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**

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PRELIMINARY STATEMENT

The Supreme Court's "history and logic" test is the standard for determining whether a type of government proceeding is subject to the qualified First Amendment right of public access. *See* Brief for Appellants (Appellants' Br.) at 15–24. Under the Rule 12(b)(6) standard that governs assessment of a complaint, the plaintiff-appellant news organizations ("Plaintiffs") have manifestly alleged facts that, if proven, satisfy the history and logic test. Their complaint alleges both an unbroken history of public access to executions and multiple ways this access supports the proper functioning of an execution proceeding and the criminal justice system.

When the Virginia Department of Corrections ("VDOC") carries out the sentence in a capital case, it exercises a state's most consequential power. The complaint challenges VDOC's current execution regulation because it selectively closes off a key part of an otherwise public execution, infringing the public access right. At no point has VDOC ever suggested how its departure from historical practice serves a compelling interest.

Instead, VDOC's strategy is to avoid application of the "history and logic" test at all costs. The district court accepted VDOC's arguments and dismissed Plaintiffs' complaint for failure to state a claim. The arguments were incorrect as a matter of law and compel reversal and a remand for further proceedings.

VDOC argues that the history and logic test is confined to "criminal adjudications." That argument ignores the language and the rationale of the seminal *Richmond Newspapers* case; it also ignores extensive contrary precedent in the federal circuits, including this one. VDOC argues that this constriction of the right of public access to government proceedings is appropriate because the right is a corollary to the Sixth Amendment speedy trial right. That argument disregards that the Supreme Court expressly rejected a right of public access under the Sixth Amendment one year before it recognized a right of public access under the First Amendment. While Sixth Amendment rights are often cabined to criminal trials, First Amendment rights are not.

VDOC deploys this Court's recent *Fusaro* decision in an effort to rewrite the Supreme Court's opinion in *Richmond Newspapers*. Its argument is a dubious and overly literal reading of *obiter dictum* that would not only abandon the rationale of *Richmond Newspapers* but overrule a longstanding line of decisions in this circuit.

Controlling precedent establishes that this civil action, as a facial challenge to a Virginia regulation under the First Amendment, is not time-barred. The district court's rationale in dismissing this case is contrary to law and there is no alternative ground on which to affirm.

ARGUMENT

I.
THE COMPLAINT STATES A CLAIM UNDER THE TWO-PART *RICHMOND NEWSPAPERS* TEST

A. Dismissal Under Rule 12(b)(6) Is Reviewed *De Novo*

An appeal from a Rule 12(b)(6) dismissal is reviewed *de novo* and all factual allegations in the complaint must for now be "accept[ed] . . . as true . . . drawing reasonable inferences in the plaintiff's favor." *Summers v. Altarum Inst. Corp.*, 740 F.3d 325, 328 (4th Cir. 2014) (internal citation omitted). VDOC does not argue that Plaintiffs' factual averments, if proven, would fail to establish a history of public access to executions. Nor could it. The complaint surveys the long history of public executions from the founding of this country to the present day, including such allegations as:

- Hangings were historically conducted using scaffolds constructed to accommodate large crowds, and the witnesses of hangings often numbered in the thousands. Joint App. (JA) at 19, ¶ 47.
- Three to four thousand individuals witnessed the hanging of George Robinson in Virginia in 1902. *Id.*
- The time and route of pre-hanging processions were public knowledge, and the condemned could expect to see large crowds along the route to the gallows. Once there, the condemned typically delivered a speech before the culmination of an execution that was public, outdoors, and conspicuous. JA 19, ¶ 48.
- Even as executions were moved into jails, witnesses remained present, including at the nation's first execution by lethal gas, which followed in the tradition of openness that attends to executions from their start to their conclusion. JA 19, ¶ 49.

The complaint also specifies the value, or "logic," of public access to the functioning of the execution process. For example:

- Execution witnesses are able to ensure that execution teams' and state officials' actions comport with a state's execution protocol. JA 20, ¶ 51.
- Public access to the entirety of an execution ensures that the public learns whether an execution runs afoul of the Eighth Amendment. JA 20, ¶ 52.
- Public access to the full execution process enables meaningful democratic oversight by ensuring that a state's conduct comports with its constituents' evolving standards of decency and efficacy. JA 20–21, ¶ 53.

The complaint's extensive factual allegations more than suffice to plausibly demonstrate that the history and logic test is satisfied when applied to execution access, which is all that Rule 12 requires. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008). Once the history and logic test is satisfied, the First Amendment access right attaches, and the burden shifts to VDOC to demonstrate that its limitation on access is both necessary to protect a compelling interest and narrowly tailored. *See* Appellants' Br. 16–17.

B. This Court Need Not Address VDOC's Premature Attempt to Litigate the Merits of Plaintiffs' Claims

While denying that the history and logic test applies, VDOC nonetheless invites the Court to reach the merits of Plaintiffs' access claim and dismiss this

action under that very test. Brief of Appellee (VDOC Br.) at 38–47. The district court did not adjudicate the merits of the two-part test, holding as a matter of law that the test did not apply at all.

VDOC asks this Court to take judicial notice of the "historical, legislative underpinnings of Virginia's execution process," VDOC Br. 39 n.14, contending that the language in some historic statutes is sufficient to defeat any possible finding of a history of access to executions, *id.* at 38–43. However, almost every statutory development VDOC cites, from 1856 to the present, calls for representatives of the public *to witness executions*. *See* VDOC Br. 40–43.

VDOC recasts this evidence of historic access as irrelevant to the history and logic test by equating a witness to an execution with a juror at a criminal trial. It cites *Oklahoma Observer v. Patton*, which similarly equated a juror with an authorized execution witness and noted that the general public retains the right to observe a trial even though jury members function as "public[] representatives," something not true of an execution. 73 F. Supp. 3d 1318, 1327 (W.D. Okla. 2014). This approach improperly conflates two distinct conceptions of "public representation," rendering *Oklahoma Observer* neither binding nor persuasive.

A juror's role as a "representative of the public" does not vindicate the public's First Amendment right of access, as *Richmond Newspapers* itself makes clear—the presence of a jury in that murder trial did not substitute for public

access. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559-60 (1980). Rather, jurors vindicate a defendant's Sixth Amendment right to be judged by peers, and jurors are generally forbidden even from discussing ongoing trials with the public. *See Fullwood v. Lee*, 290 F.3d 663, 677 (4th Cir. 2002). Because juries are often sequestered and sworn to silence, they do not satisfy the public's right of contemporaneous access to criminal trials; to vindicate the First Amendment right, the public must retain an independent "right to attend criminal trials." *Patton*, 73 F. Supp. 3d at 1327.

Unlike jurors, statutorily mandated witnesses at executions *do* function as a proxy for the public and vindicate the First Amendment access right. As explained in *California First Amendment Coalition v. Woodford*, the fact that "only select members of the public attend" an execution does not erode its public nature because "these official witnesses act as representatives for the public at large." 299 F.3d 868, 876 (9th Cir. 2002). While some of Virginia's past laws placed restraints on public comment by execution witnesses, VDOC Br. 42–43, such a prior restraint is likely unconstitutional on its face, and there is no evidence that these restrictions were actually enforced—something that cannot be answered without factfinding.

VDOC's argument simply foreshadows the debate that would occur on remand over Virginia's statutory history and actual historical practice. JA 18–19,

¶¶ 46-49. This cannot be assessed—at trial or on appeal—based on judicial notice of historic statutory language, because actual historic *practice* is the touchstone of the history prong. *E.g., Richmond Newspapers*, 448 U.S. at 564 ("What is significant for present purposes is that throughout its evolution, the trial *has been open* to all who care to observe.") (emphasis added). Moreover, the history prong "does not look to the particular practice of any one jurisdiction" alone, but instead to the experience in that type of proceeding "*throughout the United States*." *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 150 (1993) (internal quotation marks & citation omitted) (emphasis added). The complaint alleges facts satisfying the history prong; there is no record evidence before this Court to deny that these allegations can be proven.[1]

VDOC's arguments on the merits are premature. VDOC prevailed as a matter of law in the district court by arguing that this evidence is legally irrelevant. The post-dismissal proffer of evidence does not provide any alternative ground for affirmance of the dismissal of this civil action.

[1] VDOC gestures at the logic prong in a footnote arguing that it is not logical to "assume" that public witnesses at executions improve the performance of those carrying out the execution or add "any quantifiable degree of public oversight." VDOC Br. 47 n.18. To be clear, Plaintiffs do not assume, they allege. At this stage, that is all that is required.

II.
THE DISTRICT COURT ERRED IN REJECTING THE USE OF THE *RICHMOND NEWSPAPERS* TEST TO EVALUATE VDOC'S SELECTIVE CLOSURE OF A PORTION OF ITS EXECUTION PROCEEDINGS

A. The Rationale of the History and Logic Test Applies to VDOC's Regulation

No Supreme Court decision applying the First Amendment access right indicates that the history and logic test applies only in a limited category of government proceedings as VDOC contends. *See* Appellants' Br. 15-24. The district court's constriction of the public's access right to prejudgment, criminal adjudications contravenes applications of the access right by every federal circuit, including this one. *Id.* at 24-32. VDOC's scattershot, inconsistent arguments misread precedent, rely upon dictum with no precedential value, and fail to distinguish contrary holdings.

The history and logic test was developed by the Supreme Court to identify government proceedings that are subject to a qualified right of access. Appellants' Br. 18-24. With only one dissent, the Court found a right of public access rooted in the express guarantees of the First Amendment, which all "share a common core purpose of assuring freedom of communication on matters *relating to the functioning of government*." *Richmond Newspapers*, 448 U.S. at 575 (emphasis added).

The decision in *Richmond Newspapers* makes plain that a "First Amendment right to receive information and ideas" exists "in a variety of contexts." *Id*. at 576 (internal citation & quotation marks omitted).[2] The Court found the existence of the access right defined by two factors that could generally be applied to determine the existence of an access right in other contexts—history and logic. *Id.* at 573. It did not limit the right to criminal adjudications and, indeed, acknowledged that the same facts supporting a right of access to a criminal trial applied equally to civil trials. *Id*. at 580 n.17.

VDOC's contention that *Richmond Newspapers* resolves a "narrow question," VDOC Br. 19, is literally true, in that it addressed only the case before it involving access to a criminal trial. What VDOC refuses to address is the explicitly-stated rationale underlying the Court's answer to that question: that the First Amendment extends a right of public access to those governmental proceedings where history and logic confirm the value of access. As Justice

[2] VDOC attempts to cast doubt on this accepted proposition by citing two unrelated holdings. VDOC Br. 19. The first, decided fifteen years before *Richmond Newspapers*, involved a litigant who challenged the Secretary of State's refusal to validate his passport for travel to Cuba as violating a First Amendment right to receive information. *See Zemel v. Rusk*, 381 U.S. 1 (1965). The second involved a litigant who challenged a protective order that prohibited dissemination of information obtained through court-ordered discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). Neither addresses the First Amendment right of access to government proceedings.

Brennan explained, the access right reflects the First Amendment's "*structural* role . . . in securing and fostering our republican system of self-government." *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J. concurring). It recognizes that the public's right to observe the exercise of government power in certain contexts is essential to democracy. Nothing the Supreme Court has said limits the public access right to criminal proceedings, and its rationale refutes this limitation.

Nor has this Court embraced VDOC's limited view of the access right. VDOC's brief footnotes four decisions in which "this Court recognize[d] a right of access to information that concerns criminal proceedings," VDOC Br. 28 n.9, but none of the cited cases limits the right exclusively to criminal proceedings. Three of those cases applied the right of access in the criminal-adjudicative context without suggesting that the right applies *only* in that context. *See In re Wall St. Journal*, 601 Fed. Appx. 215, 218 (4th Cir. 2015) (per curiam); *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999); *Fisher v. King*, 232 F.3d 391, 397 (4th Cir. 2000). VDOC's fourth case, *In re Washington Post Co.*, suggests precisely the contrary, recognizing that

> In deciding whether the First Amendment right of access applies to a *particular kind of hearing*, both the Supreme Court and the courts of appeals have looked to two factors: historical tradition and the function of public access in serving important public purposes.

807 F.2d 383, 389 (4th Cir. 1986) (emphasis added).

VDOC's proposed limitation on the access right would not only fail to promote "our republican system of self-government," but it could actively undermine it. To defend the challenged regulation closing a critical portion of an otherwise public execution, VDOC proffers that it could lawfully deny all public access to any aspect of an execution—executions could be carried out entirely in secret notwithstanding centuries of experience demonstrating the value of access. Chief Justice Burger defended *Richmond Newspapers*' landmark holding that criminal trials are subject to a First Amendment access right by noting it was "difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers*, 448 U.S. at 575. Executions are the end result of a capital trial in which guilt has been found. As the most consequential exercise of state power, they are precisely the type of proceeding the Chief Justice contemplated.

VDOC expresses concern about applying the history and logic test as a "sweeping default rule," VDOC Br. 1, but the Supreme Court formulated the test to address just such concerns. First, the history prong ensures that the access right can only be vindicated where government has traded longstanding openness for secrecy—just as VDOC is alleged to have done here. *See Richmond Newspapers*, 448 U.S. at 569 (opening criminal trial because, *inter alia*, such openness had "long been recognized as an indispensable attribute of an Anglo-American trial.").

Second, the logic prong separately limits the scope of the access right to situations where openness promotes the functioning of the governmental process. *See id.* at 556 (underscoring that public access at trials assures that proceedings are conducted fairly and discourages perjury, misconduct by participants, and decisions based on secret bias); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 13 (1986) (*Press-Enterprise II*) (finding a right of access to preliminary hearings due largely to the "value of openness" to the proceeding). Together the two prongs of the test inherently limit the right to situations where access is important to ensure that constitutional constraints are followed.[3]

Courts both state and federal routinely apply the history and logic test to determine the existence of an access right outside of the context of a criminal proceeding. Appellants' Br. 25–28. Were this circuit to uphold the district court's ruling, it would become the only circuit to limit the application of the history and logic test to pre-judgment, adjudicatory criminal proceedings.

[3] VDOC baselessly claims that recognizing a right of access threatens "compelled . . . broadcasting of executions for public viewing." VDOC Br. 2. This ignores that the access right can be limited on a proper showing, even where it is found to exist. *See Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*) (confirming that the access right may be overcome where "closure is essential to preserve higher values and is narrowly tailored"); *see also Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (rejecting right-of-access challenge to a court rule prohibiting cameras in the courtroom).

B. The Access Right Is Not Driven by Place, but by Process

VDOC misses the point in suggesting that the existence of the access right turns on place rather than process, reading cases like *Pell v. Procunier*, 417 U.S. 817 (1974) and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) to mean that no access right could ever exist to a proceeding that takes place in a prison. VDOC Br. 31. The Supreme Court's cases evaluate the right of access to a governmental "process," addressing the history and logic of access to that process, not by fixating on the building in which the process occurred. *See Richmond Newspapers* (addressing the history and logic of access to criminal trials); *Press-Enterprise I* (juror voir dire); *Press-Enterprise II* (pre-trial criminal proceedings). The fact that Virginia today wields this important power in a prison does not determine whether the public has a right to observe how it is being carried out—the history and logic test does.[4] *See* Appellants' Br. 15–24.

A simple example illustrates VDOC's erroneous logic. No one would suggest that the public has an unfettered right to roam the halls and judicial chambers of a courthouse. Yet, when a judicial official enters a courtroom to preside over a trial, it is beyond argument that a First Amendment right of public

[4] While Virginia's executions now occur inside a prison, VDOC concedes that they have not always. VDOC Br. 40. The public's constitutional access right was not terminated by moving an execution inside a prison, any more than the right to attend a bail proceeding could automatically be eliminated by moving those historically open proceedings "behind prison walls." *See* VDOC Br. 10.

access attaches, subject to being overcome for compelling reasons stated on the record. Similarly, the fact that the public cannot daily roam the halls of a prison, undermining safety and security, does not mean that the state's entry into the death chamber to end a life has no First Amendment access implications.

C. VDOC Applies the Wrong Framework for Determining the Existence of the First Amendment Access Right

VDOC depicts *Richmond Newspapers* as identifying a limited access right derived from the Sixth Amendment's "speedy and public trial" right that exists as an exception to a "general rule" supposedly laid down in *Houchins*. VDOC Br. 26. Both its premise and conclusion are incorrect.

The First Amendment access right has no basis in the Sixth Amendment and serves distinct constitutional goals. The First Amendment access right is an "exception" to *Houchins*' denial of a general right of access to government information only in the sense that the First Amendment right does not exist anywhere unless the history and logic test of *Richmond Newspapers* is satisfied.

1. The history and logic test is neither rooted in nor limited by the Sixth Amendment.

In VDOC's view, "the public right to access a criminal proceeding is inextricably tied to the Sixth Amendment right to a 'speedy and public trial'—after all if there were no public trial right, there would be no corresponding right to

access those proceedings." VDOC Br. 34–35. The argument is incorrect historically and analytically.

As a matter of history, the public nature of criminal trials far predates the Sixth Amendment. *See Richmond Newspapers*, 448 U.S. at 565–69 (tracing the history of public trials back before the Norman Conquest). And the analytic foundation of the accused's public trial right is fundamentally different from the foundation of the public access right. The former is granted by the Sixth Amendment, while the latter flows implicitly from the rights secured by the First Amendment. In *Gannett Co. v. DePasquale*, the Supreme Court expressly rejected the notion that the Sixth Amendment creates "a constitutional right in strangers to attend a pretrial proceeding," holding that the Sixth Amendment "confers the right to a public trial only upon a defendant and only in a criminal case." 443 U.S. 368, 385-87 (1979). Two years later, the Court in *Richmond Newspapers* held that the First Amendment conveyed an implied right of public access to certain government proceedings "to give meaning to" those freedoms it explicitly guaranteed. 448 U.S. at 575.

2. The plurality opinion in *Houchins* does not preclude application of the history and logic test outside of a criminal adjudicatory proceeding.

The *Houchins* plurality declined to provide special press access to prisons as a governmental "place" and noted the absence of any general First Amendment

right to government information. Two years later, the Supreme Court articulated the history and logic test for identifying where a qualified right of access exists to governmental "proceedings" in *Richmond Newspapers*. The results in the two cases are not inconsistent—applying the later-developed history and logic test to the facts in *Houchins* would yield the same result because *Houchins* found no history of access to prison facilities. *See Richmond Newspapers*, 448 U.S. at 576 n.11 ("Penal institutions do not share the long tradition of openness."). The narrow holding of *Houchins* has no bearing on whether the later-adopted history and logic test is the touchstone for determining whether a qualified access right attaches to government executions.

VDOC depicts *Houchins'* rejection of a general right of access to government information as precluding the general applicability of the history and logic test. *See, e.g.*, VDOC Br. 18 (claiming Plaintiffs' interpretation of *Richmond Newspapers* amounts to a general grant of a "right of access to government-held information"). The two are not the same; that the history and logic test applies does not mean such a right exists.

D. VDOC Wrongly Relies Upon Dictum in *Fusaro v. Cogan* That Must Yield to Earlier Circuit Precedent in Any Event

VDOC relies heavily on the recent opinion in *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019). *Fusaro* addressed a First Amendment challenge to a Maryland election law regulating access to the state's voter registration list. It

upheld the access claim, finding that First Amendment scrutiny of the election law was warranted because the law was "intertwined with political speech." 930 F.3d at 252.

Before affirming the First Amendment interest at stake, the Court contextualized Fusaro's claim. It observed that, as a general rule, "there is no . . . First Amendment right to access a government record." *Id*. at 249 (citing *Houchins*, 438 U.S. at 16). The Court then remarked that *Richmond Newspapers* had created "a narrow exception" to this rule "with respect to a limited First Amendment right of access to criminal proceedings." 930 F.3d at 250 (internal quotation omitted). VDOC hitches its wagon to these asides, arguing that "*Fusaro* squarely forecloses plaintiffs' argument . . . that the *Richmond Newspapers* line of cases abrogated the 'general rule' articulated in *Houchins*." VDOC Br. 25–26. Indeed, VDOC asserts that *Fusaro* is "fatal" to plaintiff's claims. *Id*. at 26. This is wrong twice over.

First, *Fusaro*'s cursory discussion about the relationship between *Houchins* and *Richmond Newspapers* is dictum. This Court has instructed that dictum consists of a "'statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it.'" *Pittston Co. v. United States*, 199 F.3d 694, 703 (4th Cir. 1999)

(quoting *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988)). *Fusaro* addressed the impact on political speech of a law regulating access to voter information, remanding the case to the district court for further consideration under the *Anderson-Burdick* balancing test. 930 F.3d at 263. *Fusaro*'s sidebar about the "general rule" of *Houchins* and the "exception" of *Richmond Newspapers* could be deleted entirely from the opinion without "seriously impairing the analytical foundations of the holding." *Pittston Co.*, 199 F.3d at 703. Moreover, *Fusaro* makes no mention of the several Fourth Circuit cases extending the First Amendment right of access beyond criminal proceedings. It plainly did not give "full and careful consideration" to the question at the center of this case. *Id*.

Second, and apart from its status as dictum, *Fusaro*'s short-hand characterization of *Richmond Newspapers* conflicts directly with earlier Circuit precedent applying the history and logic test outside of criminal proceedings. *See* Appellants' Br. 25–27; *see also Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (finding a right of access to summary judgment motion papers); *Stone v. University of Maryland Medical System Corp.*, 948 F.2d 128, 131 (4th Cir. 1991) (finding a right of access to records in civil rights case); *ACLU v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011) (assuming a right of access to a *qui tam* complaint and sealed civil docket). When a later panel opinion conflicts with

earlier decisions, the earlier decisions must control. *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004).

Confronted with this inconsistency, VDOC counters with a non-sequitur: it claims that *Fusaro* can be reconciled with prior precedent because those earlier cases "involved access to documents filed *in court*." VDOC Br. 27. That the earlier decisions finding a right of access in civil cases involved access to records rather than proceedings in no way reconciles them with *Fusaro*'s assertion that *Richmond Newspapers* applies only in "criminal proceedings." *Fusaro*'s unexplained assertion that the history and logic test applies only to criminal proceedings creates an "*irreconcilable* conflict between opinions issued by three-judge panels" that necessitates adherence to the earlier-decided case law. *McMellon*, 387 F.3d at 334 (emphasis added).

Fusaro is neither fatal to the proposition that the history and logic test determines where the right of access to a government proceeding attaches, nor to the application of that test beyond the narrow scope of prejudgment criminal proceedings.

E. VDOC'S Effort to Unlink Executions from Criminal Judicial Processes Ignores Reality

Accepting for argument's sake VDOC's assertion that the history and logic test applies only to criminal proceedings, the district court was still wrong to reject its application here. *See* Appellants' Br. 32–37.

VDOC asserts, without citation to authority, that executions occur without sufficient judicial involvement to be considered "part of a criminal trial or any related proceeding." VDOC Br. 12. This is simply not so. Executions are carried out only after the "Circuit Court of jurisdiction" issues an Execution Order "pronounc[ing] the sentence of death," and only after this judicial order is read at the execution proceeding. *See* JA 25, 33; Va. Code Ann. § 53.1-234 (requiring the court clerk to deliver the death sentence to the VDOC director).

Up to the time of the execution proceeding, an execution is typically the subject of many judicial proceedings and court orders relating to the prisoner's appeals and petitions for habeas relief, a fact recognized by state statute. *See* Va. Code Ann. § 53.1-232.1 (permitting a trial court to set an execution date only if the defendant has been denied habeas relief by the Supreme Court of Virginia, the United States Court of Appeals, or the Supreme Court of the United States). And "a stay of execution may be granted by the trial court or the Supreme Court of Virginia" even after the execution date has been set. *Id*. If at any point the condemned prisoner obtains a writ of error from the Supreme Court of Virginia or receives a stay of execution "by any other competent judicial proceeding," VDOC must "yield obedience to the same." Va. Code Ann. § 53.1-232. Executions are the final step in a capital prosecution, and they are both judicially ordered and judicially supervised.

Nor does the fact that an execution proceeding occurs post-judgment have any bearing on whether the history and logic test applies. The test is properly applied to determine whether there is a public access right to bail hearings, probable cause hearings, suppression hearings, sentencing hearings and other proceedings—both pre- and post-judgment—that are an integral part of any capital prosecution. *See* Appellants' Br. 33–35 (citing, among others, *In re Wash. Post Co.*, 807 F.2d at 389).

VDOC erroneously points to cases construing the scope of the Sixth Amendment as supporting the rejection of any First Amendment access right post-judgment. VDOC Br. 33–35. Apart from the fact that the public access right does not derive from the Sixth Amendment, *see supra*, Point II.C.1, entry of judgment does not automatically define the limit of the rights conferred by the Sixth Amendment. For example, in *Coleman v. Thompson*, 501 U.S. 722 (1991) (incorrectly cited by VDOC at VDOC Br. 33), the Supreme Court recognized that the Sixth Amendment right to counsel does not end immediately at the entry of judgment. *Id*. at 755-56 (holding only that the right to counsel does not extend "beyond [the defendant's] first appeal in pursuing state discretionary or collateral review").

VDOC similarly falls short in attempting to distinguish this Court's application of the history and logic test to search warrant affidavits in

Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989) on the grounds that search warrant affidavits, unlike execution proceedings, are documents filed in court. VDOC Br. 37 n.13. This elides the more fundamental point. The *Goetz* court explicitly rejected the argument that the history and logic test could not apply to search warrant materials because they are not "ancillary . . . to the criminal trial," but to the investigation of a criminal suspect. *Goetz*, 886 F.2d at 63. This is closely analogous to the argument that VDOC makes here. In VDOC's view, the applicability of the history and logic test depends entirely on the stage of a capital prosecution. The *Goetz* court, to the contrary, found the distinction between a trial and "other official proceedings" not "even important" in evaluating the First Amendment access issue. *Id.* (citing *Press-Enter. I*, 464 U.S. at 516 (Stevens, J., concurring)).

So too here. The distinction between a pre-judgment proceeding and "other official proceedings" in a capital case has no bearing on whether the history and logic test is to be applied. Such distinctions ignore the close nexus between criminal adjudications and other governmental actions, including executions.

III.
PLAINTIFFS' FACIAL CHALLENGE TO VDOC'S REGULATION IS NOT TIME-BARRED

VDOC argues alternatively that Plaintiffs' First Amendment challenge to its execution protocol under 42 U.S.C. § 1983 is time-barred. VDOC Br. 48–53. This

Court has previously found it "doubtful that an ordinance facially offensive to the First Amendment" could ever 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). Other courts agree. *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."); *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 441 (M.D.N.C. 1999) (rejecting statute of limitations for a facial challenge to an ordinance).

VDOC attempts to side-step this principle by arguing that it applies only where a state law, regulation, or city ordinance is facially challenged, not an administrative regulation. VDOC Br. 51. VDOC provides no authority supporting this distinction, and it makes no sense. The execution protocol is an administrative regulation promulgated pursuant to an express grant of authority. *See* Va. Code Ann. § 53.1-8 (West 2020); Va. Code Ann. §§ 53.1-232–53.1-236 (West 2020). In ordinary terms, it is "an official rule or order, having legal force." *Regulation*, Black's Law Dictionary (11th ed. 2019). The hair VDOC splits is a distinction without difference.

VDOC again falls short in arguing that a statute of limitations should apply because the protocol inflicts no ongoing harm on the general public. VDOC Br. 51. The First Amendment access right infringed by the protocol is a *public* right,

even when it is vindicated by proxy. *Cf. Richmond Newspapers*, 448 U.S. at 572-73 (noting that reporters play an important role "as surrogates for the public" in exercising access rights). The public suffers an ongoing harm because the protocol, on its face, denies access to information needed for democratic oversight of the execution process. As a facial violation of the access right, the protocol is not "insulated from challenge by a statutory limitations period." *Nat'l Advert. Co.*, 947 F.2d at 1168; *see also Napa Valley Publ'g Co. v. City of Calistoga*, 225 F. Supp. 2d 1176, 1184 (N.D. Cal. 2002) (holding that no statute of limitations applies "to the facial challenge of a statute that infringes First Amendment freedoms").

Even if the constitutional harm inflicted by the protocol were viewed as episodic and not continuous, VDOC's statute of limitations argument still fails under the same reasoning that permits pre-enforcement challenges to unconstitutional regulations. Pre-enforcement challenges hew to the commonsense principle that "where threatened action by *government* is concerned, [courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Pre-enforcement standing exists when a plaintiff alleges "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution

thereunder.'" *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018) (quoting *Babbit v. Farm Workers*, 442 U.S. 289, 298 (1979)). In the First Amendment context, this Court has put these requirements a bit differently: plaintiffs must show that they "intend to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy they wish to challenge, and that there is a credible threat that the policy will be enforced against them when they do so." *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018) (internal quotations marks omitted).

Plaintiffs plainly satisfy these three conditions. They intend to observe the entirety of an execution in Virginia, their right to do so is "arguably protected by the First Amendment" but proscribed by VDOC's revised execution protocol, and a "credible threat" of the protocol's enforcement exists. This last conclusion is buttressed by VDOC's application of the new access limitation after the protocol was revised in 2017 and by VDOC's re-adoption of the substantively identical limitation earlier this year. VDOC Br. 4 n.1. *See Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 164 (2014) (finding the "threat of future enforcement" substantial in light of a "history of past enforcement").

Once again, the fact that the challenged regulation is administrative rather than statutory is of no moment to the propriety of a pre-enforcement challenge. *Id.* at 165 (noting that harm from "administrative action" can justify pre-enforcement review). Nor is it problematic that this is a constitutional challenge brought under

42 U.S.C. § 1983. *See, e.g.*, *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013) (finding standing for a pre-enforcement First Amendment claim under § 1983); *Kenny*, 885 F.3d 280 (4th Cir. 2018) (same for pre-enforcement Fourteenth Amendment claims); *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir. 2017) (same for pre-enforcement Second Amendment claim).

Indeed, to accept VDOC's statute of limitations approach would produce outcomes that are equal parts untenable and incoherent. Under its approach, Plaintiffs' Section 1983 claim accrued either when VDOC altered its execution protocol in February 2017 or when VDOC followed the protocol at a July 2017 execution, and the claim is now barred by a two-year statute of limitations. VDOC Br. 49. Applying a statute of limitations under either scenario makes no sense.

If the limitations period began at the time of the last execution in 2017, no challenge could now be mounted until after VDOC conducts another execution, at which point the alleged constitutional harm will undeniably have been inflicted—an untenable limitation imposing exactly the kind of chronological irrationality pre-enforcement challenges are designed to prevent. And if a limitations period begins to run when the protocol is adopted, VDOC's statute of limitations objection could easily be cured by a new complaint since VDOC re-enacted the protocol *just this year*. VDOC Br. 49. This would be an incoherent and equally

untenable result that yields only the duplication of effort and waste of judicial resources.[5]

Neither approach supports the basic reasons for which statutes of limitations exist—"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). No such considerations are implicated here. Plaintiffs seek an injunction against the future implementation of a regulation that allegedly violates the First Amendment right of public access. Finding Plaintiffs' claim to be time barred would not promote justice, but instead would lead either to future injustice or wasted resources.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court order dismissing the complaint and remand this action for further proceedings with

[5] To optimize judicial resources, the D.C. Circuit permits a plaintiff to bring an otherwise-stale Administrative Procedure Act challenge when an agency adopts a policy at one time, and later "restates the policy or otherwise addresses the issue again without altering the original decision." *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 110 (D.C. Cir. 2006) (internal citation omitted). "'The general principle is that if the agency has opened the issue up anew, even though not explicitly, its renewed adherence is substantively reviewable.'" *Id.* VDOC in 2020 promulgated a new set of execution protocols that adhere to the substantively objectionable elements first adopted in 2017.

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

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Dated: November 23, 2020

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I hereby certify that on this 23rd day of November, 2020, I caused this Reply Brief of Appellants 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.

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