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**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ALABAMA**
**SOUTHERN DIVISION**

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|---|---|
| DOYLE LEE HAMM,<br><br>Plaintiff,<br><br>v.<br><br>JEFFERSON S. DUNN, et al.,<br><br>Defendant. | No. 2:17-cv-02083-KOB (JDB) |

# MEMORANDUM IN SUPPORT OF MOTION BY PRESS MOVANTS FOR LEAVE TO INTERVENE AND UNSEAL JUDICIAL RECORDS

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## PRELIMINARY STATEMENT

This motion to intervene and unseal is brought by Alabama Media Group, the *Montgomery Advertiser*, and the Associated Press (collectively, "Press Movants") to exercise the public's right to inspect the sealed judicial records, transcripts, and briefs in this case discussing Alabama's execution protocol.[1]

This case concerns a matter of intense public interest: the method by which the State of Alabama exercises the power to put people to death. Doyle Lee Hamm claimed that executing him under the procedures prescribed by Alabama's execution protocol would violate the Eighth Amendment's prohibition on cruel and unusual punishment. Yet the key evidence describing Alabama's execution protocol remains sealed and, as a result, the public is unable to fully assess Hamm's claim or to evaluate the manner in which it was resolved.

Press Movants seek to vindicate the public's right of access to the records in Hamm's lawsuit. The public has both a constitutional and common law right to records of judicial proceedings, rights necessary to ensure that open trials remain

[1] The voluntary settlement of the parties on March 26, 2018, does not deprive the Court of jurisdiction to entertain this motion. This Court's power to adjudicate claims for access to its records derives from its authority and control over those records and thus persists even after the underlying dispute has ended. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d. Cir. 2004) (holding that a district court has power to unseal records "when a third party requests judicial documents after the parties have filed a stipulation of dismissal pursuant to settlement"); *see also Carlson v. United States*, 831 F.3d 753, 756-57 (7th Cir. 2016) (adjudicating request to unseal 70-year-old grand jury records). "So long as [records] remain under the aegis of the court, they are superintended by the judges who have dominion over the court." *Gambale*, 377 F.3d at 141.

the "bulwarks of our free and democratic government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980). Given the intense and undisputed public interest in this proceeding and the absence of any compelling need for complete secrecy, this Court should vacate the protective order pursuant to which public access has been denied, unseal all records, and make public unredacted briefs and transcripts of *in camera* proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1987, Doyle Lee Hamm was convicted by a jury of capital murder. *Hamm v. State*, 564 So.2d 453, 464–65 (Ala. Crim. App. 1989). Despite mitigating circumstances, he was sentenced to death. *Id.* at 469. Following an unsuccessful direct appeal, *Hamm v. Alabama*, 498 U.S. 1008 (1990) (denying certiorari), Hamm unsuccessfully sought both state collateral review, *Hamm v. Alabama*, 546 U.S. 1017 (2005) (denying certiorari), and federal collateral review, *Hamm v. Comm'r, Alabama Dep't of Corr.*, 620 Fed. App'x. 752 (11th Cir. 2015) (affirming denial of federal habeas relief), *cert. denied*, *Hamm v. Allen*, 137 S. Ct. 39 (2016).

On December 13, 2017, the Supreme Court of Alabama entered an order setting Hamm's execution date for February 22, 2018. *See* Mem. Order 5, ECF No. 30. That same day, Hamm initiated this § 1983 action, challenging the constitutionality of Alabama's method of execution, not generally, but as applied

to him. *See* Compl., ECF No. 1. Hamm filed an amended complaint on January 16, 2018, *see* Am. Compl., ECF No. 15, and the government moved for summary judgment on January 19, 2018, *see* Mot. for Summ. J., ECF No. 16. The Court set an expedited briefing schedule on the government's motion and scheduled an evidentiary hearing on the motion for January 31, 2018. *See* Revised Br. Schedule, ECF No. 17.

At the time, Hamm did not have access to the central piece of evidence on which his claim turned: Alabama's execution protocol. For months prior to initiating this action, Hamm repeatedly requested that the State provide him with a copy of its execution protocol but to no avail. *See* Exs. 16, 18, 19, 20, 21, 22, 25, ECF No. 24. This Court recognized the centrality of the protocol to the resolution of Hamm's claim and ordered the State to disclose the protocol prior to the evidentiary hearing. *See* Redacted Resp. Br. 35, *Hamm v. Dunn*, No. 18-10473 (11th Cir. Feb. 13, 2018).

On January 30, 2018, the protocol was submitted to the Court under a stipulated sealing order. *See* Joint Mot. for Protective Order, ECF No. 26; Agreed Confidentiality Order, ECF No. 28. Per a joint motion from the parties, the protocol was "deemed Confidential Material, and [could] not be disclosed to any persons or entities" other than the parties or the Court. Agreed Confidentiality Order ¶ 2, ECF No. 28. The Court entered the parties' Agreed Confidentiality

Order without a hearing and without making any findings of fact. There is no public record of any demonstrated need for secrecy by the parties. The sealing order contains no date of expiration, and it requires the protocol—and all "extracts and summaries thereof"—to be returned to the Defendants or "permanently destroyed" within 60 days of the termination of this case. *Id.* at ¶ 15.

On January 31, 2018, the Court conducted an evidentiary hearing on the government's summary judgment motion. At the hearing, the Court took evidence and heard testimony on, among other issues, "whether, despite the undisputed inaccessibility of *many* peripheral veins, Mr. Hamm still has enough good quality peripheral veins for the State to execute him using the procedures described in its confidential lethal injection protocol." Mem. Order 8, ECF No. 30.

After carefully reviewing the evidence, including the State's protocol, this Court, *sua sponte*, ordered an initial stay of Hamm's execution on February 6, 2018. *See* Mem. Order, ECF No. 30. In a section of the order titled, "Alabama's Lethal Injection Protocol," the Court summarized the State's protocol at length. *Id.* at 7–8. After reviewing Hamm's claim and the evidence adduced at the January 30th hearing, the Court found that "a genuine dispute of material fact exist[ed] about whether executing Mr. Hamm using the intravenous injection method described in Alabama's execution protocol present[ed] a risk that [was] *sure* or *very likely* to cause serious illness and needless suffering, and give rise to

sufficiently *imminent* dangers." *Id.* at 20 (internal quotation marks omitted). The Court concluded that an independent medical examination was necessary to resolve the factual dispute and ordered a stay until such an examination could be completed. *Id.* at 23. The protocol itself, however, remained sealed.

Defendants appealed, and the Eleventh Circuit reversed this Court's initial stay, but it nevertheless agreed with this Court that an independent medical evaluation was required and it ordered this Court to immediately appoint an independent medical examiner and make additional findings. *See* Order, *Hamm v. Dunn*, No. 18-10473 (11th Cir. Feb. 13, 2018). On remand and after receiving a report following an independent medical exam, this Court concluded there was not enough evidence to merit a preliminary injunction, based in part on the State's stipulation that they would "not attempt peripheral venous access in Mr. Hamm's upper extremities." Mem. Op. and Order 4, ECF No. 58.

On appeal, the Eleventh Circuit had some outstanding concerns with Alabama's execution protocol. It ordered the State to submit a sworn affidavit clarifying whether it would have both "ultrasound technology and an M.D. will be present for the execution." *Hamm v. Dunn*, No. 18-10636, 2018 WL 1020051, at *6 n.8 (11th Cir. Feb. 22, 2018). The warden of Holman Correctional Facility promptly submitted an affidavit assuring the Eleventh Circuit that the State would have both on hand. *See id.* at *3. Having satisfied itself with the protocol, as

supplemented by the State's affidavit, the Eleventh Circuit affirmed this Court's denial of Hamm's request for a preliminary injunction and permitted the execution to go forward. *See id.*

After the Supreme Court denied both an application for a stay and a petition for a writ of certiorari, *see Hamm v. Dunn*, 138 S. Ct. 828 (2018), the State attempted to execute Hamm. They were not successful. According to published reports, the execution was called off after two and a half hours because the State was unable to find suitable veins in Hamm's groin, feet, or legs. Notice of Submission of Expert Report of Dr. Mark Heath, ECF No. 93.

On March 5, 2018, Hamm filed a motion to amend his complaint a second time "to include the facts of Alabama's botched execution attempt" because it "bears directly on the ability of Alabama to access Doyle Hamm's veins in the future should they proceed in their plan to execute Doyle Hamm by intravenous lethal injection again." Mot. for Leave to Amend First Am. Compl. and File Second Am. Compl., ECF No. 94. However, on March 26, 2018, the parties "jointly stipulate[d] to the voluntary dismissal of this action." Joint Stipulation of Voluntary Dismissal 1, ECF No. 104.

As of the time of this filing, the protocol and other court records critical to understanding this action are being kept secret from the public. Through this

motion, Press Movants seek to unseal these records (the "Protocol Records"), including specifically:

1. the Alabama Execution Protocol;[2]

2. the sealed transcript of a January 31, 2018, *in camera* evidentiary hearing, *see* Sealed Transcript of Proceedings, ECF No. 53;

3. the sealed transcript of proceedings held on February 7, 2018, *see* Sealed Transcript of Proceedings, ECF No. 72;

4. the sealed transcript of proceedings held on February 14, 2018, *see* Sealed Transcript of Proceedings, ECF No. 70; and

5. the sealed transcript of proceedings held on February 16, 2018, *see* Sealed Transcript of Proceedings, ECF No. 71.

To the extent that publicly filed versions of the parties' submissions to the Eleventh Circuit and the Supreme Court are currently redacted to comply with the stipulated sealing order entered by this Court, Press Movants also seek an order authorizing the parties to release unredacted versions of these appellate papers.[3]

[2] The execution protocol appears to be filed as docket entry 54. It was relied on by the Court in its February 6, 2018, Memorandum Opinion, ECF No. 30 and appears under seal in the appellate record, *see, e.g.*, Tab 1 of Suppl. App., *Dunn v. Hamm*, No. 18-10473 (11th Cir. Feb. 13, 2018).

[3] The public version of Hamm's initial Response Brief to the Eleventh Circuit in No. 18-10473 is redacted, as is his subsequent Appellant's Brief to the Eleventh Circuit in No. 18-10636, Defendants'-Appellees' response, and Hamm's petition for a writ of certiorari.

## ARGUMENT

### I. INTERVENTION IS PROPER FOR THE LIMITED PURPOSE OF ASSERTING THE RIGHT OF ACCESS TO COURT RECORDS

Intervention is the appropriate vehicle for news organizations and other members of the public to vindicate constitutional and common law claims for access to court records. *See, e.g.*, *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983). The Eleventh Circuit explains, "because it is the rights of the public, an absent third party, that are at stake, any member of the public has standing . . . to move the court to unseal the court file in the event the record has been improperly sealed." *Brown*, 960 F.2d at 1016. Moreover, "denial of review until the district court proceedings are concluded could irreparably harm the press's ability to cover contemporaneously judicial proceedings of significant public interest." *Newman*, 696 F.2d at 800.

Thus, as the Supreme Court and the Court of Appeals both have emphasized, news organizations and the public seeking access to court proceedings and records must be afforded a prompt and full hearing on their claims. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (media and public "must be given an opportunity to be heard" on questions relating to access (citation omitted)); *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) (same).

## II. THE PARTIES HAVE ESTABLISHED NO PROPER BASIS TO OVERCOME THE PUBLIC'S CONSTITUTIONAL RIGHT OF ACCESS TO THE PROTOCOL RECORDS IN THIS PROCEEDING

The First Amendment grants the public a qualified right of access to court proceedings and records. Both the Supreme Court and Eleventh Circuit have expressly recognized the constitutional right to access court proceedings, and this access right necessarily extends to the judicial records and transcripts of those proceedings. Because the First Amendment access right encompasses the Protocol Records, and because the State has not articulated and cannot articulate a compelling interest sufficient to overcome the public's access right, the Protocol Records should be unsealed.

### A. The First Amendment Access Right Extends to the Protocol Records

The First Amendment extends a right of public access to certain government proceedings and their related records. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enter. Co. v. Superior Court of California for Riverside Cty.* ("*Press-Enter. II*"), 478 U.S. 1 (1986); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). The right extends to those proceedings and records for which there is a history and logic of access, including the proceedings and records in civil lawsuits. While *Richmond Newspapers* first recognized the right in the context of a criminal trial, the Supreme Court went out of its way to underscore that "historically both civil and criminal trials have been

presumptively open." 448 U.S. at 580 n.17. Since then, every federal circuit court to address the issue has found that the First Amendment access right applies to civil cases. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *Westmoreland v. Columbia Broad. Sys., Inc*., 752 F.2d 16, 22 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re Cont'l Illinois Sec. Lit.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983).

The Eleventh Circuit itself has specifically recognized that the constitutional right of access extends to civil proceedings like the instant action, which relate to the implementation of a criminal sentence. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001) ("[T]his court has extended the scope of the constitutional right of access to include civil actions pertaining to the release or incarceration of prisoners and their confinement."); *Newman*, 696 F.2d at 800–801. And in *Barber v. Conradi*, this Court also recognized that the "reasoning behind [the] constitutionally protected presumed access to criminal proceedings applies equally to civil proceedings." 51 F. Supp. 2d 1257, 1255-56 (N.D. Ala. 1999) (citations and internal quotation marks omitted).

This constitutional right of access to civil proceedings encompasses the judicial records containing the evidence relied upon in those proceedings, such as the Protocol Records that were key to the resolution of Hamm's injunction motion. Again, the Eleventh Circuit has made clear that the access right extends to judicial records, including "pleadings, motions, and evidence." *Brown*, 960 F.2d at 1014; *see Chicago Tribune Co.*, 263 F.3d at 1310; *cf. McCarthy v. Barnett Bank of Polk Cty.*, 876 F.2d 89, 91 (11th Cir. 1989) (holding that the public also has a constitutional right of access to discovery materials, but that the right may be overcome under a lower standard than the right of access to judicial records). In *Barber*, this Court likewise explained that the public's right of access to court proceedings "include[s] documents." 51 F. Supp. 2d at 1266. Other circuits have also confirmed that "[t]he first amendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed." *Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991).[4]

[4] *See also, e.g.*, *United States v. Erie Cty., N.Y.*, 763 F.3d 235, 236 (2d Cir. 2014) (right of access to settlement compliance reports); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (right of access extends to docket sheets); *In re N.Y. Times Co.*, 828 F.2d 110, 113-16 (2d Cir. 1987) (right extends to pre-trial motion papers); *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (right extends to affidavits on motion to close a sentencing hearing); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (right extends to bills of particulars).

The vital role that access plays in ensuring public respect for the results produced by an adjudicative process is perhaps best demonstrated by considering the converse. "Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part) (internal quotation marks omitted).

Here, the public's First Amendment right of access to court proceedings and court documents extends to the Protocol Records upon which the Court's rulings were made. This is a civil proceeding to which the constitutional access right applies, the protocol was introduced into the record during a hearing before the Court, and it was relied upon extensively in the Court's ruling. *See* Mem. Order 3–4, 10–11, ECF No. 30. The related sealed transcript sought by Movants is officially logged on the docket. *See* ECF Nos. 52, 70-72. For these reasons, the Protocol Records at issue are all subject to the First Amendment access right.

### B. The State Has Not Met and Cannot Meet the Heavy Burden Required to Overcome the Constitutional Right of Access

While the First Amendment right of access is not absolute, a party seeking to abridge the right and deny public access must bear a "weighty" burden. *Globe Newspaper*, 457 U.S. at 606. As explained in *Press Enterprise II*, the right may only be abridged where the party opposing access demonstrates a substantial

probability of harm to a compelling government interest, and that no suitable alternatives are available. *Press-Enter. II*, 487 U.S. at 13-14. Even then, any denial of access that is imposed must be narrowly tailored and actually effective in protecting the threatened governmental interest. *See id.*; *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 (11th Cir. 2005) (same).

The party opposing the right of access bears the burden of making sufficient evidentiary showings to establish the *Press-Enterprise II* factors—and the right of access cannot be overcome by conclusory assertions. *Press-Enter. II*, 478 U.S. at 15. Before authorizing a denial of the access right, a court must make on-the-record findings that sealing is necessary and justified. *Ochoa-Vasquez*, 428 F.3d at 1030 (quoting *Press-Enter. Co. v. Superior Court of California for Riverside Cty.* ("*Press-Enter. I*"), 464 U.S. 501, 510 (1984)); *see also United States v. Kooistra*, 796 F.2d 1390, 1391 n.1 (11th Cir. 1986).

In this case, the State did not articulate a compelling governmental interest sufficient to overcome the constitutional right of access to the execution protocol. It did not, and could not, meet the strict constitutional standards that govern its request for secrecy with regards to the execution protocol.

In the parties' Joint Motion for Protective Order, the State identified several purported interests which it asserted justified sealing the protocol. Joint Motion for Protective Order, ECF No. 21. The State claimed that it had compelling interests

in "protecting the confidentiality of the procedures, the identities of persons who participate in the enforcement of the death sentences, and all aspects of the manner of enforcing a death sentence in the State." *Id.* at ¶ 2. The State's assertions, however, are not sufficient to overcome the public's constitutional right of access for at least four reasons.

*First*, there simply is no "vital and compelling interest in protecting the confidentiality of the procedures . . . and all aspects of the manner of enforcing a death sentence in the State." *Id.* Blanket confidentiality is inconsistent with Alabama law, which permits the public—including relatives or friends of the condemned, and the adult family of the victim—to attend and witness executions. Ala. Code § 15-18-83 (2017); *see also, e.g.*, Bryan Lyman, *Torrey McNabb's Final Words for Alabama Before Execution: 'I Hate You'*, Montgomery Advertiser (Oct. 19, 2017, 9:50 PM).[5]

Moreover, Alabama's execution procedures are already largely public. The Court summarized the protocol extensively in its summary judgment opinion in this case, including information about the type of personnel involved, the medical preparations for the execution and placement of IV lines, and the execution itself. Mem. Order 7–8, ECF No. 30. The State has also disclosed the details of its most

[5] *Available at* https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/10/19/torrey-mcnabb-executed-murder-montgomery-police-officer/782360001.

recent version of the execution protocol, including the drugs used and dosage information. *See, e.g.*, Brian Lyman, *Alabama Adopts New Death Penalty Protocol*, Montgomery Advertiser (Sept. 12, 2014, 3:02 PM).[6]

In addition, other courts have recognized that the public's right of access to witness executions, including the insertion of IV lines in lethal injection executions, overrides any state interest in secrecy. *See, e.g.*, *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868 (9th Cir. 2002); *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 373 (M.D. Pa. 2012). And Alabama is one of only a few states whose execution protocol is completely unavailable to the public. *See State by State Lethal Injection*, Death Penalty Info. Ctr..[7]

In sum, there simply is no compelling state interest in blanket confidentiality of execution procedures.

*Second*, although Alabama may have a compelling interest in protecting the identities of the prison officials who participate directly in its executions, the total sealing of the protocol is not "narrowly tailored" to serve that interest. *Globe Newspaper*, 457 U.S. at 607. In those cases where a compelling government interest justifies withholding information in a document, "the constitutionally preferable method for reconciling the First Amendment interests of the public and

[6] *Available at* https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2014/09/12/alabama-has-new-death-penalty-protocol-says-ag-office/15526777/.

[7] *Available at* https://deathpenaltyinfo.org/state-lethal-injection.

press with the legitimate [governmental] interests . . . is to redact" the document.. *Press-Enterprise I*, 464 U.S. at 520 (Marshall, J., concurring in judgment). Here, to the extent that the execution protocol reveals the identity of low-level prison officials involved in the execution, it can be redacted to remove any identifying information.

*Third*, sealing the Protocol Records is not effective in protecting the State's asserted interests. As noted above, much of the information that the State seeks to withhold has already been made public through this Court's orders and the State's own disclosures. *See supra* at pp. 15–16. Accordingly, at a minimum, those portions of the execution protocol which convey the information already made public, as well as the transcripts discussing those portions, must be made public.

*Fourth*, the State's assertions of compelling interests, unavailability of alternatives, and of the propriety of total sealing are entirely conclusory and unsupported by explanation or evidence. Such conclusory assertions cannot, on their own, suffice to defeat a First Amendment right of access. *Press-Enter. II*, 478 U.S. at 15. Nor is it of any significance that the parties agreed to the denial of public access. The First Amendment right of access belongs to the *public*, not to the parties. The public's right of access cannot be defeated by the mere agreement of the parties involved. *See Richmond Newspapers*, 448 U.S. (holding that the

right of access was violated even when defense counsel filed a motion for the trial to be closed without objection from the prosecution).

In short, the State has not and could not satisfy the strict constitutional standard for overcoming the public's constitutional right of access, and the Protocol Records should be disclosed.

## III. THE PUBLIC ALSO HAS A COMMON LAW RIGHT TO DISCLOSURE OF THE PROTOCOL RECORDS

In addition to the constitutional right of access, the common law has long recognized a presumption of public access to judicial proceedings and records, including civil proceedings such as this one. As the Eleventh Circuit explains, "[t]here is no question that a common law right of access exists as to civil proceedings." *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985). This common law access right requires the Protocol Records to be unsealed.

### A. The Common law Access Right Attaches to the Protocol Records

"The common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process." *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1245 (11th Cir. 2007) (internal quotation marks and citation omitted). It includes the right to inspect and copy "judicial records." *Chicago Tribune Co.*, 263 F.3d at 1311. Pleadings,

motions, material filed in connection with any substantive, non-discovery motion, and exhibits introduced at trial or in a hearing are all subject to the common law right of access. *See, e.g.*, *Fed. Trade Comm'n v. AbbVie Products*, 713 F.3d 54, 63 (11th Cir. 2013) (pleadings and exhibits thereto); *Romero*, 480 F.3d at 1245 (materials attached to non-discovery motions).[8]

This common law right of access to judicial records developed to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice"—goals that cannot be accomplished "without access to testimony and documents that are used in the performance of Article III functions." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1981).

Alabama's execution protocol is clearly a judicial record subject to the public's common law right of access. It was entered into the record in the district court, relied upon at an evidentiary hearing, and is included in various appendices in briefs in subsequent appellate litigation. *See supra* at pp. 6–7.

More importantly, the execution protocol played a dispositive role in the parties' arguments and the performance of this Court's Article III duties in

[8] Only those documents that "play no role in the performance of Article III functions," such as documents attached to discovery motions which "come within a court's purview solely to insure their irrelevance," fail to qualify as judicial records to which the common law right of access attaches. *United States v. Amodeo*, 71 F.3d 1044, 1049–50 (2d Cir. 1995); *accord Chicago Tribune Co.*, 263 F.3d at 1312.

resolving Hamm's claim. The central question in this case is whether the protocol's application to Hamm would violate the Eighth Amendment, which hinged on the protocol's content. *See* Amend. Compl., ECF No. 15. The Court conducted an evidentiary hearing on the issue and initially found that a genuine issue of material fact existed about whether executing Hamm using the intravenous injection method described in Alabama's execution protocol "present[ed] a risk that is *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.'" Mem. Order 19, ECF No. 30 (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015)). And both this Court and the Eleventh Circuit ultimately rejected Hamm's claim, based, in part, on stipulations from the State supplementing the protocol. Mem. Op. 4, ECF No. 58; *Hamm v. Dunn*, No. 18-10636, 2018 WL 1020051 (11th Cir. Feb. 22, 2018).

For these reasons, the Protocol Records are clearly judicial records to which there is a presumptive common law right of access by the press and public.

### B. No Good Cause Exists Sufficient to Override the Public's Common law Right of Access to the Protocol Records

While the common law access right, like the constitutional right, is not absolute, the State has not made and cannot make sufficient showings to overcome it in this case. The Eleventh Circuit has held that when information sought is central to a merits decision in a case, there is a strong presumption of access. *Romero*, 480 F.3d at 1246. To determine whether this strong common law right is

overcome, courts must weigh "the competing interests of the parties" and determine whether there is good cause to deny the public the right to access the document. *AbbVie Prods.*, 713 F.3d at 62 (citing *Chicago Tribune Co.*, 263 F.3d at 1312). When "a party seeks to seal only particular documents within the record, [the court's] task is 'to balance the competing interests of the parties.'" *Perez-Guerrero v. U.S. Atty. Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013) (quoting *Chicago Tribune Co.*, 263 F.3d at 1312). The common law right of access can only be overcome when a court finds the that State's interests sufficiently outweigh the strong presumption of access. A court's decision is reviewable for abuse of discretion. *Id*. (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978)).[9]

In deciding whether to seal a judicial record, the Court must consider a number of factors. None of these factors is independently dispositive, but the balancing must be conducted in light of the presumption in favor of public access. *See, e.g.*, *AbbVie Prods.*, 713 F.3d at 63-64. "[T]he weight to be given the presumption of access [is] governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to

[9] A court is required to articulate its findings, for review by an appellate court. *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983). If a court fails to give reasons in findings for its decision to deny access to judicial records, the case may be remanded. *United States v. Kooistra*, 796 F.2d 1390 (11th Cir. 1986).

those monitoring the federal courts." *Id.* (second alteration in original) (quoting *Amodeo*, 71 F.3d at 1049). In this case, the protocol was central to the Court's resolution of Hamm's claim. *See supra* at pp. 18–19. Thus, the presumption in favor of access to the judicial record here is quite heavy.

The scale tips further towards access when such access is "likely to promote public understanding of historically significant events," *Newman*, 696 F.2d at 803 (citing *Nixon*, 435 U.S. at 598–603 & n. 11), and when the "information [sought] concerns . . . public concerns," *Romero*, 480 F.3d at 1246.

Factors weighing against disclosure include when records are sought for "such illegitimate purposes as to promote public scandal or gain unfair commercial advantage." *Newman,* 696 F.2d at 803. The Court may also consider "whether the administrative difficulties in providing access would disrupt the progress of the trial." *United States v. Rosenthal*, 763 F.2d 1291, 1295 (11th Cir. 1985) (citing *United States v. Edwards*, 672 F.2d 1289, 1296 (7th Cir. 1982)).

Here, the balance tips overwhelmingly in favor of unsealing the Protocol Records. The records concern a matter of the utmost public concern: the means by which Alabama carries out the most serious criminal punishment on behalf of its citizens. As this Court acknowledged, "[t]he public interest requires *constitutional* punishments," *see* Mem. Op. 24, ECF No. 30, and disclosure of the execution

protocol would allow the public to understand the State's procedures and whether they comport with the demands of the Constitution.

Access to the Protocol Records would also shed light on an "historically significant event[]." *Newman,* 696 F.2d at 803. Executions are both the most extreme punishment doled out by the State and relatively rare, rendering each execution historically significant, as evidenced by the significant press coverage devoted to executions.[10]

These historically significant events cannot be fully understood by the public, especially witnesses to the execution, without knowledge of the Protocol Records. This is made all the clearer by the State's failed attempt to execute Hamm on February 22. *See* Matthew Haag, *On Execution Day, Three Killers in Different States Meet Different Fates*, N.Y. Times (Feb. 23, 2018)[11]. Witnesses indicated that the State called off the execution after trying for an extended time to find a vein. *Id.* Without access to the protocol, it is impossible for the public to

[10] *See, e.g.*, Melissa Brown, *Doyle Lee Hamm Punctured at Least 11 Times in Execution Attempt, Report States*, Montgomery Advertiser (Mar. 5, 2018, 6:23 PM), https://www.montgomeryadvertiser.com/story/news/2018/03/05/execution-attempt-so-painful-inmate-hoped-get-over-report-states/397304002/; Ivana Hrynkiw, '*It Was a Botched Execution': Doyle Hamm's Lawyer on Thursday's Execution Attempt*, AL.com (Feb. 26, 2018), http://www.al.com/news/birmingham/index.ssf/2018/02/doyle_lee_hamm_attempted_execu.html ; Jennifer Gonnerman, *The Long Defense of the Alabama Death-Row Prisoner Doyle Lee Hamm*, New Yorker (Sep. 13, 2016), https://www.newyorker.com/news/news-desk/the-long-defense-of-the-alabama-death-row-prisoner-doyle-lee-hamm.

[11] *Available at* https://www.nytimes.com/2018/02/23/us/thomas-whitaker-execution-alabama-florida.html.

understand if the failure was due to a problem inherent in protocol, or to some other cause.

Additionally, and critically, disclosure of the Protocol Records is essential for the public to understand this Court's resolution of Hamm's claims, which permitted the State to proceed with his execution. As noted above, although the protocol played a central role in the summary judgment decision in Hamm's case, *see supra* at pp. 18–19, the Court's final order and the briefs in the Eleventh Circuit appeal contain numerous redactions due to the protective order, making it difficult for the public to understand the arguments in that case (and its resolution). *See* Redacted Mem. Op. and Order, ECF No. 58-2; Mot. to Seal Unredacted Resp. Br., *Hamm v. Dunn*, No. 18-10636 (11th Cir. Feb. 13, 2018); Mot. to Seal Unredacted Appeal Br., ECF No. 2, *Hamm v. Dunn*, No. 18-10636 (11th Cir. Feb. 20, 2018); Mot. to Seal Unredacted Resp. to Appeal Br., ECF No. 12, *Hamm v. Dunn*, No. 18-10473 (11th Cir. Feb. 21, 2018). Movants seek access to the execution protocol to promote public understanding of judicial proceedings surrounding an attempted execution which has received widespread media attention.

On the other hand, none of the Eleventh Circuit's factors weigh against disclosure in this case. The records are not sought to cause scandal or for commercial advantage. Nor would public access to the judicial records cause

delays to the proceeding, since the parties have come to a voluntary settlement. *See Rosenthal*, 763 F.2d at 1295.

Further, continued sealing of the entire protocol is far broader than necessary: insofar as the State has any concerns about protecting the identities of individuals, a redacted version of the protocol which omits individual names and identifying information would be a narrower way to protect that interest. *See Perez-Guerrero*, 717 F.3d. Yet, the State seeks to withhold the Protocol Records in full. Such overbroad and unwarranted sealing violates the "strong common law presumption in favor of access," *Brown*, 960 F.2d at 1015, and frustrates the public's ability "to appreciate fully the often significant events at issue in public litigation and the workings of the legal system," *Newman*, 696 F.2d at 803.

Finally, the State has made no on-the-record showings of good cause sufficient to keep the records sealed. This Court has previously held that the burden on the State is exacting: "In civil litigation, only trade secrets, information covered by a recognized privilege[,] . . . and information required by statute to be maintained in confidence . . . is typically enough to overcome the presumption of access." *In re Blue Cross Blue Shield Antitrust Litigation*, 2016 WL 7026339, at *3 (N.D. Ala. Oct. 18, 2016) (internal quotation marks omitted). Without sufficient evidentiary showings, the State has failed to carry its burden of

demonstrating sufficient interest to overcome the presumption of common law access.

## CONCLUSION

For the foregoing reasons, Press Movants respectfully ask the Court to grant its motion to intervene and to unseal the Protocol Records.

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**Pro hac vice motion forthcoming*

[12] This motion has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School but does not purport to present the school's institutional views, if any.

**CERTIFICATE OF SERVICE**

I hereby certify that on March 28, 2018, a true and correct copy of the foregoing was filed with Clerk of the Court using the CM/ECF system, which will send electronic notification to counsel of record.

/s/ *Gabriella E. Alonso*
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