppliers and subsequently denied the DOC's

motion to stay her orders, concluding that § 546.720.2 did not extend to drug suppliers. *Id.* at *2. On appeal, a majority of the Eighth Circuit, sitting *en banc*, again reversed on other grounds. The majority held that the requested information was not relevant. *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014) (en banc). Three dissenting judges, however, did reach the § 546.720.2 issue, and concluded that the Missouri Supreme Court would likely construe § 546.720.2 to exclude from its shield Missouri's drug suppliers. *Id.* at 901 (Bye, J., dissenting).

In sum, until this Court's decision two weeks ago, there was a unanimous consensus among all federal and state judges to have considered the issue that § 546.720.2 cannot be used to shield lethal drug suppliers from public scrutiny. This Court's decision finding that the identities of the state's lethal injection drug suppliers fall within § 546.720.2 therefore creates a split between this Court and the federal judges who have considered the question. This Court's decision breaks the consensus among these judges and creates considerable uncertainty over the correct construction of the statute.

That uncertainty is further exacerbated by the Missouri Supreme Court's decision in *Middleton v. Missouri Department of Corrections*, 278 S.W.3d 193 (Mo. banc 2009). There, the Court construed the execution protocol as "describ[ing] the technical duties of an execution team consisting of DOC employees and medical personnel" involved in "preparing syringes and the proper quantities of injection chemicals" and "supervising their administration." *Id.* at 195–96. That

gloss, though dicta, strongly suggests that, at least as of 2009, the Missouri Supreme Court did not believe § 546.720.2 reached the DOC's drug suppliers.

Only the Missouri Supreme Court can definitively resolve the divergence between this Court's decision and the decisions of the federal judges who have considered the issue. The Missouri Supreme Court is the final arbiter of Missouri law. Mo. Const. art. V, § 2. Although federal courts are "bound by decisions of the Supreme Court of Missouri," they are not "bound by decisions of intermediate appellate courts." *Lancaster v. Am. & Foreign Ins. Co.*, 272 F.3d 1059, 1062 (8th Cir. 2001). Only the Missouri Supreme Court may definitively resolve competing federal and state constructions of state law.

Given that this Court's holding conflicts with the conclusions of five federal judges and, seemingly, the Missouri Supreme Court's own gloss on the statute, Respondents submit that this Court should transfer this case to the Supreme Court so that it can definitively resolve the important statutory question at issue.

II. Transfer is appropriate so that the Missouri Supreme Court may definitively construe the scope of a statute that directly affects the functioning of executions.

Imposing the death penalty is perhaps the most significant exercise of state government power. To curb any abuse of that power, the framers placed limits on its exercise. U.S. Const. amend. VIII. Missourians, in turn, have imposed an additional check on the death penalty, granting the Missouri Supreme Court exclusive appellate jurisdiction in cases imposing it. Mo. Const. art. V, § 3. Missouri-

ans granted the Missouri Supreme Court exclusive jurisdiction over a limited set of cases to ensure that it oversees the resolution of particularly "important cases," such as those involving the validity of state statutes and cases imposing the death penalty. *Garrett v. State*, 481 S.W.2d 225, 228–29 (Mo. banc 1972) (Finch, J. concurring); *see* Laura Denver Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 Mo. L. Rev. 711, 717–18 (2009) (explaining that the purpose of the Supreme Court's exclusive jurisdiction over issues like the death penalty is to ensure that that court resolves "key issues"). Accordingly, the Missouri Supreme Court plays a special and significant role in overseeing cases involving executions in Missouri.

This case directly implicates the proper functioning of executions and should properly be resolved by the Missouri Supreme Court. The public needs access to information to exercise democratic oversight over executions and to ensure that they are carried out in accordance with the Missouri and United States Constitutions. In the case of lethal injections, this information includes the quality, composition, and source of lethal chemicals. Six states have turned to black market dealers to acquire lethal injection drugs, *see* Whitaker, *The Execution of Joseph Wood*, CBS News (Nov. 29, 2015), http://www.cbsnews.com/news/execution-of-joseph-wood-60-minutes/, and other states have attempted to illegally import them from foreign manufacturers. Associated Press, *Drugs Intended for Executions Were Impounded by FDA*, N.Y. Times (Oct. 23, 2015), https://www.nytimes.com/2015/10/24/us/drugs-intended-for-executions-were-

impounded-by-fda.html. Because these incidents raise important concerns about the execution process, transparency is critical for the public to maintain trust in the legitimacy, and constitutionality, of the executions that are carried out in this state.

Given the Missouri Supreme Court's special, constitutionally-enshrined role in monitoring executions in Missouri, it is in the best position to resolve this issue of overriding public interest.

III. This Court should transfer the case to the Missouri Supreme Court to comply with principles of constitutional avoidance.

After the DOC refused to produce responsive records in response to the Guardian Respondents' Sunshine Law requests, the Guardian Respondents filed suit, alleging violations of the Sunshine Law and alleging that the DOC's construction of the § 546.720.2 violated the public's constitutional right of access to government proceedings and records under the First and Fourteenth Amendments of the United States Constitution. The parties and the Circuit Court agreed to sever the Guardian Respondents' First and Fourteenth Amendment claims, for if the requested records were open records under the Sunshine Law, the First and Fourteenth Amendment claims would not need to be addressed.

This Court's holding that DOC's construction of § 546.720.2 does not violate the Sunshine Law now makes the Guardian Respondents' First and Fourteenth Amendment claims ripe. Upon remand, the Circuit Court will need to address those claims, which were previously dismissed without prejudice as moot.

As the United States Supreme Court has recognized, the public has a constitutional right to access information about proceedings that "have historically been open to the press and general public" and where "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Executions possess both of these characteristics. Executions, including those in Missouri, have always been open to the public, as evidenced by Mo. Rev. Stat § 546.740, which provides that "at least eight reputable citizens" must be invited "to witness the execution." In addition, "[a]n informed public debate is critical in determining whether execution by lethal injection comports with 'the evolving standards of decency which mark the progress of a maturing society.'" *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Accordingly, if § 546.720.2 permits the DOC to conceal the information plaintiffs-respondents seek, the Guardian Respondents submit that it is inconsistent with the First Amendment. *See, e.g.*, *id.*; *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 WL 5551668, at *5 (D. Ariz. Oct. 7, 2013) (holding that the public enjoys a First Amendment right of access to specific information about the drugs that are inextricably intertwined with the process of putting the condemned inmate to death).

As with cases involving the imposition of the death penalty, the Missouri Constitution vests the Missouri Supreme Court with exclusive appellate jurisdiction over cases concerning the validity of state statutes. Mo. Const. art. V, § 3. Therefore, any appeal—by either respondents or the DOC—of the Guardian Re-

spondents' First and Fourteenth Amendment claims will go directly to the Missouri Supreme Court.

In that appeal, the Missouri Supreme Court will be guided the long-standing principle of constitutional avoidance. *See, e.g., State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. 1985) (a court should "avoid the decision of a constitutional question" if "the case can be fully determined without reaching it"); *State Highway Comm'n v. Spainhower*, 504 S.W.2d 121, 125 (Mo. 1973) ("if a statute may be so construed as to avoid conflict with the Constitution, this will be done"). As a result, the Missouri Supreme Court—before addressing the constitutionality of the DOC's interpretation of § 546.720.2—will necessarily have to address the question of whether the requested records are open records under the Sunshine Law. This is because if the records are open records, the Supreme Court will avoid the constitutional issue.

Transfer is thus warranted to ensure that the Guardian Respondents and the Circuit Court do not unnecessarily litigate the merits of the Guardian Respondents' First and Fourteenth Amendment claim, only to have the Missouri Supreme Court ultimately reverse this Court's decision on the basis of the Guardian Respondents' Sunshine Law claim.

Transferring this case to the Missouri Supreme Court therefore serves a significant additional purpose: it would potentially avoid the need for unnecessary litigation on a constitutional question—*i.e.* whether § 546.720.2, as construed by the DOC and this Court, violates the public's First Amendment right of access.

Conclusion

For the reasons above, plaintiffs-respondents respectfully request that this Court transfer the matter to the Missouri Supreme Court.

Respectfully submitted,

/s/Bernard J. Rhodes
Bernard J. Rhodes – MO #29844
Lathrop & Gage LLP
2345 Grand Blvd., Ste. 2400
Kansas City, MO 64108-2684
Tele: (816) 292-2000
Fax: (816) 292-2001
Email: brhodes@lathropgage.com
Attorneys for Plaintiffs-Respondents Guardian News & Media LLC; The Associated Press; Cypress Media, LLC; Gannett Missouri Publishing, Inc.; and the St. Louis Post-Dispatch LLC

/s/Elizabeth Unger Carlyle
Elizabeth Unger Carlyle – MO #41930
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, MO 64113
Tele: (816) 525-6540
Fax: (816) 764-1249
Email: elizabeth@carlyle-law.com
Attorneys for Plaintiff-Respondent Joan Bray

David A. Schulz
John Langford
Allison Douglis (law student intern)
Eric Brooks (law student intern)
Delbert Tran (law student intern)
Media Freedom and Information Access Clinic
Abrams Institute for Freedom of Expression
Yale Law School*
P.O. Box 208215
New Haven, CT 06520

* This brief was prepared in part by the Media Freedom and Information Access Clinic, a program of the Abrams Institute for Freedom of Expression at Yale Law School. The brief does not purport to express the School's institutional views, if any.

/s/Anthony E. Rothert

Anthony E. Rothert - MO #44827
ACLU of Missouri Foundation
454 Whittier Street
St. Louis, Missouri 63108
Tele: (314) 652-3114
Fax: (314) 652-3112

Gillian R. Wilcox - MO #61278
ACLU of Missouri Foundation
406 West 34th Street, Suite 420
Kansas City, Missouri 64111
Tele: (816) 470-9933
Attorneys for Plaintiffs-Respondents ACLU of Missouri Foundation, Reporters Committee for Freedom of the Press, and Christopher McDaniel

Adam A. Marshall (*pro hac vice*)
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Tele: (202) 795-9308
Attorney for Reporters Committee for Freedom of the Press

Nabiha Syed (*pro hac vice*)
BuzzFeed, Inc.
11 East 18th St., 13th Floor
New York, NY 10003
Tele: (646) 660-9617
Attorney for Christopher McDaniel

Bruce D. Brown
Katie Townsend
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Tele: (202) 795-9300
Of Counsel for Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was filed and served via CaseNet this 1st day of March, 2017, on the following counsel of record:

Stephen C. Doerhoff
Daryl Hylton
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Stephen.Doerhoff@ago.mo.gov
Daryl.Hylton@ago.mo.gov

/s/Bernard J. Rhodes
An Attorney for Respondents

Missouri Court of Appeals

Western District

March 28, 2017

IMPORTANT NOTICE

To: All Attorneys of Record

Re: JOAN BRAY, RESPONDENT; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION AND CHRISTOPHER S MCDANIEL, RESPONDENTS; GUARDIAN NEWS & MEDIA LLC, ET AL., RESPONDENTS.

vs.

GEORGE LOMBARDI, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MISSOURI DEPARTMENT OF CORRECTIONS, MATT BRIESACHER, IN HIS OFFICIAL CAPACITY AS DEPUTY COUNSEL OF THE MISSOURI DEPARTMENT OF CORRECTIONS AND MISSOURI DEPARTMENT OF CORRECTIONS, APPELLANTS

WD79893

Please be advised that Respondents' Reporters Committe For Freedom of The Press, American Civil Liberties Union of Missouri Foundation, Christopher S. McDaniel, Guardian News & Media, LLC., Associated Press, Cypress Media, LLC., Gannett Springfield, and St Louis Post Dispatch's motion for Transfer to Supreme Court is **DENIED.** See Rule 83.04.

Terence G. Lord
Clerk

cc: JESSICA MARY STEFFAN
GILLIAN R WILCOX
ANTHONY EDWARD ROTHERT
ELIZABETH UNGER CARLYLE
BERNARD JOSEPH RHODES
DARYL RALPH HYLTON
MICHAEL JOSEPH SPILLANE

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOAN BRAY, et al.,	)	
	)	
Respondents,	)	
	)	
v.	)	Nos. WD79893
	)	WD79894
GEORGE LOMBARDI, et al.,	)	WD79895
	)	
Appellants.	)	

NOTICE OF RESPONDENTS' JOINT APPLICATION
FOR TRANSFER TO THE MISSOURI SUPREME COURT

Notice is hereby given that Respondents Joan Bray, The Reporters Committee for Freedom of the Press, American Civil Liberties Union of Missouri Foundation, Christopher S. McDaniel, Guardian News and Media LLC, The Associated Press; Cypress Media, LLC; Gannett Missouri Publishing, Inc. and the St. Louis Post-Dispatch LLC will file their Application for Transfer under Rule 83.04 in the Missouri Supreme Court on the 12th day of April, 2017.

Respectfully submitted,

/s/Bernard J. Rhodes

Bernard J. Rhodes – MO #29844
Lathrop & Gage LLP
2345 Grand Blvd., Ste. 2400
Kansas City, MO 64108-2684
Tele: (816) 292-2000
Fax: (816) 292-2001
Email: brhodes@lathropgage.com
Attorneys for Plaintiffs-Respondents Guardian News & Media LLC; The Associated Press; Cypress Media, LLC; Gannett Missouri Publishing, Inc.; an the St. Louis Post-Dispatch LLC

David A. Schulz
John Langford
Allison Douglis (law student intern)
Eric Brooks (law student intern)
Delbert Tran (law student intern)
Media Freedom and Information Access Clinic
Abrams Institute for Freedom of Expression
Yale Law School
P.O. Box 208215
New Haven, CT 06520

/s/Elizabeth Unger Carlyle
Elizabeth Unger Carlyle – MO #41930
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, MO 64113
Tele: (816) 525-6540
Fax: (816) 764-1249
Email: elizabeth@carlyle-law.com
Attorneys for Plaintiff-Respondent Joan Bray

/s/Anthony E. Rothert
Anthony E. Rothert - MO #44827
ACLU of Missouri Foundation
454 Whittier Street
St. Louis, Missouri 63108
Tele: (314) 652-3114
Fax: (314) 652-3112

Gillian R. Wilcox - MO #61278
ACLU of Missouri Foundation
406 West 34th Street, Suite 420
Kansas City, Missouri 64111
Tele: (816) 470-9933
Attorneys for Plaintiffs-Respondents ACLU of Missouri Foundation, Reporters Committee for Freedom of the Press, and Christopher McDaniel

Adam A. Marshall (*pro hac vice*)
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Tele: (202) 795-9308
Attorney for Reporters Committee for Freedom of the Press

Nabiha Syed (*pro hac vice*)
BuzzFeed, Inc.
11 East 18th St., 13th Floor
New York, NY 10003
Tele: (646) 660-9617
Attorney for Christopher McDaniel

Bruce D. Brown
Katie Townsend
Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Tele: (202) 795-9300
Of Counsel for Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was filed and served via CaseNet this 12th day of April, 2017, on the following counsel of record:

Daryl Hylton
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Stephen.Doerhoff@ago.mo.gov
Daryl.Hylton@ago.mo.gov

/s/Bernard J. Rhodes
An Attorney for Respondents