UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SETH WESSLER *Plaintiff*, v. UNITED STATES COAST GUARD and UNITED STATES DEPARTMENT OF HOMELAND SECURITY *Defendants*.	No. 19-cv-0385-ENV-RML Served August 27, 2019

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case involves the public's right under the First Amendment to know how the government is exercising its power to arrest and detain, a power expressly constrained through various provisions of the U.S. Constitution. Through this lawsuit, journalist Seth Wessler asserts a First Amendment right of access to the names of individuals taken into custody by the government and the dates of their arrest—information essential for the public to know if constitutional constraints are being obeyed. Our society has never sanctioned secret arrests, and access to this basic information both promotes law enforcement's adherence to proper procedures and makes possible the type of public scrutiny of government conduct that is critical to a properly functioning democracy.

Defendants wrongly seek to stop this case at the outset by denying that any such First Amendment right exists. The issue on this motion is whether plaintiff has alleged facts that, if proven, would plausibly establish the existence of this right and its violation by defendants. As demonstrated below, Mr. Wessler plainly has. The Supreme Court has articulated the controlling test for determining where the First Amendment access right exists (the so-called "history and logic" test), and Mr. Wessler's Complaint alleges facts plausibly satisfying this test. The Complaint credibly demonstrates that the limited information at issue *is* subject to a qualified First Amendment right of access, such that the government may only properly withhold this important information if it establishes a compelling need for a narrowly tailored restriction of the access right.

Defendants seek to avoid altogether any application of the history and logic test by misstating the law governing the public access right and quarreling with the Complaint's factual allegations—disputes not properly raised on a motion to dismiss. Their motion should be denied.

STANDARD OF REVIEW

Motions to dismiss for failure to state a claim place a substantial burden upon the movant. A plaintiff's complaint need allege "only enough facts to state a claim of relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This standard demands that the district court accept as true all the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 89-90 (2d Cir. 2004). This standard is no different in a lawsuit alleging a violation of the First Amendment right of access, wherein a plaintiff must only plead facts plausibly supporting a history and logic of access to the government information sought to survive a motion to dismiss. *Id.* Dismissal is not proper so long as the complaint alleges facts that give raise to "a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Twombly*, 550 U.S. at 555 (2007) (internal citation omitted).

ARGUMENT

THE COMPLAINT PLAUSIBLY ALLEGES A VIOLATION OF THE FIRST AMENDMENT RIGHT OF ACCESS BY DEFENDANTS

Defendants' motion to dismiss should be denied because it misstates both the scope of the First Amendment access right and the legal standards for determining where the right exists. Plaintiff is a journalist who, as a representative of the public, asserts a constitutional right to important information about government conduct. He has alleged facts plausibly establishing that this right extends to the information he seeks, and a violation of that right by defendants. Nothing more is required at this stage.

A. The First Amendment Extends a Qualified Right of Access To Certain Government Proceedings and Information

The First Amendment grants the public a limited right of access to certain governmental information whose disclosure promotes the effective functioning of government and is needed to

ensure that constitutional constraints are being observed. "By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982). This right of access informs public debate, advances civic knowledge, promotes rational decision-making, and provides a check on government authority. Simply put, access to certain information is essential for the very functioning of a democratic society. As James Madison, architect of the First Amendment, noted: "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both." Letter from James Madison to W.T. Berry (Aug. 4, 1822).

Recognizing the intrinsic connection between access to information and democratic accountability, the Supreme Court has repeatedly confirmed that the First Amendment grants the public a qualified right of access to certain governmental processes and information, and has articulated clear standards for determining where this right exists. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (right of access to attend criminal trials); *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (right of access to transcripts of pre-trial proceeding). The Supreme Court found this access right to be a necessary corollary to freedoms expressly granted by the First Amendment—speech, press, assembly, and petition. Each of these freedoms "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Globe Newspaper*, 457 U.S. at 604. And the "First Amendment is broad enough to encompass those rights that . . . are necessary to the enjoyment of other First Amendment rights." *Id.* Thus, the First Amendment ensures the public a right of access to certain "information about the operation of their government," *Richmond Newspapers*,

448 U.S. at 584 (Stevens, J., concurring), in order to "protect the free discussion of governmental affairs" that is vital to democracy. *Globe Newspaper*, 457 U.S. at 604.

The Supreme Court first recognized the implied constitutional right of access in 1980 in *Richmond Newspapers*. In so doing, it articulated two factors that define where this constitutional right exists. Specifically, it declared that the First Amendment access right extends to those governmental processes and information that have historically been public and for which public access plays a significant positive role in the functioning of government. *Richmond Newspapers*, 448 U.S. at 569-73; *see also Press-Enterprise*, 478 U.S. at 8-13. A history of access is important in delimiting the scope of the right because "a tradition of accessibility implies the favorable judgment of experience." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). And because "all information bears on public issues" to some extent, it is "crucial in individual cases" also to determine "whether access to a particular government process is important in terms of that very process." *Id*. The right of access attaches only to those governmental processes and records that satisfy the Supreme Court's history and logic test. *See, e.g.*, *Press Enterprise*, 478 U.S. at 9-10; *N.Y. Civil Liberties Union v. NYC Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) ("NYCLU"); *Hartford Courant*, 380 F.3d at 92.

B. The First Amendment Access Right Is Not Limited to Judicial Proceedings

Seeking to avoid application of the history and logic test altogether, defendants rely largely upon pre-*Richmond Newspapers* decisions to declare that there is no constitutional right of access to government information. Defendants argue that the First Amendment access right applies only to "criminal proceedings," or in a "judicial" or "adjudicative" context, Def. Mem. 2, 6-8, and not ever to "government records," *id.* at 4, 6. This is flatly incorrect. Defendants' purported limitation of the access right to criminal or adjudicative proceedings conflates the

Supreme Court's *application* of the history and logic test in the cases before it with the actual *holdings* in those cases, which adopt the history and logic test as a generally applicable test for determining where the limited constitutional right of access exists.

1. As a threshold matter, defendants wrongly read *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), and other pre-*Richmond Newspapers* cases as holding that the First Amendment never protects access to government information unrelated to a judicial proceeding. This misreads the narrow holding of *KQED* and ignores the consistant contrary holdings in *Richmond Newspapers* and its progeny adopting the "history and logic" test to define the scope of the First Amendment access right. Indeed, in *Richmond Newspapers,* Justice Stevens undercored that the conclusion in the 4-judge opinion in *KQED* that non-discriminatory access to government information generally falls outside the protection of the First Amendment had never been accepted by a majority of the Court, and was now limited by the near-unanimous recognition of a First Amendment access right in *Richmond Newspapers*. 448 U.S. at 583. Justice Brennan agreed, noting that *KQED* and other earlier decisions "did not rule[] out a public access component in every circumstance." *Id.* at 586. *Richmond Newspapers* defined those circumstances where a public access right does exist.

2. The Supreme Court has been unequivocal that the right of access encompasses both physical access to certain government proceedings *and* access to certain governmental records. The right seeks to protect "the stock of information from which members of the public may draw" to participate in our democracy, and it exists wherever the "history and logic" test is satisfied. *Richmond Newspapers*, 448 U.S. at 576; *see also NYCLU*, 684 F.3d at 290, 297; *In re Search of Fair Finance*, 692 F.3d 424, 430 (6th Cir. 2012); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694-96 (6th Cir. 2002); *Cal. First Amend. Coalition v. Woodford*, 299 F.3d 868, 875-

77 (9th Cir. 2002). When the Court first recognized this right in *Richmond Newspapers*, the Justices described it as a right to access "important information," "information about the operation of the[] government," "governmental information," and "newsworthy matter." *See, e.g.*, 448 U.S. at 582-84, 586. Then, in *Globe Newspapers*, the Court reaffirmed that the right of access reaches even "sensitive information" that is integral to "the free discussion of governmental affairs." 457 U.S. at 604, 606. In *Press-Enterprise*, the Court left no doubt that the right is more than a right to attend proceedings, holding that the First Amendment access right extends to court transcripts. 478 U.S. at 13. Indeed, even the lone dissent in *Press-Enterprise* accepted that "the First Amendment embraces a right of access to information about the conduct of public affairs." *Id.* at 18.

3. The Supreme Court has made clear that the existence of the right of access is determined by the history and logic test, not by whether a process or record pertains to a judicial or executive function. If the "tests of experience and logic" are satisfied, "a qualified First Amendment right of public access attaches." *Press-Enterprise*, 478 U.S. at 9. Indeed, the Court has explicitly admonished that the reach of the right cannot be resolved based on the type of process at issue or the label given to an event. *Id.* at 7-8. Cabining the right of access to certain adjudicative proceedings, as defendants advocate, is to put the cart before the horse: the reason the right applies to criminal trials, for example, is that there is a history and logic of access to them, not the other way around. History and logic define whether the access right exists in a given context; the context does not define whether the history and logic test is to be applied.

The Supreme Court has never declared that the access right exists only in the context of adjudicative proceedings as defendants assert, and it has never said that types of information or proceedings are categorically beyond the scope of the right. It is not surprising why—doing so

would contradict both the scope of the First Amendment and the purpose of the right of access. The First Amendment does not "distinguish among branches of government; rather it protects the public against the government's 'arbitrary interference with access to important information,'" wherever the history and logic test is satisfied. *NYCLU*, 684 F.3d at 298 (quoting *Richmond Newspapers*, 448 U.S. at 583). And as the Supreme Court has made clear, the purpose of the access right is to protect the "discussion of governmental affairs," necessary to a well-functioning democracy. *Globe Newspapers*, 457 U.S. at 604. "[S]ecuring and fostering our republican system of self-government" requires "access to information about the operation of the[] *government*," not simply judicial proceedings. *Richmond Newspapers*, 448 U.S. at 584, 587. Put simply, while the scope of the *right* is limited, the *test* to determine where the right exists is not. The history and logic test is a test of general applicability for identifying those specific governmental proceedings and information to which the constitutional right of access attaches.

The U.S. Courts of Appeals have consistently confirmed this interpretation and applied the history and logic test to identify where the right of access exists, regardless of the underlying governmental proceeding or information at issue. And in so doing, courts have held that the access right attaches to a variety of proceedings *and* records. For example, every Circuit Court to have addressed the issue has applied the history and logic test to find that the access right applies to most civil proceedings and various related records.[1] Applying the history and logic test, courts have found that the right of access applies to the names of jurors, *United States v.*

[1] *See, e.g.*, *Westmoreland v. CBS*, 752 F.2d 16, 22 (2d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253-54 (4th Cir. 1988); *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re Iowa Freedom Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983).

Wecht, 537 F.3d 222, 234-39 (3d Cir. 2008), lists of eligible voters, *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 960 F.2d 105, 109 (9th Cir. 1992), and to executions, *see, e.g.*, *Cal. First Amendment Coalition*, 299 F.3d at 873-77. The Second Circuit applied the history and logic test to determine that the access right extends to administrative proceedings before New York City's Transit Authority Board. *NYCLU*, 684 F.3d at 296-303. Courts applying the history and logic test do not always find the alleged right to exist, but they uniformly have held that the history and logic test governs that determination. *See, e.g.*, *United States v. Miami Univ.,* 294 F.3d 797 (6th Cir. 2002) (denying constitutional right of access to student disciplinary proceedings); *Balt. Sun Co. v. Goetz,* 886 F.2d 60, 64 (4th Cir. 1989) (denying constitutional right of access to search warrant materials). In short, defendants' claim that the First Amendment access right and the history and logic test categorically do not apply outside of adjudicative proceedings has no basis in reason or precedent.[2]

Defendants not surprisingly cite almost no post-*Richmond Newspapers* case law, and the few cases they do invoke are not to the contrary. For example, they wrongly cite *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) (*LAPD*), for the proposition that the Supreme Court has denied a right of access to "information analogous to that sought" by plaintiff. Def. Mem. 7. Not so. In *LAPD*, the Supreme Court reviewed a facial challenge to a regulation of commercial speech, *not* a right of access claim, and noted that under commercial speech doctrine California may refuse to give out arrestee *address* information. 528 U.S. at 40. This holding says nothing about whether a right of access attaches to an arrestee's

[2] Even under defendants' cramped interpretation of the right of access as extending solely to "criminal proceedings," Def. Mem. 6, plaintiff has alleged a colorable right of access claim because he seeks information pertaining to arrests, which are quintessentially criminal proceedings and, "like a trial, [are] part of the general administration of justice that is central to government authority." *NYCLU*, 684 F.3d at 303 (internal marks omitted).

identity and date of arrest—information that is most certainly *not* analogous to address information, the disclosure of which sheds little light on the governmental process at issue.

Defendants' heavy reliance on *Center for National Security v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), is similarly misplaced. *See* Def. Mem. 8. The only relevant holding in that case, decided by a divided panel of the D.C. Circuit, was that the arrest dates of individuals criminally charged in the investigation of the 9/11 terrorist attacks were not subject to disclosure under the constitutional right of access. 331 F.3d at 933-36. First, the factual disparities between that case and this one are so significant to the point of being decisive: there, the government had already released the detainees' names, the detainees had access to counsel and were free to communicate with the public, and the case was litigated in the immediate aftermath of the worst terrorist attack in this country's history, when the court compared release of the information to "a suicide pact . . . that might cost lives." *Id.* Even more critically, the court's holding relied entirely, and without analysis, on a conclusion that the right of access does not extend to non-judicial documents that are not part of a criminal trial—a conclusion that conflicts with the Supreme Court's definition of the right and with binding Second Circuit authority. *See supra*, pp. 5-7; *NYCLU*, 684 F.3d at 290, 298-99.

At bottom, none of the cases defendants muster in defense of their arguments are persuasive, let alone authoritative. As a matter of settled law, whether plaintiff may assert a First Amendment right of access to basic information about arrests being made by his government is determined by whether there is both a history of and logic to such access. Plaintiff has sufficiently plead that there is.

C. The Complaint Plausibly Alleges the Existence of a First Amendment Right of Access to Names and Dates of Those Arrested

To survive a motion to dismiss, a plaintiff must only allege facts that, if true, plausibly establish the existence of a claim. *See Twombly*, 550 U.S. at 570. Plaintiff Seth Wessler has plainly pled sufficient facts to plausibly establish a history of public access to the names and dates of those arrested and to plausibly establish that such access serves a significant positive role in the proper functioning of the arrest process.

History. Plaintiff's Complaint offers concrete factual allegations establishing a long and unbroken history of contemporaneous public access to arrestees' names and their dates of arrest. The Complaint details the Anglo-American tradition of access to arrest information and repudiation of secret arrests, including England's abolition of the Star Chamber in 1641 to end this "arbitrary form of government." Compl. ¶ 31. This conclusion was not lost on the Founding generation, which deemed secret arrests to be "a *more dangerous engine* of arbitrary government" than arbitrary executions. Compl. ¶ 32 (citing Federalist No. 84 (J. Cooke ed. 1961), at 577).

Accordingly, "the first formal records that police departments used to document their arrests were made public. These records became known as 'police blotters.'" Compl. ¶ 33. Police blotters containing the names of arrestees and dates of their arrest have been "contemporaneously available to the press and public throughout American history." Compl. ¶ 34. Today, *every* state makes its police department's arrest logs available for public inspection. Compl. ¶ 36. Many federal law enforcement agencies also "make information about their detainees publicly available." Compl. ¶ 38. Both Congress and the U.S. Department of Justice have independently recognized the long custom and practice of keeping arrest logs open for public inspection. Compl. ¶¶ 35, 37.

Logic. Plaintiff has also sufficiently alleged that access to arrest records plays a particularly significant role in the functioning of the arrest process and the criminal justice system as a whole. Compl. ¶ 39. It is not sufficient, as defendants suggest, that the identities of some of the arrestees are eventually made public if they are charged with a crime. Def. Mem. 3. As the Complaint states, public access "enhances the proper functioning of law enforcement by deterring abuses of power that uniquely arise in the context of an arrest." Compl. ¶ 40. It "deter[s] law enforcement officials from mistreating arrestees or unjustly prolonging their detentions." Compl. ¶ 41. Public access "promotes public confidence in the integrity of the manner in which the government has exercised its monopoly on criminal arrest powers," Compl. ¶ 42, including protecting officers from imputations of dishonesty or illegal conduct. *See Richmond Newspapers*, 448 U.S. at 569 n.7.

"Without access to even the most basic information about who the government has arrested, there can be no public oversight, discourse, or accountability when the government oversteps." Compl. ¶ 42. Furthermore, public access to arrest records "allows the public to monitor the use of government resources," including tax payers' dollars; is "essential for public confidence in the government's compliance with domestic and international laws in making arrests;" enables defense counsel to provide legal services to arrestees; helps ensure that potentially exculpatory evidence is properly preserved; and "is especially vital to deter abuse and enable public discourse when arrestees are denied, or are never provided with, the opportunity to communicate with defense counsel, the media, or any outside actors." Compl. ¶¶ 43-48.

From these allegations, which must be assumed true, plaintiff has more than adequately pled a history and logic of access to the information he seeks and thus established a qualified First Amendment right to this information. This right, of course, is not absolute, and access may

be denied if the government demonstrates a compelling governmental interest in narrowly tailored confidentiality. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 606-07. The ultimate legal viability of plaintiff's claim, however, and whether the access right asserted may somehow be overcome in this case, are questions of fact not now before the Court. At this stage, plaintiff need only plausibly allege the existence of the right. This he has done.

D. The Complaint Plausibly Alleges a Violation of the Constitutional Access Right by Defendants

The Complaint also plausibly alleges that the defendants are violating the public's constitutional right to know the names of individuals arrested by the government and their dates of arrest. Defendants do not deny that the Coast Guard intercepts vessels suspected of drug trafficking, takes individuals into custody, and holds them involuntarily aboard Coast Guard ships for weeks or months until presented for criminal prosecution in U.S. courts. They argue only that such detentions are not "arrests" within the meaning of the Fourth Amendment because they occur at sea, and "the constitutional arrest concept has no application to extraterritorial law-enforcement activities." Def. Mem. 5 (citing *United States v. Vergudo-Urquidez*, 494 U.S. 259, 267-75 (1990)). This argument is unavailing.

As an initial matter, whether these detentions are arrests is a factual question not proper on this motion to dismiss. Plaintiff has sufficiently alleged that they are, and this allegation must be taken as true. Moreover, whether these detentions are arrests within the meaning of the Fourth Amendment has no bearing on whether the public has a First Amendment right to the names and dates of arrest of those being involuntarily held. Neither the maritime nature of these arrests nor the alien status of those detained are of any consequence to whether a U.S. citizen's First Amendment right of access to this basic information has been abridged.

1. As alleged in the Complaint, the information sought by plaintiff pertains to detentions that constitute "arrests" as historically understood, and within the legal and practical definition of that term. Compl. ¶¶ 5-18. The Supreme Court has made plain that "to constitute an arrest . . . the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, [is] sufficient." *California v. Hodari D.*, 499 U.S. 621, 624 (1991). There is no doubt that the detentions at issue in this case factually comport with that description: the Coast Guard has fired shots at interdicted vessels, detained and transferred individuals to Coast Guard ships, shackled those individuals by their ankles to ship decks, and held them incommunicado for as long as 70 days. *See* Compl. ¶¶ 3-18. As such, these detentions are not different from "run-of-the-mill domestic arrests," Def. Mem. 1, 5—they are initiated and sustained by a federal law enforcement agency to enforce ordinary criminal prohibitions on the sale and distribution of drugs.

By the government's own admissions these detentions constitute arrests. In describing a "typical" interdiction, the U.S. Interdiction Committee states that upon "determin[ing] the location of a suspect drug trafficking vessel . . . a nearby U.S. Coast Guard, U.S. Navy, or allied [ship], with assistance from a U.S. Coast Guard Law Enforcement Detachment, will seize the illicit cargo and *arrest the crew*." Compl., Exh. A, at 3 (emphasis added). Federal litigation on the issue has generated further concessions from the government on this very point. For example, in *United States v. Giler*, defendants moved to dismiss charges under the Speedy Trial Act because 37 days had passed between their initial detention at sea and their presentment for trial. In the hearing on that motion, counsel for the government stated that the defendant "was arrested on the high seas" and that all the defendants in that case "were arrested for all intents

and purposes [on the date of their detention]." *See* Tr. of Record at 4, *United States v. Giler*, No. 0:17-cr-60032 (S.D. Fla. Apr. 19, 2017), ECF No. 59.

2. That Fourth Amendment protections do not extend to non-citizens extraterritorially has no bearing on whether the First Amendment grants plaintiff—a U.S. journalist residing in New York—a right of access to the newsworthy information he seeks. The inapplicability of a different constitutional right in a given context is not dispositive of whether the First Amendment right of access exists in that context. For instance, while detainees at Guantanamo Bay may not enjoy certain constitutional due process rights, *see, e.g.*, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), both the federal courts and the Guantanamo military commissions have nonetheless held that the First Amendment right of access attaches to proceedings and information regarding the detainees and their detention. *See, e.g.*, *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 34-38 (D.D.C. 2009). Similarly, that certain Fifth Amendment rights do not apply in the context of a civil detention of an alien has no bearing on whether the public's First Amendment right of access attaches to deportation hearings. *See Detroit Free Press*, 303 F.3d at 700.[3]

Where the Coast Guard's actions take place and whether they are labeled arrests or detentions simply make no difference to Mr. Wessler's claim. Both the Supreme Court and the Second Circuit have stressed that courts must look to the nature of the governmental process in question, as opposed to the label it is given, when determining whether that process satisfies the

[3] Defendants' Fourth Amendment argument is also undermined by the Supreme Court's recent pronouncements that the extraterritorial application of the Fourth Amendment is not as resolved as defendants contend. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (declining "to resolve [the] issue" of whether the Fourth Amendment applies to the cross-border shooting of a Mexican citizen in Mexico by a U.S. Border Patrol agent, because such a "Fourth Amendment question . . . is sensitive and may have consequences that are far reaching").

history and logic test. *Press-Enterprise*, 478 U.S. at 7. For example, when plaintiffs sought access to Transit Authority Board hearings in *NYCLU*, the Second Circuit did not focus "on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake." 684 F.3d at 299. Reasoning that "[t]he *Richmond Newspapers* test looks not to the formal description of the forum but to the historical 'experience in that *type* or *kind* of hearing throughout the United States,'" the court equated the administrative hearings to criminal trials and held the right of access attached. *NYCLU*, 684 F.3d at 301 (quoting *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993)). So too here, the *type* or *kind* of process at issue is functionally an arrest. While the extraterritorial *forum* in which these arrests take place may preclude Fourth Amendment protections from attaching, the absence of Fourth Amendment protections does not itself redefine the Coast Guard's actions or the concept of an arrest itself.[4]

* * *

Because arrest information has historically been made public and public access greatly benefits the arrest process itself, information regarding the Coast Guard's maritime arrests is subject to the public's First Amendment right of access. This right is a structural right; it protects the health and vitality of democracy itself. *Richmond Newspapers*, 448 U.S. at 587-88 (Brennan, J., concurring). Defendants wrongly ask this Court to reject any First Amendment right to the names and dates of those they arrest—without even applying the history and logic

[4] Indeed, under this argument, it would necessarily follow that arrests by state law enforcement officers for over 150 years were in fact not "arrests" at all because the Fourth Amendment did not apply to the states until 1949, *see Wolf v. Colorado*, 338 U.S. 25, 27-28, and thus the "constitutional arrest concept [would have had] no application." *Vergudo-Urquidez*, 494 U.S. at 267-75. Such a gaping hole in logic confirms this argument does not hold water.

test—simply because the Fourth Amendment *might* not apply and the arrests *might* not be arrests. Each of these arguments is based on factual quarrels, legal errors, or both.

CONCLUSION

Plaintiff has sufficiently stated a plausible claim for a violation of the First Amendment right of access by defendants. Their motion to dismiss should be denied.

Dated: August 27, 2019

Respectfully submitted,

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