IN THE
INDIANA SUPREME COURT

Case No. 19S-PL-401

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| Indiana Department of Correction,<br>*Appellant-Defendant*, | )<br>) | Appeal from the<br>Marion Circuit Court |
| v. | ) | Case No. 49C01-1501-PL-3142 |
| A. Katherine Toomey,<br>*Appellee-Plaintiff*. | ) | Hon. Sheryl Lynch, Judge |

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**BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, AND 15 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE-PLAINTIFF**

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## STATEMENT OF INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press, the Society of Professional Journalists, and 15 other media organizations, through undersigned counsel, respectfully submit this brief as amici curiae in support of Appellee-Plaintiff. Amici are members and representatives of the press with a strong interest in ensuring that journalists can report on matters of public concern without facing unconstitutional impediments to their newsgathering activities. Specifically, amici or their members often require access to records on lethal execution drugs to fully and accurately report on the death penalty, a matter of central concern to citizens of this State. Amici write to emphasize that if the identities of entities that provide lethal injection drugs to the Department of Correction (the "Department") are statutorily confidential, or if their identities are exempt from disclosure in response to public records requests made pursuant to the Indiana Access to Public Records Act ("APRA"), journalists will be less able to do their jobs effectively. Indiana Code § 35-38-6-1(e)–(f) is an unconstitutional prior restraint and content-based restriction on speech, and it violates the First Amendment right of access to information about the source of the drugs used in executions. For the reasons herein, amici urge the court to affirm the decision of the trial court in favor of Appellee-Plaintiff.

Amici are:[1] Reporters Committee for Freedom of the Press, Society of Professional Journalists, ALM Media, LLC, The E.W. Scripps Company, Indiana Coalition for Open Government, International Documentary Assn., The Marshall Project, The Media Institute, MPA – The Association of Magazine Media, National Freedom of Information Coalition, National Press Photographers Association, The New York Times Company, The News Leaders

[1] Descriptions of each amici are listed in the motion that this brief accompanies.

Association, The NewsGuild - CWA, Online News Association, POLITICO LLC, and Tully

Center for Free Speech.

## SUMMARY OF ARGUMENT

Indiana Code § 35-38-6-1(e)–(f) (hereinafter, the "Secrecy Statute") unconstitutionally stifles public debate and discussion about executions carried out by the State. The law is a prior restraint against speakers who would willingly convey information about execution drugs to the media. It is an impermissible content-based restriction on speech—it classifies as "confidential" the identities of pharmacies, pharmacists, wholesale drug distributors and outsourcing facilities that provide lethal injection drugs to the Indiana Department of Correction. And the law infringes upon a qualified First Amendment right of access to the information requested by Appellee-Plaintiff under APRA, which would allow the public to be fully informed about executions carried out by the State.

Members of the public cannot themselves continuously monitor Indiana's lethal injection protocol and the entities that supply the State with the drugs used to carry out executions; rather, they depend on the press to do so. Public oversight in this area is particularly important because Indiana Code § 35-38-6-1(e) excludes lethal injection drugs from the regulatory oversight of the board of pharmacy, the medical licensing board, the health department, and the professional licensing agency. In recent years, the news media has uncovered several instances in which a pharmacy or compounding pharmacy providing lethal injection drugs to corrections agencies in other states has had a record of dangerous, substandard, or corrupt practices.

The lawsuit before this Court was brought by a member of the public who sought access to public records under APRA. Rather than comply with an order from the trial court to provide those records, the Department worked to push through the Legislature a law specifically designed to circumvent the public's right to know. Indeed, upon seeing proposed legislative

language for what would eventually be enacted as the Secrecy Statute, the Department's Deputy Commissioner wrote:

> I spoke with [the Department's legislative services director] about this. I believe these [sic] version is substantially similar to the earlier draft, and should be helpful in resolving the Toomey case, and serve other purposes. I have no revcommendations [sic] to make to it.

Appellant's App. Vol. II p.28 ("Trial Court Order" at ¶ 17). Three days later, at 2:00 a.m., on the last day of the Legislature's 2017 session, the subsections were added by amendment to a bill containing the biennial budget. *Id.* at ¶¶ 18–19.

The Secrecy Statute is a prior restraint that chills reporter-source communications concerning the entities that provide lethal injection drugs to the State, a content-based restriction on speech that stymies the ability of the news media to report on this matter of significant public interest, and a denial of the public's qualified First Amendment right of access to information about the source of the drugs used in executions. As such, the Court should affirm the trial court's ruling that the statute is unconstitutional under the First Amendment to the United States Constitution.

## ARGUMENT

### I. The Secrecy Statute is a prior restraint that will inhibit important reporting on a matter of public concern.

The Secrecy Statute impermissibly prohibits individuals from, *inter alia*, communicating the identities of the Department's lethal injection drug providers. The provision states:

> (f) *The following are confidential*, are not subject to discovery, and may not be introduced as evidence in any civil or criminal proceeding:
>
> > (1) *The identity of a person described in subsection (e) that enters into a contract with the department of correction under subsection (e) for the issuance or compounding of lethal substances necessary to carry out an execution by lethal injection.*

> (2) The identity of an officer, an employee, or a contractor of a person described in subdivision (1).
>
> (3) The identity of a person contracted by a person described in subdivision (1) to obtain equipment or a substance to facilitate the compounding of a lethal substance described in subsection (e).
>
> (4) Information reasonably calculated to lead to the identity of a person described in this subsection, including a: (A) name; (B) residential or business address; (C) residential or office telephone number; and (D) Social Security number or tax identification number.
>
> *This subsection applies retroactively to any request for information*, discovery request, or proceeding, no matter when made or initiated.

Ind. Code § 35-38-6-1(f) (emphasis added). "[P]ersons" for purposes of subsection (f) is defined as "[a] pharmacist, a pharmacy, a wholesale drug distributor, or an outsourcing facility" that makes and enters into a contract to "provide[] a lethal substance to the department of correction under this subsection." Ind. Code § 35-38-6-1(e).

The trial court recognized that the Secrecy Statute would

> censor[] the speech of those individuals and entities described in subsection (e), and their officers, employees and contractors and anyone else with knowledge of the identities of suppliers of execution drugs. . . . [T]he Statute also violates Toomey's right to receive this information from any party willing to disclose it.

*See* Trial Court Order ¶¶ 74–75. The trial court characterized this proscription as an "unconstitutional prior restraint." *See* Trial Court Order ¶¶ 78–80. Specifically, the trial court wrote:

> [The Secrecy Statute] forbids any speaker from responding to any request for confidential identifying information, even about themselves. This applies not only to the Department but anyone, even the outsourcing facility, wholesale distributor, pharmacy, or pharmacist themselves, as well as their officers, employees, contractors, and anyone they contract with.

Trial Court Order ¶ 79.

Amici agree that the Secrecy Statute is a prior restraint. Because the Secrecy Statute is directed toward willing speakers—sources, rather than the press—it is similar to a prior restraint

held unconstitutional in *In re Paternity of K.D.*, 929 N.E.2d 863 (Ind. Ct. App. 2010). In that case, a trial court ordered the participants in a custody proceeding not to discuss it after the fact, even "based on . . . knowledge obtained independent of the juvenile proceedings," and even when motivated by the desire to engage in political speech by challenging the outcome of that proceeding in the media. *Id.* at 865, 868. The Indiana Court of Appeals held that the prohibition on a willing speaker's communication of information about her proceeding to the media was a prior restraint. Further, because the speech was politically motivated, the burden the State imposed on the willing speaker's communication was subject to strict scrutiny. *Id.* at 865.

By prohibiting pharmacists, pharmacies, wholesale drug distributors, and outsourcing facilities from identifying themselves as suppliers of lethal injection drugs to the State, even voluntarily, the Secrecy Statute acts as a prior restraint, gagging willing speakers who wish to communicate the identity of execution drug providers to the news media or the public. The Secrecy Statute would prevent these individuals and entities from discussing their role in the execution process and acting as sources to members of the news media attempting to report on Indiana's capital punishment regime. Sources, confidential or otherwise, are the lifeblood of reporting. "There are no stories without sources." Susan McGregor, *Digital Security and Source Protection for Journalists*, Tow Center for Digital Journalism (June 2014) at 12. The Secrecy Statute threatens the existence of these vital reporter-source relationships, which have been central to important public interest reporting.

For example, two confidential sources played a key role in groundbreaking reporting by journalist Chris McDaniel, then a death penalty reporter for BuzzFeed News, about Missouri's source of lethal injection drugs. McDaniel's reporting uncovered that Missouri's supplier, a compounding pharmacy named Foundation Care, "ha[d] been repeatedly found to [have]

engage[d] in hazardous pharmaceutical procedures" and its "cofounder ha[d] been accused of regularly ordering prescription medications for himself without a doctor's prescription." Chris McDaniel, *Missouri Fought For Years To Hide Where It Got Its Execution Drugs. Now We Know What They Were Hiding*, BuzzFeed News, Feb. 20, 2018.[2] An official for the Missouri Department of Corrections would drive to Foundation Care with an envelope of cash in order to obtain the drugs prior to each execution. *Id.* Moreover, the compounding pharmacy in question was later acquired by a larger pharmaceutical firm, which quickly installed the ex-attorney general of Missouri as its vice president. *Id.*; *see also BuzzFeed News Uncovers Source of Missouri's Lethal Drugs*, NPR All Things Considered, Feb. 21, 2018.[3] Indiana's Secrecy Statute, by making the identities of lethal injection drug suppliers confidential by law, effectuates a prior restraint that chills speech between sources and reporters and thereby obstructs the flow of this type of information to the public. Because the Secrecy Statute is a prior restraint and the State has not overcome the "heavy burden of showing justification for the imposition of such a restraint," *N.Y. Times Co. v. United States*, 403 U.S. 713, 71 (1971), *see infra* Section IV, this Court should affirm the trial court's conclusion that the law violates the First Amendment.

## II. The Secrecy Statute is a content-based restriction on speech subject to strict scrutiny.

In addition to holding that the Secrecy Statute is an unconstitutional prior restraint, amici also urge this Court to strike down the Secrecy Statute simply as an impermissible content-based restriction on speech. Content-based restrictions on speech are presumptively unconstitutional under the First Amendment. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). The government is prohibited from restricting speech based on its content because such restrictions

[2] https://perma.cc/PHX3-6S7M.
[3] https://perma.cc/6KSC-RQVG.

threaten to "manipulate the public debate through coercion rather than persuasion," *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 641 (1994), and permit governments to "drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1982). Laws imposing content-based speech restrictions are constitutional *only* if they survive strict scrutiny, which requires that the law be narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

The Supreme Court in *Reed* defined content-based regulations as "those that target speech based on its communicative content." *Id.* It noted that:

> This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

*Id.* at 2227. The Secrecy Statute at issue here is content based. It proscribes speech relating to the identity of certain persons that enter into "contract[s] with the department of correction" concerning a specific, controversial topic: "the issuance or compounding of lethal substances necessary to carry out an execution by lethal injection." Ind. Code § 35-38-6-1(f). It thus "defin[es] regulated speech by its function or purpose." Because the Secrecy Statute is not narrowly tailored to serve a compelling state interest, *see infra* Section IV, this Court should affirm the trial court's conclusion that the law violates the First Amendment.

## III. The Secrecy Statute impermissibly burdens the public's First Amendment right of access to information regarding the identities of execution drug suppliers.

The public and news media have a qualified right of access to information about the source of the drugs used in executions. Access to this information is critical to assessing the effectiveness and propriety of executions carried out by the State on behalf of its citizens, and

effectuates "a major purpose" of the First Amendment: "to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (citations omitted) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The First Amendment guarantees that the "constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 605. As discussed in more detail below, contrary to the Department's assertion (Appellant Br. 48), the information made secret by the Secrecy Statute is subject to a qualified First Amendment right of access because it is essential to understanding the manner in which the State carries out executions.

### A. This Court should apply the analysis in *Press-Enterprise II* to the records sought by Appellee-Plaintiff.

The First Amendment to the United States Constitution guarantees the public and press an affirmative right of access to certain government proceedings, which includes, but is not limited to criminal trials and other judicial proceedings.[4] The U.S. Supreme Court in 1980 "unequivocally" held "that an arbitrary interference with access to *important information* is an abridgement of the freedoms of speech and of the press protected by the First Amendment." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583 (1980) (Stevens, J., concurring) (emphasis added). In so ruling, the Court recognized the necessity of public oversight of

[4] The Department's reliance on *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), to argue otherwise is misplaced, as the case is readily distinguishable on its facts. *Houchins* involved a news agency's request to photograph the interior of a county jail. The Court held that "the media have no special right of access . . . different from or greater than that accorded the public generally," *id.* at 16, and it clarified that the news media's right of access extends no further than the public's. Amici do not contend otherwise. As Justice Brennan explained in a later case, *Houchins* never "ruled out a public access component to the First Amendment in every circumstance," but rather held "only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (1980) (Brennan, J., concurring).

government institutions in a democracy. *Id.* at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."); *see also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) [hereinafter "*Press-Enterprise II*"] (qualified First Amendment right of access applies to preliminary hearings in criminal matters); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) [hereinafter "*Press-Enterprise I*"] (qualified First Amendment right of access applies to voir dire proceedings in criminal matters); *Globe Newspaper*, 457 U.S. 596 (to justify the exclusion of the press and public from criminal trials, the state must show that closure is necessitated by a compelling governmental interest and narrowly tailored to serve that interest).

Citing *Globe Newspaper* and *Press-Enterprise II*, the Indiana Supreme Court has likewise held that "the public trial implicates the First Amendment right of the press and public to attend a criminal trial … or *other proceeding*." *Williams v. State*, 690 N.E.2d 162, 167 (Ind. 1997) (emphasis added); *see also State ex rel. Post-Tribune Publ'g Co. v. Porter Superior Court*, 412 N.E.2d 748, 750 (Ind.1980) ("There is venerable tradition and practice in Indiana courts engaged in the administration of the criminal law which requires proceedings to be open to attendance by the general public, the press and other news media, and friends of the accused."). As the Indiana Supreme Court in *Williams* observed, in accord with *Press-Enterprise II*, the public's right of access is not absolute, but any restrictions on the right are justified only if a "court finds that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The asserted interest in secrecy must be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Williams*, 690 N.E.2d at 167 (citations and internal quotation marks omitted).

The qualified First Amendment right of access to government proceedings is not limited to criminal trials and judicial proceedings, conservatively defined. Rather, *Press-Enterprise II* stated that "experience and logic" are appropriate considerations in a court's determination as to whether a First Amendment right of access attaches to a particular proceeding. *Press-Enterprise II*, 478 U.S. at 9. That is, in determining whether the First Amendment right of access applies to a particular proceeding, courts should consider (i) "whether the place and process have traditionally been open to the press and general public" and (ii) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id; see*, *e.g.*, *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) (finding a First Amendment right of access to a government run horse round-up).

### B. Both experience and logic support a qualified constitutional right of access to the information implicated by the Secrecy Statute.

Given the State's history of access to execution proceedings and the benefits that public oversight that public oversight of lethal injections can effectuate, amici urge this court to find a qualified First Amendment right of access to the information sought by Appellee-Plaintiff.

Amici acknowledge that four federal courts of appeal have found no First Amendment right of access to the source of lethal injection drugs in certain cases. However, none have done so in the context of Indiana's long history of providing the public access to information about executions, discussed *infra* Section III.B.1.

Each of these decisions are otherwise distinguishable as well. One such federal appellate court decision was premised at least in part on the fact that it was a prisoner, rather than a member of the press or public, attempting to assert a right of access. *See Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1266 (11th Cir. 2014) ("[W]hile there may be First Amendment implications involved in the openness of government operations, the cases Wellons

relies upon turn on the public's, rather than the individual's, need to be informed so as to foster debate[.]"). In another federal appellate holding, the plaintiffs (a group of death row prisoners) failed to make factual allegations as to experience or logic. *Zink v. Lombardi*, 783 F.3d 1089, 1112 (8th Cir. 2015) ("[T]he prisoners have not alleged facts or cited authority establishing that the particulars of execution methods have historically been open to the press and general public . . . . The complaint likewise provides no basis to conclude that public access to detailed information about execution protocols plays a significant positive role in the functioning of the process in question[.]"). And the remaining two federal appellate decisions that amici are aware of did not engage in a *Press-Enterprise II* analysis at all. In those cases, the court anchored that decision on an aside within a dissenting opinion from the Ninth Circuit that misleadingly cast information about the identity of execution drug providers as extraneous to public knowledge of the same, while ignoring that the same dissenting opinion acknowledged that a First Amendment case brought by the press or public is different in kind than that brought by a prisoner. *Compare First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1079 (9th Cir. 2019) *and Phillips v. DeWine* 841 F.3d 405, 429 (6th Cir. 2016) (each citing Judge Bybee dissent in *Wood v. Ryan*) *with Wood v. Ryan*, 759 F.3d 1076, 1101 (9th Cir.) (Bybee, J., dissenting) ("Despite the impression offered by the substance of the briefs and opinions in this case, this litigation is not really about the scope of the First Amendment right of the public to access certain information pertaining to an execution. *The existence and scope of that right could be fully litigated by a member of the public who feels he has been unconstitutionally deprived of the information at issue.*") (emphasis added).

**1. Indiana citizens have historically enjoyed broad access to information about the State's means of execution.**

Since the founding of this country, the public has traditionally enjoyed broad access to information about the methods of execution and their effectiveness. *See Calif. First Amendment Coalition v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002) (noting that historically, "[e]xecutions were fully open events in the United States"). This tradition of access, which in Indiana even predates statehood in 1816, has long provided the public with material information about the means of execution used by the State. *History of the Death Penalty: Indiana*, Death Penalty Information Center.[5] At a 1936 hanging in Indiana, for example, crowds, as they had routinely done for public executions, gathered for a close look at the gallows, and about 4,000 people passed the scaffold for a look. Dawn Mitchell, *RetroIndy: The Last Hanging in Indianapolis*, Indianapolis Star, Mar. 14, 2014.[6] In addition, press reports about hangings regularly included the identity of those individuals tasked with carrying out the death penalty. During the last hanging in Indianapolis, George Phillip Hanna, "an Illinois farmer who had overseen many executions across the country was to carry out all the details of the hanging, which included making sure the noose was tight," while the job of pulling the lever went to Charles L. Reeves, "a deputy sheriff standing all of 5 feet tall, who had volunteered for the job" and had held a number of jobs prior to law enforcement, including a trapeze performer with Barnum & Bailey, a farmer and a vaudeville performer. *Id.*

When Indiana transitioned from hanging to the electric chair as the method of execution in 1913, reporters were provided with information concerning the precise apparatus to be used in electrocutions and how the machinery was built, and reported such information to the public.

[5] https://perma.cc/M23S-XKBJ.
[6] https://perma.cc/YW8R-38XC.

*See Electric Chair Now Being Built in Prison*, Indianapolis Star, Oct. 21, 1913 at 4 ("The chair is being made by Albert Clark, the official prison builder, and Chief Engineer Henry Tedda, and certain changes in the building used for inflicting the death penalty are also to be made at once. A new high voltage dynamo has been ordered to furnish the needed current.").[7]

Historically, the press also routinely reported to the public information about the effects of various execution methods. For example, in the nineteenth and twentieth centuries, newspapers in Indiana and in other states reported on the physical effects of hangings on prisoners' bodies. *Paying a Death Penalty: Two Men Hanged on One Gallows*, N.Y. Times, Jan. 30, 1879, at 5 (reporting that while one Indiana prisoner hung motionless after the sheriff, accompanied on the scaffold by the named medical professional, Dr. Bayliss, opened the trapdoor, the other's body "twitched convulsively for several minutes, his legs drawing up six or eight times and the breast heaving heavily"). Following Indiana's transition to the electric chair, journalists continued to report, in detail, the procedures used during execution, the qualifications of the officials performing or advising executions, the pain and suffering of the condemned, the statements and movements of the prisoners, the length of time until death, and the psychological effects on witnesses. For example, a year after the execution of Gregory Resnover in 1984, an *Indianapolis Star* reporter who was among the media witnesses to the proceeding described what he saw:

> [W]hen the blinds opened in the window between the viewing area and the execution room, I felt like I knew the man strapped in the electric chair with a black hood covering his shaven head. Then Resnover's body jerked upward—the first jolt, 2,300 volts. Hazy smoke. An orange halo of fire and sparks encircled his head.

[7] Although the method was not used in Indiana, newspapers also reported on the use of gas chambers in executions, describing their size, cost, and makeup, and documented the efforts of Eaton Metal Products Co.—a provider of gas chambers, and holder of a patent in which the devices were detailed in the public record. *Wood v. Ryan*, 759 F.3d 1076, 1083 (9th Cir.), *vacated*, 135 S. Ct. 21 (2014) (citation omitted).

> His body slumped, then jumped—the second jolt, 500 volts. His body slumped one last time.

Lynn Ford, *One Year Later, State's Execution of Greg Resnover Still Haunts Me*, Indianapolis Star, Dec. 9, 1995, at D1; Joseph Gerth, *Lethal Injection: Humane or Cruel?*, Courier-Journal (Ky.), Mar. 14, 1997, at 1A (reporting that Indianan William Vandiver's gruesome electrocution required five separate jolts of electricity and 17 minutes before he was declared dead).[8]

Simply put, the secrecy imposed by the Secrecy Statute starkly departs from a long tradition of public access to information about executions, including the way in which they are carried out. Indiana adopted lethal injection in 1995, but it wasn't until 2002 that the State sought to exempt from its disclosure under APRA records identifying the "persons who assist the warden of the state prison in an execution" and authorized the Department to "classify as confidential and withhold from the public any part of a document relating to an execution that would reveal the identity of a person who assists the warden in the execution." Ind. Code § 35-38-6-6. Even so, as recently as the passage of the Secrecy Statute in 2017, at least some information about who manufactured and sold lethal injection drugs was publicly available. *See*, *e.g.*, Tom Coyne, *State Eyes New Drug for Lethal Injections*, Associated Press, May 31, 2014, 2014 WLNR 15708076 (naming Par Pharmaceutical as the maker of the anesthetic Brevital, which Indiana had obtained for use in an execution). Upholding a statute that shields this information from public view is inconsistent with the access traditionally afforded in this State.

[8] Indiana lawmakers have said they were moved to change the State's method of execution from electrocution to lethal injection after the graphic media accounts of Resnover and Vandiver's executions. Deborah W. Denno, *Getting to Death: Are Executions Constitutional*, 82 IOWA L. REV. 319, 446 n.812 (1997).

**2. Public access to information about execution drug suppliers is integral to public oversight of the criminal justice system and improves the proper functioning of capital punishment.**

Access to information about the means of execution "plays a particularly significant positive role in the actual functioning of the process." *Press-Enterprise II*, 478 U.S. at 11. Not only does it allow the news media and the public to monitor those who manufacture and provide the drugs designed to execute prisoners to the State, but it is also necessary to ensure meaningful, informed public discussion of capital punishment and the means used to carry it out. This is particularly true in cases where government entities have turned to compounding pharmacies for their lethal injection drugs. Unlike large pharmaceutical manufacturers, compounding pharmacies are subject to less rigorous, consistent regulation and testing that would identify chemical flaws or impurities. Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. Rev. 1367, 1382, 1420 (2014). Even the slightest variation in drug combinations or doses can affect the efficacy of the drugs used, and thus their reliability as a proper means of execution. *Id.*

Although the Department derides reporting done by members of the news media about lethal injection protocols as "public shaming" (*see* Appellant Br. at 15–17), it fails to give a full accounting of what that reporting uncovered. For example, the 2013 reporting by The Associated Press ("AP") that is cited by the Department found that:

> The Texas Department of Criminal Justice, responding to a Freedom of Information request from The Associated Press, released documents showing the purchase of eight vials of the drug pentobarbital last month from [The Woodlands Compounding Pharmacy] in suburban Houston. Such pharmacies custom-make drugs but aren't subject to federal scrutiny. . . .
>
> The U.S. Food and Drug Administration considers products from compounding pharmacy unapproved drugs and does not verify their safety or effectiveness. But such businesses came under intensified scrutiny after a deadly meningitis

> outbreak was linked to contaminated injections made by a Massachusetts compounding pharmacy.

Michael Graczyk, *Texas Reveals Execution Drug's Origin*, AP News, Oct. 2, 2013.[9] Accurate reporting of this kind provides key information necessary for effective public oversight of government; it does not, as the Department argues, constitute "public shaming." Appellant Br. at 16.

Moreover, the AP's 2013 report did not prevent Texas from continuing to use compounding pharmacies as a source for lethal injection drugs (though Woodlands Compounding Pharmacy ceased providing such drugs to the State after the AP report). In 2018, BuzzFeed News obtained documents through state and federal public records requests showing that Texas had continued to purchase lethal injection drugs from compounding pharmacies. Specifically, BuzzFeed News reported:

> [D]ocuments obtained by BuzzFeed News indicate that one source is Greenpark Compounding Pharmacy in Houston, which has been cited for scores of safety violations in recent years. Its license has been on probation since November 2016, when the Texas State Board of Pharmacy found that it had compounded the wrong drug for three children, sending one to the emergency room, and forged quality control documents.
>
> Questions about the source and quality of Texas's execution drugs have been particularly acute in the past year, since in their final moments of life, five of the 11 inmates who Texas put to death in 2018 said the drug they were injected with, which is supposed to be painless, felt like it was burning as it coursed through their bodies.

Chris McDaniel, *Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.*, BuzzFeed News, Nov. 28, 2018[10]; *see* Mathew Schafer, *How We Used Public Records Laws To Tell You Stories In 2018*, BuzzFeed News, Dec. 27, 2018 ("McDaniel was able

[9] https://perma.cc/5FN8-FU4S.
[10] https://perma.cc/95Z3-BUBY.

to get this story in part because of federal and state public records laws, which guarantee a right to inspect certain government documents.").[11]

Indeed, access to the identity of the companies that manufacture and provide execution drugs is critical to assessing how the State carries out an execution. This information allows the news media and the public to evaluate the pharmacy's reputation by investigating its volume of drug sales, consumer complaints, citations issued by the federal or state government, drug recalls, and litigation involving the pharmacy's products, practices, or conduct. Given the central role such drugs play in the execution process, the compounding pharmacies that provide them warrant public scrutiny. And, as a number of botched executions involving concealed information about the sources of the drugs used show, this process requires accountability. *Behind the Curtain: Secrecy and the Death Penalty in the United States*, Death Penalty Information Center (recounting the recent problematic executions using new drug formulas in various states).[12]

## IV. The Secrecy Statute cannot overcome strict scrutiny.

In order to overcome the presumption that the Secrecy Statute is an unconstitutional content-based restriction on speech, the Department must show that it is narrowly tailored to serve a compelling state interest. *Reed*, 135 S. Ct. at 2226. Similarly, to overcome the First Amendment access right, the Department must show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 at 510. Furthermore, because the Secrecy Statute is a prior restraint, the State "carries a heavy burden of showing justification for the imposition of such a restraint."

[11] https://perma.cc/AJQ5-P7CW.
[12] https://perma.cc/AS5N-JAPR.

*New York Times Co. v. United States*, 403 U.S. at 71. As the Supreme Court has stated, "prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Secrecy Statutes cannot survive strict scrutiny.

A mere desire to shield lethal injection drug manufacturers and providers from public scrutiny does not constitute a compelling state interest that would justify a content-based restriction on speech; nor does it overcome the public's constitutional right of access to information about how the State conducts executions. The Department argues that death penalty opponents' "public shaming" of drug manufacturers and providers has made it "increasingly difficult for States to carry out lawfully imposed sentences." (Appellant Br. 15, 17). This fails to justify a denial of the public's right to information about the means of execution. For example, the Arkansas Supreme Court has found unpersuasive the argument that disclosure of information relating to the manufacturer and vendor of lethal injection drugs would prevent Arkansas from being able to carry out lawfully imposed death sentences, noting that "many manufacturers of lethal-injection drugs already prohibit the use of these drugs in executions." *Ark. Dep't of Corrs. v. Shults*, 529 S.W.3d 628, 633 (Ark. 2017).

Moreover, while the Department asserts that Par Pharmaceuticals announced that it would take steps to prevent distribution of its drug Brevital to corrections departments, (*id.* 17) it offers no argument that that decision was due to "public shaming" or the disclosure of the company's identity. The Department also states that a vendor, after initially agreeing to supply lethal execution drugs, later withdrew its offer because of "public pressure" imposed on those who supply execution drugs. *Id.* However, the agreement with the vendor came *with* the

promise of confidentiality, so it does not follow that a lack of confidentiality led to the vendor's decision to withdraw.

## CONCLUSION

*Amici* respectfully submit that the Court should affirm the Order's finding the Secrecy Statute unconstitutional under the First Amendment to the United States Constitution.

Respectfully submitted,

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**WORD COUNT CERTIFICATE**

I verify that this Brief of Amici Curiae contains no more than 7,000 words, not including those portions excluded by Indiana Appellate Rule 44(C)

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**CERTIFICATE OF SERVICE**

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