UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

BH MEDIA GROUP, INC. *et al.*, Plaintiffs, v. HAROLD W. CLARKE, Defendant.	Case No. 3:19-cv-00692-REP

PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Plaintiffs, by counsel, submit this brief in opposition to defendant's motion to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

BH Media Group, Inc., The Associated Press, Guardian News and Media, LLC, and Gannett Co., Inc., ("plaintiffs") bring this civil action against Defendant Harold W. Clarke ("defendant"), in his official capacity as Director of the Virginia Department of Corrections ("VDOC"), to challenge the constitutionality of certain regulations implementing VDOC's revised execution protocol. The regulations mask critical elements of the execution process, and thus violate the public's qualified First Amendment right to observe an execution in its entirety. That access right arises when (1) a government proceeding has historically been open to the public, and (2) public access plays a significant role in ensuring government's proper functioning.

Plaintiffs ask the Court to apply this "history and logic" test, as articulated by the Supreme Court of the United States in a series of cases following its 1980 *Richmond Newspapers*

decision. The Complaint alleges facts demonstrating that, throughout American history, the death penalty has been carried out under public scrutiny. The Complaint further alleges facts demonstrating that public access to executions plays a critical role in ensuring the proper functioning of government and testing whether Eighth Amendment requirements are satisfied.

VDOC's decision to mask certain critical features of its executions departs from history. It is a direct challenge to the logic of allowing full public scrutiny of the manner in which the sovereign chooses to end the life of a citizen. The Complaint plausibly alleges a colorable constitutional claim under 42 U.S.C. § 1983 and the Court should deny the motion to dismiss.

STANDARD OF REVIEW

Defendant has moved to dismiss the Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. The Supreme Court has held that "where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." *Bell v. Hood*, 327 U.S. 678, 681-82 (1946). The "failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Id.* at 682. Thus, "where a complainant raises allegations which may or may not state a federal claim, a district court should take jurisdiction to decide the merits of the controversy so long as the questions raised are not frivolous on their face." *Donohoe Const. Co. v. Montgomery Cty. Council*, 567 F.2d 603, 607 (4th Cir. 1977).

Defendant has also moved for dismissal of the Complaint under Federal Rule of Civil Procedure 12(b)(6). To survive a motion to dismiss, the complaint need only contain sufficient factual matter that, accepted as true, "state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Facial plausibility is established once the factual content of a complaint 'allows

the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). A plaintiff is not required to plead "detailed factual allegations," *Iqbal*, 556 U.S. at 678; rather, it is enough if the facts, which must be taken as true, move the claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

ARGUMENT

I. The Court Possesses Subject Matter Jurisdiction Over This Action.

Defendant's argument seeking dismissal for lack of subject matter jurisdiction conflates the Court's power to adjudicate a constitutional claim with the Court's determination of the merits of that claim. His brief analyzes decisions that, in his view, evaluate the scope of the First Amendment access right as applied to executions, and concludes: "[t]here being no First Amendment right, there is no constitutional question remaining in this case, and the Court should dismiss these proceedings for failure to state a claim and for lack of subject matter jurisdiction." Memorandum in Support of Defendant's Motion to Dismiss ("Def. Mem.") at 21-22. That argument is offered in direct contravention of *Bell v. Hood*, and the Court should reject it. *See Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012); *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009). The question presented is whether the plaintiffs have stated a claim meeting the requirements of Rule 12(b)(6).

II. The Complaint Meets the *Twombly-Iqbal* Test, Plausibly Alleging that VDOC's Regulations Are Not Consistent with History or Supported by Logic.

A. Controlling Precedent Requires Application of the Two-Part Test of History and Logic to the Challenged Regulations.

The Supreme Court in 1980 recognized a First Amendment-based qualified right of public access to certain government proceedings and related records. This right is derived from the

First Amendment's express guarantees of free speech, a free press, and the right to petition the government. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-78 (1980). Each of these express rights is essential for democracy to function; none is effective if the public lacks access to basic information about how the government exercises its constitutional powers. The access right thus plays a structural role in our constitutional system. It is rooted in "the principle that debate on public issues should be uninhibited, robust, and wide-open" and its "antecedent assumption that valuable public debate—as well as other civic behavior—must be informed." *Id*. at 587 (Brennan, J., concurring) (citation omitted). The right of access "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982).

In a line of cases following *Richmond Newspapers*, the Supreme Court clarified the two-part test it adopted to determine in what contexts and to what information the right of access applies.[1] First, courts consider "whether the place and process have historically been open to the press and general public." *Press-Enter. Co. v. Superior Court* (*Press-Enter. II*), 478 U.S. 1, 8 (1986). Second, courts assess "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*. (citing *Globe Newspaper*, 457 U.S. at 606). Where this history and logic test is met, the government may still restrict public access, but only if it can demonstrate that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. Co. v. Superior Court* (*Press-Enter. I*), 464 U.S. 501, 510 (1984).

[1] *See Globe Newspaper*, 457 U.S. at 610-11 (finding a right of access to the testimony of a child victim of a sex offense); *Press-Enter. Co. v. Superior Court* (*Press-Enter. I*), 464 U.S. 501, 505 (1984) (finding a right of access to *voir dire* proceedings); *Press-Enter. Co. v. Superior Court* (*Press-Enter. II*), 478 U.S. 1, 9 (1986) (finding a right of access to preliminary hearings in a criminal trial).

Defendant acknowledges this test at page 12 of his brief. Moreover, he acknowledges its repeated application by the Fourth Circuit in at least eight cited cases. Def. Mem. at 13-14. He cites no case in which the issue presented in this civil action was presented to the court of appeals for this circuit, and no argument that a decided Fourth Circuit case is so closely on point that it constitutes controlling precedent.

Numerous federal courts over the last three decades have declined to limit the rationale of *Richmond Newspapers* and its progeny to judicial proceedings, as defendant suggests this Court must do. They have applied the history and logic test to determine where the right of access exists:

- The Second Circuit applied the history and logic test to determine that the right of access extends to administrative proceedings before New York City's Transit Authority Board. *New York Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 300 (2d Cir. 2012);
- The Ninth Circuit applied the history and logic test to evaluate a photojournalist's claim of a First Amendment right to view horse roundups conducted by the Bureau of Land Management, explaining that the test has been applied to determine whether an access right exists to "a wide range of civil and administrative government activities." *Leigh v. Salazar*, 677 F.3d 892, 899-900 (9th Cir. 2012);
- The Sixth Circuit made clear that "the Government is free to argue that the particular historical and structural features of certain administrative proceedings do not satisfy" the history and logic test, but "there is no basis to argue that the

test itself does not apply." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002);

- The Third Circuit declared that the history and logic test is "broadly applicable to issues of access to government proceedings." *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 208-09 (3d. Cir. 2002); and
- The Ninth Circuit applied "[t]he Supreme Court's two-pronged test . . . to conclude that the public has a First Amendment right to view executions." *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002).

Contrary to defendant's portrayal, the Supreme Court well understood that the access right it articulated broadly protects access to information essential for the public to know that the Constitution itself is being obeyed by government actors. Justice Stevens, writing separately in *Richmond Newspapers*, emphasized that, "for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press." 448 U.S. at 583 (Stevens, J., concurring). As Justice Brennan further explained, the Court recognized a right of access that serves the structural role of "securing and fostering our republican system of self-government." *Id*. at 587 (Brennan, J., concurring).

Against this background, defendant's blanket assertion that the right of access does not apply to "non-judicial government proceedings," Def. Mem. at 12, lacks a sound basis in precedent and interprets the right so narrowly as to undermine the reason it exists—to "protect the free discussion of governmental affairs." *Globe Newspaper*, 457 U.S. at 604. Likewise, characterizing the right as narrowly "derived from the public right to access a courtroom," Def. Mem. at 16, misstates both its constitutional basis and its origin in Supreme Court precedent.

Just one year before identifying an implied right of access in the First Amendment, the Court expressly rejected recognizing a public right of courtroom access in the Sixth Amendment right to a public trial. *Gannett Co. v. DePasquale*, 443 U.S. 368, 391-92 (1979). Grounding the access right in the First Amendment rather than the Sixth clarified its nature and purpose. The access right derives from the broad protection of speech, press, and petition, not the narrower protections of a fair trial.

Defendant's effort to limit the public access right solely to criminal proceedings would not be dispositive even if it were accurate because executions are a part of the criminal justice system. In the Commonwealth, "[t]he Circuit Court of jurisdiction" must author the Execution Order, which "pronounc[es] the sentence of death," and is read just prior to the prisoner's final statement. Va. Dep't of Corr., *Operating Procedure: Execution Manual* (Feb. 7 2017) at IV.C.1 and IV.F.4(j). Without this judicial authorization, effectuated in the moments before the event, an execution cannot proceed.

The Fourth Circuit has already held that the access right extends to proceedings that are "an integral part of a criminal prosecution." *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986). Certainly, carrying out a death sentence is just as integral a part of a criminal prosecution as the examples of probable-cause hearings, suppression hearings, bail hearings, plea hearings, and sentencing hearings noted in that case. *See id*. Indeed, an execution is the *culmination* of that process, and the most consequential exercise of the government's power to prosecute and punish criminals.

As this Court recently noted, what "triggers the public's right of access to the charging document" is its reflection of "the operation of . . . prosecutorial forces against the defendant." *In re Reporters Comm. for Freedom of the Press to Unseal Criminal Prosecution of Assange*,

357 F. Supp. 3d 528, 534 n.4 (E.D. Va. 2019). Execution proceedings are the ultimate "operation of . . . prosecutorial forces," and they are certainly an "integral" part of any capital prosecution. At bottom, an execution is itself a criminal proceeding to which the right of access attaches, regardless of whether a judge presides or the process takes place in a courtroom. "'[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues.'" *Balt. Sun Co. v. Goetz,* 886 F.2d 60, 63 (4th Cir. 1989) (quoting *Press-Enter. I,* 464 U.S. at 516 (Stevens, J., concurring)).

Defendant's reliance solely on the ancient decision in *Schwab v. Berggren*, 143 U.S. 442 (1892), to contend otherwise is misplaced. *See* Def. Mem. at 16. *Schwab* is over a century old and has not been cited in any reported opinion since 1945. Moreover, the case establishes nothing more than that "the time and place of execution are not, strictly, part of the judgment of sentence." 143 U.S. at 451. Certainly, charging documents, preliminary probable-cause hearings, and even *voir dire* proceedings are not "part of the judgment of sentence," either. Yet, like an execution, they constitute aspects of a criminal prosecution that are subject to the First Amendment right of access.

Defendant acknowledges, as he must, that the only appellate court to have reached the constitutional question presented in this case has answered it in the affirmative. *See Woodford,* 299 F.3d at 877. The Ninth Circuit reaffirmed this holding a decade later in *Associated Press v. Otter*, 682 F.3d 821, 824 (9th Cir. 2012) ("[T]he First Amendment protects the public's right to witness all phases of [an] execution"), and most recently expanded the right to encompass "a right to hear the sounds of executions in their entirety." *First Amendment Coal. of Ariz., Inc. v. Ryan,* 938 F.3d 1069, 1075 (9th Cir. 2019).

Defendant attempts to discredit these rulings by noting that a Ninth Circuit opinion, supposedly "relying on the rationale advanced in [*Woodford*], was summarily vacated by the Supreme Court." Def. Mem. at 22 (citing *Ryan v. Wood*, 573 U.S. 976 (2014), vacating 759 F.3d 1076 (9th Cir. 2014)). But the *Wood* decision reviewed by the Supreme Court did *not* deal with public access to an execution; it dealt with a claim of a constitutional right to information about the makers of the lethal-injection drugs. *See* 759 F.3d at 1093 (Bybee, J., dissenting) ("Unlike the plaintiffs in [*Woodford*], Wood does not seek access to a criminal *proceeding*, nor does he seek documents filed in a proceeding or transcripts of the proceeding. Instead, he wants *information* in the government's possession . . ." (emphasis in original)).

To date, no other federal court of appeals has rejected the Ninth Circuit's holding, and at least one district court has expressly adopted it. In *Philadelphia Inquirer v. Wetzel*, the Middle District of Pennsylvania held that the history and logic test, as well as Third Circuit precedent recognizing the right of access beyond criminal judicial proceedings, supported recognition of a First Amendment right of public access to witness Pennsylvania's execution proceedings. 906 F. Supp. 2d 362, 371 (M.D. Pa. 2012). Unlike the isolated and factually-distinguishable cases relied upon by defendant, *Philadelphia Inquirer* and *Woodford* and its progeny are, in defendant's words, "on all fours with the situation presented here." Def. Mem. at 19.

Indeed, the two out-of-circuit district court opinions upon which defendant relies are unpersuasive. *See* Def. Mem. at 17-19. One case, an unreported decision out of the Eastern District of Arkansas, assumed that the history and logic test did, in fact, apply to execution proceedings. *Ark. Times, Inc. v. Norris*, No. 5:07-cv-00195, 2008 WL 110853, at *4 (E.D. Ark. Jan. 7, 2008). The other case, out of the Western District of Oklahoma, is inapposite because that court declined to apply the history and logic test to executions under Tenth Circuit

precedents that contradict Fourth Circuit caselaw. *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1325 (W.D. Okla. 2014). The *Patton* court interpreted Tenth Circuit precedent as limiting the right of access only to those specific proceedings at issue in the Supreme Court's access cases—*i.e.* to criminal trials. *Id.* As discussed above, and as defendant acknowledges at page 13 of his brief, the Fourth Circuit has affirmatively recognized that the right of access extends beyond these proceedings, including to civil trials and civil proceedings, *ACLU v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011), and to criminal proceedings that, while not part of the trial itself, are "an integral part of a criminal prosecution." *In re Washington Post Co.*, 807 F.2d at 389.

Defendant's reliance on the Supreme Court's century-old decision in *Holden v. Minnesota*, 137 U.S. 483 (1890), similarly misses the mark. *See* Def. Mem. at 16-17. That case involved an *ex post facto* challenge by a condemned prisoner to a state statute limiting the number of witnesses to his execution. 137 U.S. at 491 (1890). It was not a First Amendment challenge brought on behalf of the public, and thus it is quite unsurprising that the Supreme Court did not take "the opportunity" to recognize a public right of access to executions. Def. Mem. at 17. Moreover, the Supreme Court decided that case a generation before the advent of modern free speech doctrine, marked by seminal cases such as *Schenck v. United States*, 249 U.S. 47 (1919) and *Abrams v. United States*, 250 U.S. 616 (1919), and nearly a century before the recognition of a First Amendment right of access in *Richmond Newspapers* and its progeny, the cases that govern here. Since *Richmond Newspapers*, courts addressing a First Amendment right of access to executions have readily dismissed the applicability of *Holden*. *See*, *e.g.*, *Woodford*, 299 F.3d at 875 n.3; *Patton*, 73 F. Supp. 3d at 1326.

Defendant is on no more solid ground in arguing that there is no First Amendment right of access to execution proceedings because they occur behind prison walls. Def. Mem. at 14-16.

The cases defendant relies on, which largely predate *Richmond Newspapers*, cannot be read as foreclosing any First Amendment access right within a prison. Rather, those cases upheld reasonable limitations on press access in certain prison contexts. *Pell v. Procunier*, for example, ruled that limiting the media's ability to conduct face-to-face interviews with certain inmates did not "abridge the constitutional right of a free press." 417 U.S. 817, 834-35 (1974). But, at the same time, the Court emphasized the constitutional importance of "both the press and the general public [being] accorded full opportunities to observe prison conditions." *Id.* at 830. Similarly, *Houchins v. KQED, Inc.* rejected a broadcasting company's claim to have a right over and above that of the general public "to enter [prison] institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes." 438 U.S. 1, 9 (1978).

Justice Brennan's concurrence in *Richmond Newspapers* explains how these cases must be read in light of the Court's subsequent articulation of the history and logic test for determining the existence of the constitutional access right, and explicitly warns against the very reading urged by defendant:

> [T]he Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions [in *Houchins* and *Pell*] must therefore be understood as holding 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.

448 U.S. at 586. Just as the Supreme Court could uphold restrictions on television access inside the courtroom in *Estes v. State of Texas*, 381 U.S. 532 (1965), and fifteen years later could recognize a First Amendment right of access to such a proceeding in *Richmond Newspapers*, so too can this Court reconcile the existence of a First Amendment right of access to executions inside a prison without running afoul of *Pell* and *Houchins*.

B. Plaintiffs Have Alleged Facts Plausibly Establishing a First Amendment Right of Access to Witness the Entirety of an Execution.

The allegations in the Complaint, which must be taken as true and with every inference construed in plaintiffs' favor, plausibly demonstrate that the history and logic test is met and provide a firm basis for the claim that Virginia has unconstitutionally limited the public right of access to the entire process of execution.

History. The Complaint alleges that "[t]hroughout American history, from the colonial period to the present, there has been a tradition of public access to the entirety of the execution process." Compl. ¶ 46. It makes specific factual allegations about the nation's long history of ensuring that representatives of the public always had access to observe executions from start to end. These allegations include that:

- Hanging was the dominant mode of execution for much of the nation's past, dating back to the colonial period. Compl. ¶ 46. Thousands of people attended hanging executions, which were "public, outdoors, and conspicuous." Compl. ¶ 48.
- Witnesses could see the condemned approach the gallows and observed the preliminary execution procedures, such as the tying of the hangman's knot. Compl. ¶ 48.
- This tradition of unabridged access to the entire execution continued through the twentieth century, even as executions were brought inside the jail yard and even as methods of execution evolved. Compl. ¶ 49.

- Public witnesses, including reporters, were a constant presence in the execution room as states began to experiment with the electric chair and the gas chamber.[2] Compl. ¶ 49.
- As newspapers documented in detail, these witnesses saw every step of the execution. Compl. ¶ 49. At the nation's first execution by lethal gas, for instance, spectators watched as the condemned "was led from his cell and across the courtyard to the gas chamber, as guards strapped him to a chair, and as the gas inside the chamber was administered." Compl. ¶ 49.

In sum, the Complaint plausibly alleges that there has been a tradition of public access to the entirety of the execution process, "from the moment that a prisoner arrives at the execution site to the moments following his or her death." Compl. ¶ 46.

Logic. The Complaint similarly alleges several reasons that public access to executions—particularly access to the initial procedures of an execution—plays a "significant positive role in the functioning" of capital punishment. *Press-Enter. II*, 478 U.S. at 8. It alleges that the presence of witnesses "aids the proper functioning of the execution process, guards against unconstitutional executions, and enables the public to exercise meaningful democratic

[2] Defendant attempts to show that executions were private by relying on an outdated Virginia law that prohibited newspapers from "print[ing] or publish[ing] the details of the execution of criminals." *See* Def. Mem. at 6, 20. This law is an odd hook on which to hang a constitutional defense, for it was plainly an unconstitutional prior restraint (which may explain why it was quietly laid to rest in 1982, as defendant acknowledges at page 7 of his brief). Moreover, the historical reality is that restrictions on execution reporting were almost never enforced and widely flouted. *See* Stuart Banner, *The Death Penalty: An American History* 163 (2002). In any case, this is one of the many factual contentions that defendant improperly raises on his motion to dismiss.

control over a state's enforcement of its most consequential power." Compl. ¶ 50. For example, allegations include:

- The presence of eyewitnesses ensures that officials conduct executions competently and according to protocol. Compl. ¶ 51. Public scrutiny "enhances the quality and safeguards the integrity" of government processes. *Globe Newspaper*, 457 U.S. at 606. By concealing any part of an execution from view, the state also withdraws it from public oversight.
- Witnesses are able to monitor the proceedings for violations of the Eighth Amendment, which prohibits execution procedures that carry "substantial risk of severe pain." *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015); *see also* Compl. ¶ 52. Lethal injection requires the placement of IV lines, a procedure that is prone to "serious technical and procedural errors." Compl. ¶ 52. These errors have caused serious harm to execution subjects in the past. Compl. ¶ 52.
- Access to the complete execution process enables the public to exercise meaningful democratic oversight of capital punishment. Compl. ¶ 53; *see Globe Newspaper*, 457 U.S. at 606 (public access permits the public to "serve as a check upon the judicial process" at issue in that case). Throughout American history, the public has reacted to eyewitness accounts of botched executions by updating and improving execution procedures. Compl. ¶ 53. This process of continual renovation could not proceed without public witnesses observing executions in their entirety. Compl. ¶ 53.

Plaintiffs allege that executions have historically been open in their entirety and that public access improves the functioning of the execution process itself. The Complaint plausibly alleges the existence of a right of access "to the entirety of Virginia's execution procedures, from

the moment the government initiates the execution process until death, and including all those initial procedures that are an essential part of the execution process." Compl. ¶ 45. Plaintiffs also allege that the current protocol of the Virginia Department of Corrections violates the public access right by requiring parts of the execution process to be shielded from view, including "the entry of the condemned prisoner into the execution chamber and the placement of IV lines and other procedures to prepare the condemned for execution." Compl. ¶ 44. In short, the Complaint sufficiently alleges both the existence of a right and its violation.

Defendant cannot circumvent the sufficiency of the allegations in the Complaint by arguing that an execution entails only the brief period between the reading of the death warrant and the moment of death. *See* Def. Mem. at 22. That is not the scope of public access that has historically been provided, as set forth in allegations that must be accepted as true. *See, e.g.*, Compl. ¶ 48 (public ceremony surrounding a hanging encompassed the procession from the jailhouse to the final drop); Compl. ¶ 49 (tradition of public access to every step of an execution, "from the moment the condemned entered the execution chamber to the final moment of death," continued after states transitioned to the electric chair and the gas chamber). Nor is defendant's portrayal consistent with access provided by Virginia itself in the prior version of its execution protocol, which "provided that the curtain to the witness room be closed *after* the condemned entered the execution chamber." Compl. ¶ 39.

An execution in criminal law is "[t]he carrying out of a death sentence." *Execution*, *Black's Law Dictionary* (11th ed. 2019). The "carrying out" of a death sentence naturally includes essential procedures such as the insertion of the IV lines that carry lethal chemicals. Defendant cannot reduce an execution to its culminating act just as the government cannot

reduce a trial to pronouncement of the final verdict. The right of access to a government proceeding is a right to witness the constituent parts that make up the proceeding as a whole.

Allowing witnesses to observe the preliminary steps of an execution also serves a functional purpose. The process of setting up and attaching the execution equipment is essential to the success of the execution, and this crucial step benefits from public oversight. With lethal injection, for instance, the insertion of the IV lines is a high-risk procedure that can fail and cause serious undue harm. Compl. ¶ 52. To censor such a pivotal moment from view significantly hinders the public's right to meaningfully oversee executions.

Recognizing this logic, the Ninth Circuit has held repeatedly that the First Amendment right to view executions extends to "those 'initial procedures' that are inextricably intertwined with the process of putting the condemned inmate to death." *Woodford*, 299 F.3d at 877. This includes the "right to view the condemned as the guards escort him into the chamber, strap him to the gurney and insert the intravenous lines." *Id.* at 876; *see also Otter*, 682 F.3d at 824; *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 WL 5551668, at *4 (D. Ariz. Oct. 7, 2013). In *Woodford*, the Ninth Circuit expressly rejected defendant's argument that an execution begins only "when the lethal chemicals start to flow," dismissing it as a "definition [ ] simply of defendants' own making." 299 F.3d at 876.

By arguing that any right of access to an execution exists only after the intravenous lines are placed, defendant is simply redefining what an execution entails—and in the process, refusing to accept plaintiff's allegations about the history and logic of access to executions in their entirety. It is inappropriate to raise this factual dispute at this stage of the proceedings. Plaintiffs have sufficiently stated "a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678.

C. Defendant's Effort to Supplement or Contradict Facts Averred in the Complaint is Impermissible in Support of a Rule 12(b)(6) Motion.

Defendant's attempt to introduce factual claims about Virginia's history of access to executions is improper on a motion to dismiss. "[A]s a general rule, extrinsic evidence should not be considered" on a motion to dismiss. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004). The Fourth Circuit has recognized a narrow exception to this rule for "items in the public record," where neither party disputes the facts are authentic, *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004), and all "relevant facts obtained from the public record are construed in the light most favorable to the [plaintiff]." *Papasan v. Allain*, 478 U.S. 265, 283 (1986). That exception does not apply here. Defendant does not seek simply to introduce the undisputed terms of Virginia's historic statutes, but offers undocumented commentary on how those statutory provisions were implemented. *See, e.g.*, Def. Mem. at 10 (alleging that "access to [executions in Virginia] has been closed to the public for over a century and a half); *id.* at 20 (alleging that, since 1908, "[t]he Commonwealth has never returned to any 'public' form of an execution."); *id*. at 21 (alleging that there is no 'unbroken, uncontradicted' history of public access to executions in the Commonwealth of Virginia"). If this Court were to consider such "matters outside the pleading," it would be required to convert defendant's motion into a motion for summary judgment and afford plaintiffs a "reasonable opportunity to present all material made pertinent to such a motion." *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1471 (4th Cir. 1991) (citing Fed. R. Civ. P. 12(b)).

Defendant's attempt to rely upon Virginia history to deny the existence of any First Amendment access right is not only procedurally incorrect; it also misunderstands what history is relevant in defining the scope of the First Amendment access right. As the Supreme Court has made clear, the test "does not look to the particular practice of any one jurisdiction, but instead to

the experience in that *type* or *kind* of hearing throughout the United States." *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 150 (1993) (emphasis in original) (internal quotation marks omitted). The national history, as the Complaint alleges, is clear: members of the American public have long attended and witnessed executions from start to finish. To whatever extent the "unique history and traditions of the Commonwealth" diverge from the national experience, these local practices are largely immaterial.[3] *Id*. at 149.

Moreover, accepting *arguendo* that the boundaries of Virginia constrain the relevant inquiry, Virginia's own history actually *confirms* that the public has historically been provided access to executions. Prior to 1908, the state conducted hangings that were open to the public. Compl. ¶ 14. The hanging of George Robinson in 1902, for instance, drew over three thousand spectators. Compl. ¶ 16; *see* Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* 46-48 (2014). Subsequently, even as attendance at executions became more *regulated*, public access has remained constant. Defendant's citations to Virginia legal history reveal an uninterrupted practice of public access to the entirety of the execution process; they do not refute it.

Since 1856, Virginia laws have consistently required the presence of citizen witnesses at executions. Va. Acts of Assembly (1855-56), Chap. 43, § 2; *see also* Def. Mem. ¶ 9; Compl. ¶ 14. This statutory requirement survives to this day, demonstrating Virginia's long tradition of not only allowing, but *mandating* public access to its executions. *See* Va. Code Ann. § 53.1-

[3] Defendant's reference to the isolated history in Oklahoma is similarly unavailing. *See* Def. Mem. at 18. As *El Vocero* made clear, only the *overall* tradition in the United States is relevant to the history prong of the *Press-Enterprise* test. *See El Vocero*, 508 U.S. at 150-51 ("The Puerto Rico Supreme Court's reliance on Puerto Rican tradition is also misplaced. . . The established and widespread tradition of open preliminary hearings among the States was canvassed in *Press–Enterprise* and is controlling here").

234 (2019) ("At the execution there shall be present . . . at least six citizens."); *see also* Def. Mem. ¶¶ 22–24. Defendant points to the fact that Virginia regulates the number of public witnesses at executions. Def. Mem. at 19. But attendance limits do not diminish the public nature of an execution. Public places have always been subject to reasonable "time, place and manner restrictions." *Richmond Newspapers*, 448 U.S. at 578. Courtrooms, too, "have limited capacity," and when that capacity is exceeded, "reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives." *Richmond Newspapers*, 448 U.S. at 581 n.18. None of these regulations diminishes the tradition of access or the applicability of the right of access to these proceedings.

III. Plaintiffs' Claim is a Facial First Amendment Challenge to the Execution Protocol and is Not Time-Barred.

Defendant's assertion that the claim under 42 U.S.C. § 1983 is time-barred appears to arise out of a fundamental misunderstanding of the Complaint. Plaintiffs allege a facial First Amendment challenge to Virginia's execution protocol and therefore their claim is not subject to a statute of limitations.

A facially invalid regulation such as that challenged here inflicts an ongoing injury, and as such no statute of limitations applies. The Fourth Circuit has confirmed this rule. In declining to apply a statute of limitations to a claim challenging an ordinance regulating outdoor advertising signs, the Fourth Circuit explained that "it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period." *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991). Citing that decision, a North Carolina district court denied the government's motion to dismiss a First Amendment challenge and rejected the argument that "the Section 1983 statute of limitations should apply to a plaintiff who brings a facial challenge to an ordinance which has been applied

against him or her." *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 441 (M.D.N.C. 1999). Virginia's unconstitutional execution protocol inflicts an ongoing injury on the public so long as it remains operational and in violation of the First Amendment; as such, plaintiffs' facial challenge to the protocol is not subject to a statute of limitations.

That plaintiffs' claim is a facial challenge is apparent on the face of the Complaint, which contends that any application of the current execution protocol violates the public's right of access. A facial challenge contends that a statute is unable to be applied in a valid manner. *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988). Whereas an as-applied challenge "contends that a law's application to a particular person under particular circumstances deprives that person of a constitutional right," a facial challenge maintains that there is no set of circumstances under which the law could be applied without violating constitutional rights. *Marcellus v. Va. State Bd. of Elections*, 168 F. Supp. 3d 865, 872 n.8 (E.D. Va. 2016), *aff'd*, 849 F.3d 169 (4th Cir. 2017). Plaintiffs allege that Virginia's Execution Manual is fundamentally flawed; the contention that the current execution protocol violates the First Amendment in every execution is central to plaintiffs' claim. Therefore, the Complaint presents a facial challenge that is not time-barred.

The defendant tries to recast plaintiffs' claim as an as-applied challenge by noting that the challenged procedures "were *applied* during the July 2017 execution of William Morva." Def. Mem. at 24 (emphasis added). This argument, to the extent it is offered to constrict the claim stated in the Complaint, is readily rejected when the Complaint is read as a whole. The facts alleged concerning Morva's execution simply exemplify the Complaint's central claim that Virginia's execution protocol—due to its facial invalidity—will always violate the Constitution. By concealing procedures the public had a right to witness, Morva's execution did run afoul of

the First Amendment—and so will every execution conducted by the Commonwealth under the protocol plaintiffs challenge.[4] The Complaint seeks redress for an ongoing harm that inheres in the policy itself, not in any single application of the policy. Plaintiffs' challenge is facial in nature and thus insulated from a statute of limitations defense.

Defendant nonetheless asks for a new rule that diverges from Fourth Circuit precedent and seriously threatens First Amendment rights. Under defendant's logic, courts would be required to uphold laws that facially violate the First Amendment simply because filing did not occur within a given state's statute of limitations for personal injury actions.[5] Courts in many jurisdictions, including the Fourth Circuit, have recognized the dangers of this logic and have refused to apply it. *See, e.g.*, *Nat'l Advert. Co.*, 947 F.2d at 1168; *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004) ("We join the Fourth Circuit in expressing serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations."); *Napa Valley Publishing Co. v. City of Calistoga*, 225 F.Supp.2d 1176, 1184 (N.D. Cal. 2002) ("The statute of limitations does not apply to the facial challenge of a statute that infringes First Amendment freedoms as such a statute inflicts a continuing harm."); *Lavey v. City of Two Rivers*, 994 F. Supp. 1019, 1023 (E.D. Wis. 1998), *aff'd*, 171 F.3d 1110 (7th Cir. 1999) (citing *National Advertising* and rejecting defendant's contention that six-year statute of limitations barred First Amendment challenge to ordinance regulating outdoor signs); *3570 East*

[4] There are at least three men currently in Virginia prison who have been sentenced to death. *Offender Locator*, Va. Dep't of Corr., https://vadoc.virginia.gov/general-public/offender-locator/ (last visited Oct. 30, 2019) (showing Mark Eric Lawlor, Anthony Bernard Juniper, and Thomas A. Porter as sentenced to death).

[5] Where a plaintiff alleges a past violation of federal or constitutional law by a state official under 42 U.S.C. 1983, courts borrow the state statute of limitations for personal injury actions. *Owens v. Okure,* 488 U.S. 235, 236 (1989).

Foothill Blvd., Inc. v. City of Pasadena, 912 F.Supp. 1268, 1278 (C.D. Cal. 1996) (holding that plaintiff was not barred from bringing a § 1983 First Amendment claim because a statute that violates the First Amendment inflicts a harm that continues until the statute is repealed or invalidated)*; Santa Fe Springs Realty Corp. v. City of Westminster,* 906 F. Supp. 1341, 1364-65 (C.D. Cal.1995) ("Because strong policy reasons militate in favor of permitting facial challenges to statutes that impinge upon protected First Amendment rights, the statute of limitations should not preclude a plaintiff from bringing a facial challenge more than one year after the statute's enactment."); *Lamar Whiteco Outdoor Corp. v. City of W. Chi.*, 823 N.E.2d 610, 621 (Ill. App. 2005) (concluding that the trial court erred when dismissing First Amendment facial challenge to statute because such challenge was not subject to statute of limitations defense).

Statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944). Here, those considerations are not present, and justice would not be promoted by dismissing plaintiffs' claim. Indeed, the distinction between plaintiffs' claim and a § 1983 claim subject to the statute of limitations is apparent from the cases defendant cites in support of his time-bar argument. *See* Def. Mem. at 24-25. Nearly all those cases involved inmates seeking post-conviction relief or individuals seeking monetary damages for personal injuries. Here, on the other hand, plaintiffs allege an ongoing constitutional harm that violates the freedoms protected by the First Amendment. Dismissal of this claim would not be in the interest of justice; it would merely prevent plaintiffs from filing suit until after Virginia has carried out another execution that is unconstitutionally hidden from public view.

Defendant's statute of limitations argument has been firmly rejected by the courts, runs contrary to the interests of justice, and would allow an ongoing violation of the First Amendment to stand.

CONCLUSION

Plaintiffs have plausibly alleged the existence of a right of access to view the entirety of executions in Virginia, and an ongoing violation of that right by defendant. Accordingly, the motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2019, I electronically filed the foregoing Brief in Opposition to Defendant's Motion to Dismiss the Complaint with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF participant and all other counsel of record as set forth on the docket. And I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant:

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