RECORD NO. 20-1769

In The
United States Court of Appeals
For The Fourth Circuit

**BH MEDIA GROUP, INC.,
d/b/a Richmond Times-Dispatch;
GUARDIAN NEWS & MEDIA, LLC;
THE ASSOCIATED PRESS; GANNETT CO., INC.,**

***Plaintiffs – Appellants*,**

v.

HAROLD W. CLARKE, in his official capacity as Director of the Virginia Department of Corrections,

***Defendant – Appellee*.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND**

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1769 Caption: BH Media Group, Inc., et al. v. Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

BH Media Group, Inc. d/b/a Richmond Times-Dispatch
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

BH Media Group, Inc.'s parent company is Berkshire Hathaway Credit Corporation, which is not a publicly traded company. Berkshire Hathaway Credit Corporation's parent company is Berkshire Hathaway, Inc., which is a publicly traded company.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

See above.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

See above.

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: Gordon M. Phillips Date: July 23, 2020

Counsel for: BH Media Group, Inc.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1769 Caption: BH Media Group, Inc., et al. v. Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gannett Co., Inc.
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
Vanguard, Inc. and Black Rock, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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Signature: Thomas Curley Date: 7/21/20

Counsel for: Gannett Co., Inc.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1769 Caption: BH Media Group, Inc., et al. v. Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

Guardian News & Media LLC
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Guardian News and Media LLC is the wholly owned subsidiary of Guardian News and Media Limited, a United Kingdom private limited company.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
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Signature: Cullen Phillips Date: July 23, 2020
In-house
Counsel for: GNM LLC

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No. 20-1769 Caption: BH Media Group, Inc., et al. v. Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

Associated Press
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Brian Barrett Date: July 23, 2020

Counsel for: The Associated Press

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JURISDICTIONAL STATEMENT

The District Court had federal question jurisdiction under Article III of the Constitution and 28 U.S.C. §§ 1331 and 1343(a)(3) and entered a judgment disposing of plaintiffs' claims on June 10, 2020. Plaintiffs filed a notice of appeal on July 9, 2020. Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This appeal presents a narrow but important question concerning the scope of the public's qualified First Amendment access right. A right of public access to certain proceedings and information is essential for democracy to function and for citizens to know whether their government is observing constitutional constraints. The Supreme Court has thus recognized an affirmative, enforceable, qualified right of public access under the First Amendment and articulated a "history and logic" test to identify where that right necessarily exists.

In this case, four news organizations asserted that government executions satisfy the test of history and logic and are therefore subject to the First Amendment access right, something that multiple courts have previously held. Specifically, the news organizations contend that the Virginia Department of Corrections ("VDOC") violated the access right by changing its execution protocol in 2017 to prevent witnesses from viewing the entirety of an execution. VDOC

made this change after public criticism of a prolonged lethal injection execution that required multiple efforts to insert the intravenous lines. Under the new protocol, VDOC does not bar witnesses from executions altogether but does prevent them from observing the initial, most difficult steps of an execution—preventing witnesses from knowing how long the initial procedures take, how many attempts are required, whether any mistakes are made, or how much pain is inflicted.

The district court dismissed the Complaint without ever assessing whether appellants plausibly alleged that executions satisfy the history and logic test. The district court first held that there is no general First Amendment access right, only a narrow right to attend certain criminal proceedings. It then held that courts can only use the history and logic test to assess the existence of a right of access to the prejudgment phase of criminal adjudications and dismissed the complaint because an execution is purportedly not such a proceeding.

This dismissal was based on a fundamental misreading of the controlling Supreme Court precedent—ignoring the Court's explanation of the First Amendment-based access right and the rationale for its existence. The district court's categorical limitation of the history and logic test to prejudgment criminal proceedings directly contradicts prior holdings by this Court and many other Courts of Appeals, none of which have accepted the extreme limitation on the

history and logic test imposed here. The order dismissing the Complaint should be reversed.

STATEMENT OF THE ISSUE

Did the District Court err in dismissing a civil action brought by four news organizations that asserted a qualified First Amendment right of public access to view executions in their entirety on the ground that the constitutional access right is categorically limited to prejudgment criminal adjudicatory proceedings?

STATEMENT OF THE CASE

On January 18, 2017, the Commonwealth of Virginia's Department of Corrections ("VDOC") executed Ricky Gray. Witnesses observed that the placement of the intravenous lines took 33 minutes—much longer than usual. JA 16, ¶ 39. After the difficulties at Mr. Gray's execution drew intense public scrutiny, VDOC changed its regulations to eliminate public access to the beginning of the execution process. JA 16-17, ¶¶ 40-41. VDOC's revised procedures require that a curtain in the execution chamber be closed *before* the condemned enters the execution chamber and remain closed until after the intravenous lines are in place. JA 13-17, ¶¶ 26, 41.

For executions conducted by lethal injection, the revised protocol requires that the curtain remain closed while VDOC staff members prepare the inmate for the administration of the lethal drugs, including the insertion of intravenous lines

into the inmate's body. JA 13, ¶ 27. Once the front curtain opens, the executioner administers the drugs from behind a second curtain at the back of the chamber, out of sight of witnesses. *Id.* This new protocol prevents witnesses from viewing how the inmate is strapped to the gurney, how the IV lines are placed, how many times execution personnel attempt to place IV lines, how long it takes execution personnel to place IV lines, and whether the inmate experiences visible pain during these procedures. JA 14, ¶ 28.

For executions by electrocution, the regulations require that the curtain be closed prior to the entry of the inmate and remain closed while VDOC staff members carry out three preliminary steps. JA 15, ¶ 35.[1] Two additional steps are completed once the curtain is opened: attachment of the electrodes, mask, and helmet to the inmate and commencement of the electric current. JA 15, ¶ 36. This protocol prevents witnesses from observing the initial condition of the inmate, from observing the inmate being strapped to the electric chair, and from monitoring the administration of the three unknown procedures redacted from VDOC's electrocution protocol. JA 16, ¶ 38.

Four news organizations, the publishers of the *Richmond Times-Dispatch*, the *News Leader* and Guardian US online, and The Associated Press, filed this

[1] The relevant sections of the public protocol are redacted to conceal what specifically occurs during these three steps. JA 15, ¶ 35.

civil action under 42 U.S.C. § 1983 against Harold W. Clarke, in his official capacity as Director of the Virginia Department of Corrections. The action advances a single constitutional claim: that the revised execution protocol adopted by VDOC violates the qualified First Amendment right of public access to the entirety of an execution.

The Complaint alleges that Virginia's revised execution protocol violates the qualified First Amendment access right because it denies witnesses' access to important portions of an execution in the absence of a countervailing, compelling state interest sufficient to limit that right. JA 8-21, ¶¶ 5, 56. It alleges that allowing witnesses to observe the entire execution process creates no substantial probability of harm to a transcendent governmental interest and that the revised protocol is not, in any event, narrowly tailored to address any such harm. JA 20-21, ¶¶ 51-54.

The Complaint identifies a First and Fourteenth Amendment-based qualified right of public access to executions based on the two-part test enunciated in the seminal decision *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). That decision mandates inquiry into two questions: (1) whether there is an established history of public access and (2) whether public access plays a significant positive role in the functioning of the activity in question. JA 18, ¶ 45. The Complaint contains factual averments plausibly establishing that the

constitutional access right extends to execution proceedings because this "history and logic" test is satisfied by: (1) a long-standing tradition of access to the entirety of an execution dating back to the founding of this country, JA 18-19, ¶¶ 46-49, and (2) the significant positive role that public and press access plays in promoting the proper functioning of executions. JA 20-21, ¶¶ 50-54.

The Complaint traces the long history of public access to executions across the United States, providing examples of executions to which the public routinely had access and describing the near universal access provided to public and press witnesses even after executions were moved inside prison walls. JA 18-19, ¶¶ 46-49. The Complaint further demonstrates how public access to executions—and the press coverage enabled by public access—serves to incentivize compliance with execution protocols, promote the effective functioning of execution proceedings, and enable the public to maintain oversight of the state's most consequential power. JA 11-20, ¶¶ 15-19, 51-53. Indeed, access to executions is essential for the public to know that the constitutional limitations imposed by the Eighth Amendment are not being abridged. JA 20, ¶ 52.

After showing that the qualified First Amendment access right applies to executions, appellants allege that VDOC's revised regulations limiting public

access to executions violate that constitutional right.[2] The Complaint seeks declaratory and injunctive relief invalidating VDOC's execution protocol insofar as it denies public access to the entirety of an execution.

On June 10, 2020, the United States District Court for the Eastern District of Virginia (Hon. Robert E. Payne) granted Clarke's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), holding as a matter of law that the First Amendment access right applies only to certain pre-judgment adjudicatory proceedings in a criminal prosecution. The district court, without applying the "history and logic" test, determined that, because an execution occurs post-judgment, it is categorically excluded from the operation of any First Amendment access right. JA 165-70.

The district court's conclusion rested, in part, on the Supreme Court's 1978 plurality opinion in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). In that case, the Court declined a television station's demand that its reporter should have greater access to a state prison than the general public. 438 U.S. at 3. The district court read *Houchins* as rejecting the existence of any First Amendment right of public access to government places or proceedings. JA 161 n.7. Having located this general rule in *Houchins*, the district court distinguished the Supreme Court's later

[2] VDOC promulgated a new execution manual on February 7, 2020, but the updated rules regarding public access to executions are substantively the same as in the 2017 Manual cited in the Complaint. JA 24-67.

holding in *Richmond Newspapers* that the First Amendment does indeed imply a right of public access and articulating the "history and logic" test to determine where this right exists. The district court observed that *Richmond Newspapers*, as well as subsequent Supreme Court opinions in *Press-Enterprise Co. v. Superior Ct. of Cal.,* 464 U.S. 501 (1984) ("*Press-Enterprise I*"), and *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), that applied the same history and logic test, "all . . . addressed access in the criminal adjudication process before judgment." JA 168. The district court thus inferred that Supreme Court precedent permits use of the "history and logic" test *only* to determine the presence of a public access right in prejudgment adjudicatory criminal proceedings. *Id*.

The Opinion cited no Court of Appeals authority adopting this limitation on the First Amendment access right, while recognizing that the Courts of Appeals in the Second, Third, and Ninth Circuits each "have applied the history and logic test to find a First Amendment right of access to a variety of government proceedings." JA 165. It also noted that the Ninth Circuit has specifically held, at least three times, that the constitutional access right applies to executions. JA 165-67. The district court dismissed all of this precedent as unpersuasive. Stating that this Court has never "applied the history and logic test outside the criminal

adjudication process," it concluded erroneously that the First Amendment does not apply outside criminal adjudicatory proceedings. JA 164.

The district court then rejected plaintiffs' showing that, even accepting *arguendo* a limitation of the access right to criminal proceedings, the history and logic test should nevertheless be applied to executions because they are judicially-authorized proceedings within the criminal justice system. *See* JA 168-70. Again relying on *Houchins*, the district court concluded that the Court's plurality opinion in that case "does not support the view that the Supreme Court would extend the public's First Amendment right of access to the penal portion of a criminal defendant's sentence." JA 170.

Because an execution does not occur at the prejudgment stage of a criminal proceeding, the district court dismissed plaintiffs' Complaint without addressing whether its factual allegations plausibly establish that executions satisfy the "history and logic" test. *See* JA 174-75. Plaintiffs appeal that decision and order.

SUMMARY OF ARGUMENT

The First Amendment access right is not categorically limited to prejudgment criminal proceedings as the district court erroneously held. In reaching its conclusion, the district court misconstrued the controlling Supreme Court precedent. It read *Houchins* to reject the existence of any First Amendment access right and interpreted *Richmond Newspapers* as creating a narrow exception

that recognizes a right of access only in certain prejudgment criminal proceedings. This gets it exactly backwards: *Houchins* did not broadly reject the existence of any First Amendment access right, and *Richmond Newspapers* unambiguously held that the First Amendment *does* convey a qualified right of public access to important governmental processes. While this constitutional access right is both limited in scope and qualified where it applies, *Richmond Newspapers* and a series of subsequent Supreme Court rulings identify a history of access and a demonstrated value of access to government functioning ("history and logic") as the standard to identify which government proceedings are subject to the access right.

The district court's limitation of the access right to prejudgment criminal proceedings is expressly disavowed in the Supreme Court's opinions and contradicts their rationale for recognizing the existence of the right. The First Amendment conveys an affirmative access right because public access to certain proceedings promotes their effective functioning and ensures that the government's work remains within constitutional boundaries. Nothing in the Court's opinions or their reasoning limits this First Amendment right to criminal proceedings, let alone prejudgment criminal proceedings.

The district court's categorical limitation of the access right to criminal proceedings contradicts circuit precedent; this Court has found the First

Amendment access right to attach to a variety of civil proceedings and records. Every other Court of Appeals to have addressed the issue has reached the same conclusion. Indeed, other Courts of Appeals have used the history and logic test routinely over the past forty years to determine whether a First Amendment access right applies to a variety of proceedings, including non-judicial proceedings. No other court has adopted the district court's holding that the history and logic test is to be applied only to decide which prejudgment criminal proceedings are subject to the access right.

Even if the history and logic test applied only in criminal proceedings, there is no basis in the prior rulings of the Supreme Court or this Court to limit its application to prejudgment proceedings. Indeed, the access right has been found to exist in post-judgment proceedings on motions to vacate a judgment or to set aside a sentence. Like suppression hearings, plea hearings, sentencing hearings, and many other proceedings, an execution is an integral part of a capital prosecution, conducted with judicial authority and oversight. An execution can proceed only upon judicial command, and a report of the execution must be returned to the court. There is no reason to exclude executions categorically from analysis under the history and logic test to determine whether a qualified First Amendment right of public access applies to them.

STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed *de novo*. *Trejo v. Ryman Hospitality Properties, Inc.*, 795 F.3d 442, 445-46 (4th Cir. 2014).

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE FIRST AMENDMENT RIGHT OF ACCESS IS CATEGORICALLY LIMITED TO PREJUDGMENT CRIMINAL PROCEEDINGS

A. The District Court Fundamentally Misapprehended The Supreme Court Precedent Upon Which It Relied

The district court's dismissal order is based upon a misreading of the controlling Supreme Court precedent. The district court read *Houchins* broadly to hold that there is "no constitutional right to have access to particular government information, or to require openness from the bureaucracy." JA 161 n.7 (quoting *Houchins*, 438 U.S. at 14 (plurality opinion)). The district court then read *Richmond Newspapers* and its progeny as creating a narrow exception to this rule applicable only to criminal prosecutions and as articulating the history and logic test solely to determine which criminal adjudicatory proceedings are subject to the First Amendment access right. This fundamentally misstates the governing law.

1. *Houchins* does not state a broad rule rejecting the existence of any First Amendment access right.

The district court mistakenly construed *Houchins* as flatly rejecting the existence of a First Amendment access right, but its holding is far narrower. In *Houchins*, a television station was denied permission to inspect and photograph a particular area of a county jail in which an inmate had committed suicide, allegedly due to harsh conditions in the jail. 438 U.S. at 3-4. In a 4-3 ruling, a plurality of the Court refused to grant the press special access rights that went beyond the access afforded to the public and found that limiting public access did not implicate the First Amendment because there were several other ways to learn about conditions in the jail. 438 U.S. at 12-13. *Houchins* did not broadly reject the existence of any First Amendment access right as the district court believed.

As a threshold matter, the language in *Houchins* suggesting that the First Amendment does not generally create an affirmative right of access to government information has never commanded a majority on the Court. As Justice Stevens noted just two years later in *Richmond Newspapers*, a majority in *Houchins* "neither accepted nor rejected" the proposition that arbitrarily restricting public access to information can violate the First Amendment. *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring). A majority in *Richmond Newspapers*, on the other hand, "unequivocally [held] that an arbitrary interference with access to

important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.*

The plurality opinion in *Houchins* primarily follows the rationale of *Pell v. Procunier*, 417 U.S. 817 (1974), and holds that "the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally"—an issue not presented in this case. *Houchins*, 438 U.S. at 16. The *Houchins* plurality then rejects an "unrestrained right" of the public generally "to enter [penal] institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes." *Id.* at 9 (internal quotation marks omitted); *id.* at 12. The plurality was concerned that if a First Amendment right of access were recognized, it would be difficult to define where the right exists and what standards govern its application. *See id.* at 14. It declined to take up those difficult definitional issues because there were sufficient alternative means for the public to learn enough about conditions inside the prison to exercise meaningful democratic oversight. *See id.* at 6, 15.

As Justice Brennan noted in his *Richmond Newspapers* concurrence, *Houchins* did not broadly reject the existence of any First Amendment access right 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." 448 U.S. at 586 (Brennan,

J., concurring). Just two years later, in its landmark *Richmond Newspapers* ruling, the Supreme Court held that there is indeed an affirmative, enforceable First Amendment access right and answered the definitional issues it declined to answer in *Houchins*. But the district court misconstrued this controlling precedent as well.

2. *Richmond Newspapers* recognized a First Amendment access right and adopted the "history and logic" test to define where it exists.

In *Richmond Newspapers*, the Court squarely held that the First Amendment conveys a right of public access to certain governmental processes, reasoning that without a right of access, the First Amendment's explicit guarantees of free speech and freedom of the press would be hollow. *See* 448 U.S. at 580. The Court found the right of access implicit in the guarantees of free speech and free press that are expressly protected by the First Amendment, just as the right of association, right of privacy, right to travel, and right to be presumed innocent are implicit in other provisions of the Bill of Rights. *Id.* at 577. The *Richmond Newspapers* case involved access to a criminal trial that the Commonwealth of Virginia had conducted in secret, under a statute that gave the judge discretion to do so. This secrecy was impermissible, Chief Justice Burger explained, because "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id.* at 576-77.

In deciding the constitutional issue it had sidestepped in *Houchins,* the *Richmond Newspapers* decision was a "watershed" moment for the Court. *Id.* at 582 (Stevens, J., concurring). Justice Stevens wrote separately to underscore the significance of the holding: While the Court "never before" had "held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever," *Richmond Newspapers* "unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 582-83.

The *Richmond Newspapers* Court recognized that the constitutional access right is limited in scope and, even where it exists, not absolute. The Court identified (1) a history of access and (2) a demonstrated value of access to government functioning as the two measures to be used when determining which government proceedings are subject to the qualified First Amendment access right. The Court reasoned that a criminal trial courtroom "is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." *Id.* at 578.

In three subsequent cases taken up and decided in short order, the Court repeatedly reaffirmed that courts should use "history and logic" to identify where the access right exists. It also articulated strict standards that must be satisfied to

overcome or limit the access right, requiring a serious threat to a compelling governmental interest, a lack of alternative measures to protect that interest, and narrow tailoring. *See Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606-07 (1982) (holding that a Massachusetts statute categorically excluding the public from testimony of minor victims of sexual assault violated the First Amendment access right, which can only be overcome "by a compelling governmental interest" through steps "narrowly tailored to serve that interest"); *Press-Enter. I*, 464 U.S. at 509 (holding that the First Amendment right of access applies to jury *voir dire* and can only be overcome "for cause shown that outweighs the value of openness"); *Press-Enter. II*, 478 U.S. at 13-14 (holding that the First Amendment right of access applies to "preliminary hearings in California" and can only be overcome by "specific, on the record findings . . . that closure is essential to preserve higher values and is narrowly tailored to serve that interest") (citation and internal quotation marks omitted).

The district court misread the *Richmond Newspapers* line of precedent, concluding that the Court had cabined the constitutional right of access to certain prejudgment proceedings in criminal prosecutions and had articulated the history and logic test simply to identify which criminal proceedings are subject to the right. The district court started from the premise that "the First Amendment's

protection of freedom of the press has traditionally focused on the right of the press to publish information without government restraint, rather than on the acquisition of the information in the first place." JA 161. This misses entirely that *Richmond Newspapers* quite consciously deviated from this "traditional focus" in recognizing an affirmative right of access that applies equally to the press and public.

The district court then proceeded to frame the *Richmond Newspapers* line of cases as limited to simply providing "principles for determining whether there is public, and hence media, access to proceedings in criminal cases." JA 162. But nothing in the Supreme Court's multiple opinions defining the scope of the access right or the rationale for its existence limits the right to criminal proceedings. The district court's adoption of a categorical limitation of the access right to prejudgment adjudicatory criminal proceedings has never been accepted by this Court, or *any* Court of Appeals, and it cannot be squared with the Supreme Court decisions themselves.

a. *The Supreme Court's descriptions of the access right disavow the district court's limitation of the right to criminal proceedings*.

To read the Supreme Court's opinions in the *Richmond Newspapers* line of cases as recognizing a right of access limited only to criminal proceedings defies the direction they expressly provide. In finding a public access right conveyed by

the First Amendment,[3] the Court plainly understood the right to reach beyond the criminal adjudication process. The Court stated that there is a First Amendment right to receive information "[i]n a variety of contexts" and followed with an analysis of "[w]hat this means in the context of trials." *Richmond Newspapers*, 448 U.S. at 576 (internal quotation marks omitted). While first defining the access right in the context of a state criminal trial, the *Richmond Newspapers* Court made clear that the newly-defined access right is not limited to criminal proceedings generally, or even to judicial proceedings. As Justice Stevens observed, "the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, *including* the Judicial Branch." *Id.* at 584 (Stevens, J., concurring) (emphasis added); *see also Press-Enter. I*, 464 U.S. at 517 (Stevens, J., concurring) (observing that the underpinning of the access right "is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader").

In *Richmond Newspapers*, the Court even went out of its way to disavow the limiting construction of the access right adopted here by the district court—that it

[3] The Court just one year earlier in *Gannett Co. v. DePasquale*, 443 U.S. 368, 391-92 (1979) declined the opportunity to root the access right in the Sixth Amendment, deriving it instead from express First Amendment guarantees applicable to all branches of government. "[T]he First Amendment, unlike the Sixth, does not distinguish between criminal and civil proceedings; nor does it distinguish among branches of government." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012).

applies only in criminal proceedings. Chief Justice Burger noted that a right to attend civil trials was "a question not raised by this case," but he pointedly observed that "historically both civil and criminal trials have been presumptively open." 448 U.S. at 580 n.17 (1980); *see also id.* at 599 (Stewart, J., concurring) (underscoring that the constitutional right extends to trials, "civil as well as criminal").

The "history and logic" approach adopted by the Supreme Court considers whether a *type* of government proceeding has "historically been open to the press and general public" and whether "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. II*, 478 U.S. at 8. The Court consistently used expansive language in describing where this two-prong test is to be used. In *Globe Newspaper*, for example, the Court stated that the test applies to "governmental affairs," 457 U.S. at 604, and "government as a whole." *Id.* at 606. In *Press Enterprise II*, the Court again made clear that the history and logic test applies generally to identify which governmental operations are subject to the access right, cautioning that, "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." 478 U.S. at 8-9. But if a governmental process can pass the

tests of history and logic, the Court explained, "a qualified First Amendment right of public access attaches." *Id.* at 9.

The Court did not apply the history and logic test *because* the particular case before it involved a criminal proceeding; rather, it found a right of access to the proceedings at issue in each case because they met the generally applicable history and logic test. *See Richmond Newspapers,* 448 U.S. at 573 (holding that the right of access applies to a criminal trial based on the "unbroken, uncontradicted history" of public access "supported by reasons as valid today as in centuries past"); *Globe Newspaper,* 457 U.S. at 605-06 (overturning a state law categorically prohibiting access to juvenile testimony in a sex crimes trial because "the criminal trial historically has been open to the press and general public" and "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole"); *Press Enter. I*, 464 U.S. at 508 (holding that the right of access applies to jury *voir dire* based on a review of Anglo-American judicial history and the fact that openness "plays as important a role in the administration of justice"); *Press Enter. II*, 478 U.S. at 10 (holding that the right of access applies to preliminary hearings as conducted in California because "there has been a tradition of accessibility" to that type of preliminary hearing and public access to such hearings is "essential to the proper functioning of the proceedings in the overall criminal justice process"). The district court's

conclusion that the history and logic test applies only in adjudicatory criminal proceedings has no basis in the language of the controlling Supreme Court precedent.

b. *The rationale of the Supreme Court's holdings equally contradicts the district court's limitation of the right to criminal prosecutions*.

The district court's limitation of the First Amendment access right to criminal prosecutions equally ignores the Supreme Court's reasoning in recognizing the existence of the right. In fact, limiting the access right to criminal proceedings misses the point of the Court's First Amendment analysis altogether.

The Supreme Court located the access right in the First Amendment precisely because public knowledge of, and discussion about, government conduct helps ensure that governmental proceedings work properly and remain within legal, constitutional boundaries. As Justice Brennan emphasized in *Richmond Newspapers*, the First Amendment conveys a right of access because "our republican system of self-government" requires not only that public debate be "uninhibited, robust, and wide-open" but also that public debate "be informed." 448 U.S. at 587 (Brennan, J., concurring) (citation and internal quotation marks omitted). Stated differently, the access right exists because the First Amendment "has a *structural* role to play in securing and fostering our republican system of self-government." *Id.* The "process of communication necessary for a democracy to survive" requires public access to information that informs debate and makes

that debate meaningful. *Id.* at 588; *see also* Beth Hornbuckle Fleming, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 EMORY L.J. 619, 634-35 (1983).

Chief Justice Burger articulated this same rationale for the access right in *Richmond Newspapers*, noting that the First Amendment's "common core purpose" is "assuring freedom of communication on matters relating to the functioning of government." 448 U.S. at 575. In effectuating that purpose, the Chief Justice explained, "the First Amendment does not speak equivocally," *id.* at 576, and the First Amendment access right is crucial because "[p]eople 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." *Id.* at 572.

The Court forcefully restated this rationale for the access right in *Globe Newspaper*, which underscored that the First Amendment right of access exists because "a major purpose of that Amendment was to protect the free discussion of governmental affairs," and the right "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." 457 U.S. at 604 (citation and internal quotation marks omitted); *see also Press-Enter. I*, 464 U.S. at 517 (Stevens, J., concurring) (the right of access furthers the "core purpose" of assuring free communication about the functioning of government). This Court too has recognized "the value of

'openness' itself," in providing "assurance that established procedures are being followed and that deviations will become known." *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (quoting *Press-Enter. I*, 464 U.S. at 508); *see also ACLU v. Holder*, 673 F.3d 245, 258, 263 (4th Cir. 2011) (noting that "opacity inflicts causalities in the darkened corners of our government, deteriorating the quality of our democracy subtly but surely") (Gregory, J., dissenting).

The "history and logic" test advances this core purpose of the First Amendment by recognizing the existence of a public access right where a type of governmental proceeding or record has "historically been open to the press and general public," and "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. II*, 478 U.S. at 8. The protections of the First Amendment do not stop at the courthouse door, and the district court's limitation of the access right to prejudgment adjudicatory criminal proceedings is plainly incorrect as a matter of law.

B. The District Court's Categorical Limitation of the First Amendment Access Right to Prejudgment Criminal Proceedings Has Been Repeatedly Rejected by this Court and Not Adopted by Any Circuit

This Court has repeatedly applied the First Amendment access right outside the context of criminal prosecutions, as have many other Courts of Appeals. No Court of Appeals has held that the right is limited to prejudgment adjudicatory criminal proceedings as the district court held here.

1. This Court has repeatedly extended the First Amendment access right to proceedings other than criminal adjudications.

The district court's categorical limitation of the access right disregards and contradicts prior rulings by this Court holding that the First Amendment right of access applies outside of a criminal proceeding. More than three decades ago, in *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988), this Court found a First Amendment right of access to documents filed in connection with a summary judgment motion in a *civil* case. Soon after, this Court held that medical review committee records should not have been sealed from public inspection in a federal civil rights suit, in part because the medical school "declined to set forth any interest . . . compelling or otherwise, against which [F]irst [A]mendment interests" could be balanced. *Stone v. University of Maryland Medical System Corp.*, 948 F.2d 128, 131 (4th Cir. 1991).

In *Virginia Department of State Police v. Washington Post*, this Court applied its holding in *Rushford* and reiterated that "the more rigorous First Amendment standard should . . . apply to documents filed in connection with a summary judgment motion in a civil case." 386 F.3d 567, 578 (4th Cir. 2004) (citation and internal quotation marks omitted). In the same case, this Court recognized that "proceedings in civil cases are traditionally open . . . and 'in some civil cases the public interest in access . . . may be as strong as, or stronger than, in most criminal cases.'" *Id.* at 580 (quoting *Gannett Co. v. DePasquale*, 443 U.S. at

386 n.15 (1979)). As this Court noted in *Doe v. Public Citizen*, "[i]t is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings." 749 F.3d 246, 265 (4th Cir. 2014). *See also ACLU v. Holder*, 673 F.3d at 252 (applying the First Amendment access right to a *qui tam* complaint and docket sheet in a civil action but finding sufficient compelling reasons to overcome the right).[4]

Consistent with these rulings, since *Richmond Newspapers* the district courts within this Circuit have routinely applied the First Amendment right of access to proceedings and records in civil lawsuits. *See, e.g.*, *Courthouse News Serv. v. Schaefer*, No. 2:18-cv-391, 2020 WL 863516, at *22 (E.D. Va. Feb. 21, 2020) (appeal pending) (finding that the First Amendment "guarantees a qualified right to access newly-filed civil complaints contemporaneously with their filing"); *Jones v. Lowe's Companies, Inc.*, 402 F. Supp. 3d 266, 277-78 (W.D.N.C. 2019) (appeal pending) (applying the First Amendment right of access to summary judgment deposition testimony filed under seal); *Companion Prop. & Cas. Ins. Co. v. Wood*,

[4] Just last year, this Court found a First Amendment right of public access to Maryland's list of registered voters without using the history and logic test and indicated that the history and logic test applies only in a criminal proceeding. *Fusaro v. Cogan*, 930 F.3d 241, 249-50 (4th Cir. 2019). *Fusaro*'s narrow view of the history and logic test is contradicted by this Court's prior precedent and is not binding here. *See, e.g.*, *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (when there are conflicts between panel opinions, "the earlier of the conflicting opinions" must be followed); *United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015) (same).

No. 3:14-CV-03719-CMC, 2017 WL 279767, at *2 (D.S.C. Jan. 23, 2017) (same for summary judgment motion papers); *Bayer Cropscience Inc. v. Syngenta Crop Prot., LLC*, 979 F. Supp. 2d 653, 656 (M.D.N.C. 2013) (same for motions seeking injunctive relief); *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07-cv-275-D, 2011 WL 901958, at *1 (E.D.N.C. Mar. 15, 2011) (same for motions seeking dispositive relief); *Level 3 Commc'ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 589 (E.D. Va. 2009) (same for evidence at a civil trial).

The district court's holding that the access right can apply only in prejudgment criminal proceedings is singularly at odds with this contrary precedent and is plainly incorrect.

2. Other Courts of Appeals routinely use the history and logic test beyond criminal proceedings to determine if the public access right applies.

Other Courts of Appeals have equally rejected any narrow limitation of the constitutional access right to criminal proceedings. Every Circuit to have specifically decided whether the First Amendment access right applies in civil litigation has reached the same conclusion as this Court—that it plainly does. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984) (holding that the First Amendment right of access applies to civil proceedings); *Westmoreland v. CBS*, 752 F.2d 16, 22-23 (2d Cir. 1984) (same); *In re Cont'l Ill.*

Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (same); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983) (same).[5]

Other Courts of Appeals have also used the history and logic test repeatedly to decide whether a First Amendment access right applies to government proceedings not only beyond criminal prosecutions but also entirely outside the judiciary. For example, the Third and Sixth Circuits agreed that the history and logic test was the proper test for determining whether the public's First Amendment right of access applied to administrative deportation proceedings, though they reached different conclusions in applying that test. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694 (6th Cir. 2002) (finding the history and logic test to be generally applicable and using it to find a First Amendment right of access to deportation proceedings); *N. Jersey Media Grp. v. Ashcroft*, 308 F.3d

[5] The District of Columbia Court of Appeals described the access right as limited to criminal prosecutions in *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003). At issue in *Center for National Security Studies* were the names of individuals being held for immigration violations in the aftermath of the 9-11 attacks, names that were being sought primarily under the Freedom of Information Act (FOIA). The court first held that the names were exempt from disclosure under FOIA because they constituted "investigatory information" related to terrorism prevention for which there were compelling reasons for secrecy. *Id.* at 934. The court then rejected the suggestion of a constitutional right to the names, noting that the Supreme Court had yet to apply the access right outside a criminal proceeding and observing that, as in *Houchins*, plaintiffs had ample alternative means for obtaining the names of those being held. *Id.* at 935-36. Even if this Court's precedent suggested that the access right *was* so limited, plaintiffs in the present case have no alternative means for observing execution proceedings.

198, 208-09 (3d Cir. 2002) (recognizing that the history and logic test is "broadly applicable to issues of access to government proceedings" and using it to conclude that there is no First Amendment right of access to "special interest" deportation proceedings).

The Second Circuit similarly applied the history and logic test in finding a First Amendment right of access to administrative proceedings conducted by the Transit Adjudication Bureau of the New York City Transit Authority. *N.Y. Civil Liberties Union v. N.Y.C Transit Auth.*, 684 F.3d 286, 297 (2d Cir. 2012). And the Ninth Circuit held that the history and logic test must be applied to assess a photojournalist's claim of a First Amendment right to observe a "horse roundup" conducted by the Bureau of Land Management. *See Leigh v. Salazar*, 677 F.3d 892, 898-900 (9th Cir. 2012) (noting the "common understanding" that the history and logic test "is not limited to criminal judicial proceedings").

Other courts have applied the history and logic test specifically to determine if there is a First Amendment right to witness the entirety of an execution—the very access right alleged in the Complaint here. The Ninth Circuit has repeatedly held that the First Amendment access right extends to executions. Most recently, in *First Amendment Coal. of Arizona, Inc. v. Ryan*, it held that the public and the press have a constitutional right to hear the entire execution process. 938 F.3d 1069 (9th Cir. 2019). Applying the history and logic test, the court ruled that a

long tradition of public access to executions included the ability to hear the execution's sounds, and that allowing such listening enables witnesses to better understand and report what has occurred. *Id.* at 1075-76; *see also Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (reversing denial of a preliminary injunction and requiring Idaho to allow witnesses to observe the entire execution process); *California First Amendment Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002) (applying the "history and logic" test and finding "a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those 'initial procedures' that are inextricably intertwined with the process"); *Guardian News & Media LLC v. Ryan*, 225 F. Supp. 3d 859, 879 (D. Ariz. 2016) (finding First Amendment right to witness the entirety of an execution); *Phil. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 370-71 (M.D. Pa. 2012) (same).

The district court rejected all of this relevant authority—authority directly affirming that the history and logic test is properly applied to determine the existence of a right of public access to the entirety of an execution. In its view, *Houchins* upheld "limits on access to penal institutions, even when serious issues relating to inmate welfare existed" and thus does not suggest "that the Supreme Court would extend the public's First Amendment right of access to the penal portion of a criminal defendant's sentence." JA 170. This, again, misapplies

Houchins. The plurality decision in that case rejected a claimed right to inspect and photograph a prison facility because (1) the public had historically obtained sufficient information about the conditions of prisons through other means and (2) physical intrusion into the prison itself raises a number of penological concerns. *See Houchins*, 438 U.S. at 12-15. To whatever extent *Houchins* could properly be cited as finding no significant history of direct public access to prison facilities for the purpose of photojournalism, it says nothing about the history of direct public access to execution proceedings, whether conducted inside the walls of a prison or elsewhere. Moreover, *Houchins*' concern with "physical intrusion into the prison" is entirely absent—the issue here is not whether witnesses should be allowed inside the prison to view the execution at all but whether witnesses *already* inside should be allowed to view the execution in its entirety.

The sparse out-of-circuit district court authority relied upon below is neither controlling nor persuasive. In both *Oklahoma Observer v. Patton,* 73 F. Supp. 3d 1318, 1325 (W.D. Okla. 2014) and *Arkansas Times v. Norris*, No. 5:07CV00195 SWW, 2008 WL 110853, at *4 (E.D. Ark. Jan. 7, 2008), the district courts actually *applied* the history and logic test, notwithstanding grumblings that such analysis should be unnecessary. Neither case supports the district court's refusal to even entertain the extensive factual allegations made below that the history and logic test is satisfied.

The district court's conclusion that the First Amendment right of access applies only to prejudgment adjudicatory criminal proceedings has repeatedly been rejected by this Court and other Courts of Appeals. It is a plain misreading of the law and, for this reason, the order of dismissal should be reversed and remanded.

II.

EVEN IF THE HISTORY AND LOGIC TEST APPLIES ONLY IN CRIMINAL PROCEEDINGS, THE DISTRICT COURT ERRED IN FINDING THAT AN EXECUTION IS NOT A CRIMINAL PROCEEDING

In a decision not cited by the district court, this Court last year indicated that the history and logic test applies only in a criminal proceeding and applied a different analysis to find a First Amendment right of public access to certain voting records. *Fusaro v. Cogan*, 930 F.3d 241, 249-50. But even if the history and logic test applied only to criminal proceedings,[6] the district court's dismissal should be reversed because executions in Virginia are judicially ordered criminal proceedings.

The district court's restriction of the history and logic test to the "criminal adjudication process" appears to derive from *Oklahoma Observer v. Patton*, 73 F. Supp. 3d at 1324. In that out-of-circuit case, a district court deduced that the history and logic test is limited to criminal proceedings occurring before entry of

[6] As discussed above, *Fusaro*'s narrow view of the history and logic test is contradicted by this Court's prior precedent and thus not binding here. *See supra* at 26 n.4.

judgement. It reached that conclusion because the Supreme Court in *Press Enterprise II* described the type of preliminary hearing at issue as "often the 'final step' in criminal proceedings." *Id.* (citing *Press Enter. II*, 478 U.S. at 12). The deduction is entirely illogical. The Supreme Court used the history and logic test to find a right of access to a preliminary hearing in a criminal proceeding in *Press Enterprise II* and noted that such hearings are "often the final and most important step in the criminal proceeding" and "in many cases provide[] the sole occasion for public observation of the criminal justice system." *Press Enter. II*, 478 U.S. at 12 (internal quotation marks omitted). But its use of the history and logic test to find a right of access to an adjudicatory proceeding says nothing at all to negate its use to determine the existence of an access right in other types of criminal proceedings.

To the contrary, in applying the history and logic test to "criminal proceedings," neither the Supreme Court nor this Court has described the test as applying narrowly to the "criminal adjudication process." *See id.* (applying the history and logic test to proceedings important to the proper functioning of the "overall criminal justice process"); *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) (finding the test applicable to plea hearings and sentencing hearings because they are "integral part[s] of a criminal prosecution").

Indeed, in first adopting the history and logic test, the Supreme Court spoke in broad terms about the importance of openness in the criminal justice system

generally, noting that "especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Richmond Newspapers*, 448 U.S. at 571. Six years later, in *Press-Enterprise II*, the Supreme Court affirmed the test's application to a wide variety of "criminal proceedings." 478 U.S. at 8-10. This Court has applied the test in proceedings occurring in lieu of trial (plea hearings) and in post-trial proceedings (sentencing hearings) because both are "an integral part of a criminal prosecution," not because the proceedings are adjudicatory in nature. *In re Washington Post*, 807 F.2d at 389.

Nor has this Court or the Supreme Court ever identified the entry of a judgment as a limiting factor (or even a relevant one) in defining the reach of the history and logic test. Other courts have repeatedly found that a right of access attaches to various post-judgment proceedings in a criminal case, and this Court has never held to the contrary. *See, e.g.*, *United States v. Ignasiak*, 667 F.3d 1217, 1237-39 (11th Cir. 2012) (finding a First Amendment right of access to the government's post-conviction pleading revealing impeachment information about its key witness); *CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of California*, 765 F.2d 823, 825 (9th Cir. 1985) (finding a First Amendment right of access to a motion to reduce a defendant's sentence because there is "no principled basis for affording greater confidentiality to post-trial documents and proceedings than is

given to pretrial matters"); *United States v. Milken*, 780 F. Supp. 123 (S.D.N.Y. 1991) (same).

This Court has readily applied the test to judicially-authorized proceedings and documents that play an important role in the criminal justice process. In *Baltimore Sun Co. v. Goetz*, for example, this Court applied the history and logic test in determining whether affidavits for search warrants were subject to the First Amendment access right. 886 F.2d 60, 64 (4th Cir. 1989). This Court's analysis did not ask in which "phase" of a criminal prosecution such documents were generated but instead looked holistically to the importance of these affidavits in criminal prosecutions and at the existence of judicial involvement in the process. *Id*. at 63-64. The Court explicitly rejected the government's argument that an affidavit for a search warrant cannot be a judicial record because "it is ancillary to the *investigation* of one suspected of crime and not to the criminal trial itself," noting that "the distinction between trials and other official proceedings is not necessarily dispositive, or even important in evaluating the First Amendment issues." *Id.* at 63 (emphasis added) (quoting *Press-Enter. I*, 464 U.S. at 516 (Stevens, J., concurring)).

Like probable-cause hearings, suppression hearings, bail hearings, plea hearings, and sentencing hearings that are all subject to the First Amendment right of access, *In re Washington Post*, 807 F.2d at 389, execution proceedings are an

integral part of a capital prosecution and are judicially ordered. An execution is the culmination of the exercise of prosecutorial power against the criminal defendant, and the same values of "open justice" that undergird the application of the history and logic test to criminal trials and other preliminary criminal proceedings apply just as forcefully at the end stage of a capital criminal case. *See Richmond Newspapers*, 448 U.S. at 590 (Brennan, J., concurring).

Although Virginia's executions do not occur within the four walls of a courtroom, executions are carried out only after "[t]he Circuit Court of jurisdiction" issues an Execution Order "pronounc[ing] the sentence of death" and after this Order is read at the proceeding. JA 25, 33; Va. Code Ann. § 53.1-234 ("The clerk of the circuit court in which is pronounced the sentence of death against any person shall . . . deliver a certified copy thereof to the Director."). Judicial oversight occurs after each execution as well. By statute, the Director of the Department of Corrections "shall certify the fact of the execution . . . to the clerk of the court by which such sentence was pronounced. The clerk shall file the certificate with the papers of the case and shall enter the same upon the records of the case." Va. Code Ann. § 53.1-235.

In short, executions are judicially ordered and judicially supervised criminal proceedings. As such, access to them is properly subject to analysis under the history and logic test, even under the most limited interpretation of the test's

applicability. Just as the public would be left to question whether due process was followed and a fair trial provided if access to parts of a criminal trial could be denied without cause, the public cannot not determine whether proper procedures are followed and ensure that no cruel and unusual punishment is inflicted during executions conducted partially in secret. At the very minimum, plaintiffs are entitled to make their case that the history and logic test is satisfied and a qualified right to witness an execution does exist. The district court erred as a matter of law in finding that no right exists without even applying the controlling test.

CONCLUSION

For each and all of the foregoing reasons, this Court should reverse the district court order dismissing the complaint and remand with instructions that the history and logic test properly applies to plaintiffs' claim of a right of public access to the entirety of an execution.

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Respectfully submitted,

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[7] This brief has been prepared in part by Yale Law School students Anna Kaul, Sarah Lamsifer, Sara Sampoli, and Jacob Schriner-Briggs, and by a clinic at Yale Law School, but does not purport to represent the school's institutional views, if any.

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Dated: September 1, 2020

/s/ Craig T. Merritt
Counsel for Appellants

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I hereby certify that on this 1st day of September, 2020, I caused this Brief of Appellant sand Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel of record as registered CM/ECF users.

/s/ Craig T. Merritt
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