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

BH MEDIA GROUP INC., *et al.*,

Plaintiffs,

v. CASE NO. 3:19-CV-692

HAROLD CLARKE,

Defendant.

REPLY IN FURTHER SUPPORT OF DEFENDANT'S RULE 12 MOTION TO DISMISS

There is no unbroken history of "public access" to executions, whether in the Commonwealth of Virginia or elsewhere. Whatever that history is, it is far from the consistent and historical access granted to citizens who wish to observe trials conducted in a public courthouse. Thus, even if this Court were to follow the Ninth Circuit's approach and apply the *Press-Enterprise II* test in this context, Plaintiffs' claim fails to satisfy that standard. For this reason, and because this case is time-barred on its face, Defendant Clarke respectfully requests that this Court grant his motion to dismiss.

I. The *Press-Enterprise II* test does not apply outside of the courthouse.

For the reasons advanced in his initial supporting memorandum (ECF No. 19), Defendant Clarke submits that the *Press-Enterprise II* test does not apply in the execution context. Despite Plaintiffs' argument to the contrary, an execution is not a "stage" or "phase" of a criminal prosecution or trial. An execution does not test the guilt or innocence of the accused, involve the presentation of evidence, or include a presiding and neutral arbiter who is being asked to adjudicate or resolve a pending issue. This is why, for example, there is no constitutional right to

have counsel present during an execution. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (no constitutional right to an attorney post-conviction); *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1117 (10th Cir. 2016) (no constitutional right to an attorney during an execution).

Although, certainly, an execution is related to a criminal prosecution, in that it cannot occur without entry of an order finding the accused guilty of a capital crime and sentencing him to death, Plaintiffs overreach when they attempt to cast an execution as a "phase" of that criminal prosecution. The prosecution has ended, sentence has been pronounced, and the prisoner committed to the custody of the Virginia Department of Corrections. The execution is no more part and parcel of the public criminal trial than the prisoner's physical reception into the Virginia Department of Corrections. When the sentencing judge's gavel falls in the courtroom, the prosecution concludes, and so does any public right of access to those proceedings. *See, e.g.*, Black's Law Dictionary (9th ed. 2009) (defining "prosecution" as "[a] criminal proceeding in which an accused person is tried").

Because an execution is not a stage of a criminal or civil trial, Defendant Clarke submits that this ends the inquiry, and the Court can make this determination as a matter of law. The First Amendment right of access recognized in *Richmond Newspapers* applies to proceedings and written materials that occur in, or at the very least, around, a courtroom—such as preliminary hearings, voir dire, and dispositive motions—and does not extend out into the general public and then—further—behind prison doors.

As support for their argument that "access to important information" supports a First Amendment claim in the execution context, Plaintiffs cite to concurring—not majority—opinions in *Richmond Newspapers*. Plfs.' Resp. in Opp. (ECF 20), at p.6. But in contrast to the statements plucked from those concurring opinions, the Supreme Court has made clear that the

First Amendment protects the right to disseminate information (for example, through publication), but does not extend further and also protect the ability to obtain that information in the first instance. *See, e.g.*, *McBurney v. Young*, 569 U.S. 221, 233-34 (2013); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

Accordingly, the importance of the government action is not controlling or even instructive here. There are many government actions that are "important"—such as impeachment hearings, or summits authorizing the deployment of military force—but that does not mean that a door which would otherwise remain closed should be flung open and a First Amendment right of access established. The Supreme Court has squarely rejected that notion. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978).

II. Because there is no unbroken historical access to executions, the *Press-Enterprise II* test, even if it were deemed to apply, is not satisfied.

Even if this Court were to conclude that the *Press-Enterprise II* test should be applied to determine whether a First Amendment right of access exists, Plaintiffs cannot satisfy that standard. Plaintiffs have alleged that, at certain points in history, executions—such as public hangings—were open to the public. But those allegations, alone, are insufficient to satisfy the *Press-Enterprise II* test.

In *Richmond Newspapers*, the Supreme Court grounded the public right of access to criminal trials in an "unbroken, uncontradicted history," which indisputably continues "today," of conducting open criminal trials. *Richmond Newspapers*, 448 U.S. at 573. But the Virginia legislature, along a majority (if not all) of the remaining states, closed off wholesale public access to executions well over a century ago. Although Plaintiffs imply that it would be inappropriate to consider these legislative enactments, it is black-letter law that courts may consider "matters of which a court may take judicial notice" in the context of resolving a Rule 12

motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, *and matters of which a court may take judicial notice*." (emphasis added)); s*ee also Birmingham v. PNC Bank, N.A.*, 846 F.3d 88, 92 (4th Cir. 2017); *Ebersole v. Kline-Perry*, 2012 U.S. Dist. LEXIS 93193, at *6 (E.D. Va. July 5, 2012) ("Laws—including statutes and formal rules and regulations—are subject to judicial notice because they are matters of public record and common knowledge."). This Court may therefore consider the historical, legislative underpinnings of Virginia's execution process, and those underpinnings defeat the Plaintiffs' claim to relief.

By way of contrast, in *Press-Enterprise II*, the Supreme Court, finding a protected right of access to preliminary hearings in criminal cases, observed that, at least from the trial of Aaron Burr in 1807 "until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court." 478 U.S. at 10. Although it may be true, as Plaintiffs have alleged, that there was a "near uniform" practice, at one time, of allowing citizens to witness public hangings, the tide has long since turned. And at "present day," many jurisdictions have chosen not to execute at all, and those that continue to allow capital punishment have different procedures and different rules governing who is allowed to be present, and what they are allowed to see.

Accordingly, there is no "near uniform" practice of allowing public access to executions, particularly within the Commonwealth of Virginia. Far from an "unbroken, uncontradicted" history of public access, the laws of this jurisdiction plainly show a desire to shield executions from the public eye, not to conduct them in the spotlight. When Virginia elected to move

executions entirely into the state penitentiary in 1908, it did so in conjunction with a state law—one that survived for over 70 years—prohibiting people who were present during an execution from publishing any details of that execution. The limited individuals who were admitted to an execution, therefore, did not do so as proxies or for the purpose of reporting back to the rest of the public on the happenings in the execution chamber—they were expressly forbidden from doing so.

Of course, by focusing on the "history" prong of the *Press-Enterprise II* test, Defendant does not concede that the second, "logic" prong would otherwise be satisfied. For example, it is not "logical" to assume that individuals under the stress of placing IV lines—an alleged "high-risk procedure"—benefit or do their job more accurately when multiple strangers gather around to scrutinize their actions. It is not "logical" to assume that watching an inmate walk across the floor adds any quantifiable degree of public oversight to the execution itself. But because there is no unbroken historical right of access to executions in the first instance, that ends the inquiry, regardless of whether there may be other factors to support the "logic" inquiry.

Accordingly, even if this Court were to deem it appropriate to apply the two-pronged *Press-Enterprise II* test in this context, that test is not satisfied. Because there is no First Amendment public right of access to an execution, the complaint fails to state a cognizable constitutional claim, and it should therefore be dismissed.

III. The two-year statute of limitations applies, and the complaint should therefore be dismissed as time-barred.

Based on language from *National Advertising Company v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991), Plaintiffs contend that there is no statute of limitations applicable to their cause of action, essentially leaving them free to file this federal § 1983 suit against the Commonwealth at any point they see fit. This Court should reject Plaintiffs' attempt to craft a

new rule of law—no statute of limitations for First Amendment facial challenges to prison policies, ever—and dismiss the complaint as time-barred.

Statutes of limitations "are mechanisms used to limit the temporal extent or duration of liability," *CTS Corp. v. Waldberger*, 573 U.S. 1, 7 (2014), and are "among the universally familiar aspects of litigation considered indispensable to any scheme of justice," *Felder v. Casey*, 487 U.S. 131, 140 (1988). "[T]he ultimate purpose of a statute of limitations is to ensure that causes of action be brought within a reasonable period of time." *Delebreau v. Bayview Loan Servicing, LLC*, 680 F.3d 412, 415 (4th Cir. 2012). "Statute[s] of limitations . . . reflect[] legislative purposes of encouraging promptness in the initiation of claims, and of avoiding stale claims, inconvenience, and fraud that may result from the untimely assertion of such claims." *Id.* Statutes of limitations therefore "require plaintiffs to pursue diligent prosecution of known claims," and "'promote justice by preventing surprises through [] revival of claims that have been allowed to slumber.'" *CTS Corp.*, 573 U.S. at 8 (quoting *R.R. Telegraphers v. Rwy. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (internal quotation omitted)); *see also Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) ("[T]he general purpose of statutes of limitations [is] to protect defendants against stale or unduly delayed claims." (internal quotation omitted)).

The Supreme Court has never recognized a statute-of-limitations exception for facial challenges to prison policies, and neither has the Fourth Circuit. Rather, in the context of a facial challenge to a city ordinance, the Fourth Circuit commented—*in dicta*—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.*, 947 F.2d at 1168. The Ninth Circuit, similarly, has "express[ed] serious doubts" as to whether a First Amendment "facial challenge" to a "state

statute" could "ever be barred by a statute of limitations." *Maldonado v. Harris*, 370 F. 3d 945, 955 (9th Cir. 2004). But these cases, along with the other authorities cited in Plaintiffs' response, deal with state *laws*, generally applicable to all members of the public, whose mere existence allegedly inflicts a continuing injury under the First Amendment. *See, e.g., Summit Media LLC v. City of Los Angeles*, 530 F. Supp. 2d 1084, 1090 (C.D. Cal. 2008) ("The statute of limitations does not apply to the facial challenge of a *statute* that . . . inflicts a *continuing harm*." (emphases added)).

This case is different. Plaintiffs have not challenged a state law or ordinance that is alleged to inflict an ongoing and continuing harm to the general public, such as the advertising restrictions at issue in *Maldonado* and *National Advertising*. They have challenged a policy of the Virginia Department of Corrections, one that is not subject to any formal rule-making process, and one that is only applied at sporadic intervals to a handful of individuals. It is different in kind and scope to the generally-applicable state laws at issue in *National Advertising* and *Maldonado*.

Other courts have made this distinction. In *Redd v. Alameida*, 2008 U.S. Dist. LEXIS 67626 (N.D. Cal. Aug. 29, 2008), for example, the plaintiff alleged that prison authorities violated the First Amendment by enacting a policy prohibiting prisoners from possessing a Swahili/English dictionary. Although the plaintiff contended that his facial challenge was timely, citing *Maldonado*, the district court disagreed. Noting that the Ninth Circuit had merely "expressed 'serious doubts,' rather than declaring a new rule," *id.* at *9, and because *Maldonado* "did not announce a rule regarding the application of statute of limitations to [all] facial First Amendment challenges," *id.* at *10, the district court granted the Defendants' motion to dismiss

the First Amendment claim as time-barred. *Id.*; *accord Lightner v. Huntsman*, 2009 U.S. Dist. LEXIS 87658 (D. Idaho Aug. 6, 2009).

It is worth noting, as well, that the Supreme Court has recently cast doubt on any argument that different rules should apply to facial and as-applied challenges. In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the inmate plaintiff contended that he should be exempted from the pleading standards of *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), because he filed an as-applied, rather than facial, challenge to a state's execution protocol. Rejecting this argument, the Supreme Court noted that the position advanced by the inmate "invites pleading games," particularly considering that "[t]he line between facial and as-applied challenges can sometimes prove amorphous and not so well defined." *Bucklew*, 139 S. Ct. at 1128 (internal quotations and citations omitted). "A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications," the Court explained, "[s]o classifying a lawsuit as facial or as-applied [merely] affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy." *Id.* at 1127 (internal quotation omitted).

Finally, and also of note, statutes of limitation in the Commonwealth of Virginia "are strictly enforced and exceptions thereto are narrowly construed." *Arrington v. Peoples Sec. Life Ins. Co.*, 458 S.E.2d 289, 290-91 (Va. 1995). "Consequently, a statute should be applied unless the General Assembly clearly creates an exception, and any doubt must be resolved in favor of the enforcement of the statute." *Id.* Plaintiffs cite to no provisions of the Virginia Code evidencing any legislative intent to exempt facial constitutional challenges from otherwise-applicable statute of limitations. Nor has the Virginia Supreme Court ever created such an exception. In an analogous vein, though, the United States Supreme Court, commenting on the

borrowing of state statutes of limitations for civil rights actions brought under 42 U.S.C. § 1983, has commented, simply, that through enactment of the Civil Rights Act, "it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity." *Felder*, 487 U.S. at 140. Yet, that is precisely what Plaintiffs' position would mean under the circumstances of this case.

Here, then, Plaintiffs cannot escape the bar of the two-year statute of limitations by couching their allegations as a facial challenge to a VDOC policy. There is no question that these Plaintiffs had notice of the VODC policy and its implications more than two years before they filed this lawsuit. Rather than taking action to vindicate their alleged rights, Plaintiffs lay in wait, finally electing to file suit in 2019, with no recent executions behind them and none in sight.[1] By slumbering on their rights, Plaintiffs allowed the statute of limitations to elapse.

CONCLUSION

For these reasons, and those expressed in his original supporting memorandum, Defendant Clarke respectfully requests that this Court grant his motion to dismiss.

Respectfully submitted,

HAROLD CLARKE, Defendant.

By: /s/

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[1] Plaintiffs contend that there are three individuals in Virginia custody under a sentence of death. In truth, there are only two. Mark Lawlor's death sentence has been vacated and he is currently awaiting resentencing in state court. *See Lawlor v. Zook*, 909 F.3d 614 (2018). Anthony Juniper and Thomas Porter have habeas petitions still pending in the federal district courts, following remands from the Fourth Circuit. *See Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 2012 (2019); *Juniper v. Zook*, 876 F.3d 551 (4th Cir. 2017).

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CERFIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2019, I electronically filed the foregoing Reply in Further Support of Defendant's Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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