No. 18-12402

United States Court of Appeals

for the

Eleventh Circuit

DOYLE LEE HAMM,

Plaintiff,

– v. –

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, HOLMAN CF WARDEN, DONALDSON CF WARDEN,

Defendants-Appellants,

ALABAMA, ATTORNEY GENERAL,

Defendant,

ADVANCE LOCAL MEDIA LLC, d.b.a. Alabama Media Group, MONTGOMERY ADVERTISER, THE ASSOCIATED PRESS,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION, IN CASE NO. 2:17-CV-02083-KOB
HONORABLE KARON O. BOWDRE, CHIEF U.S. DISTRICT JUDGE

BRIEF FOR INTERVENORS-APPELLEES

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(admission pending)
DAVID SCHULZ
(admission pending)
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18-12402

Advance Local Media, LLC, et al v. Commissioner, Alabama DOC, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with FRAP 26.1 and the accompanying circuit rules, Appellee Advance Local Media, LLC served the following Certificate of Interested Persons:

1. Advance Local Media LLC, an Intervenor in this case, which does business as the Alabama Media Group, which is a subsidiary of Advance Publications, Inc., a media company incorporated and headquartered in New York;
2. Allen, Richard, former Commissioner of the Alabama Department of corrections;
3. Alonso, Gabriella E., counsel for Intervenors in this case;
4. Armstrong, Jeremy, former Assistant Attorney General during the postconviction proceedings;
5. Bolling, Leon, Warden of Donaldson Correctional Facility and Defendant in this action;
6. Bowdre, Karon Owen, federal district court judge;
7. Brasher, Andrew, Solicitor General of the State of Alabama;
8. Crain, Charles, counsel for Intervenors in this case;
9. Cunningham, Patrick, victim;

10. Dobbs-Ramey, Kimberly J., counsel for Hamm during the postconviction appeal;
11. Dunn, Jefferson S., Commissioner of the Alabama Department of Corrections;
12. Folsom, Fred C., trial judge;
13. Forrester, Nathan, former Solicitor General for the State of Alabama during the postconviction appeal;
14. Frisby, Stephen M., counsel for Defendants in this case;
15. Govan, Jr., Thomas R., counsel for Defendants in this case;
16. Hamm, Doyle Lee, plaintiff;
17. Harcourt, Bernard, counsel for Hamm in postconviction proceedings, in federal habeas proceedings, and in this Court;
18. Hardeman, Don L., postconviction judge;
19. Harris, Hugh, trial and direct appeal counsel for Hamm;
20. Hughes, Beth Jackson, counsel for the State in postconviction proceedings, in federal habeas proceedings, and in this Court;
21. King, Troy, former Alabama Attorney General during the federal habeas proceedings;
22. Langford, John, counsel for Intervenors in this case;
23. Little, William D., Assistant Attorney General during the direct appeal;

24. Marshall, Steve, Alabama Attorney General;
25. Martinez, Catherine, law student intern for Intervenors in this case;
26. Morin, Robert, counsel for Hamm on appeal to the United States Supreme Court on direct appeal;
27. Morse, Michael, law student intern for Intervenors in this case;
28. Nail, Pamela, counsel for Hamm in postconviction proceedings;
29. Newsome, Kevin C., former Solicitor General of the State of Alabama during postconviction proceedings;
30. Nunnelley, Kenneth, former Assistant Attorney General during the postconviction proceedings;
31. Pryor, William H., former Alabama Attorney General during the postconviction proceedings;
32. Roden, Douglas, co-defendant;
33. Roden, Regina, co-defendant;
34. Schulz, David A., counsel for Intervenors in this case;
35. Seidell, Charlie, law student intern for Intervenors in this case;
36. Siegleman, Don, former Alabama Attorney General during the direct appeal;
37. Simpson, Lauren A., counsel for Defendants in this case;

38. Stewart, Cynthia, Warden Holman Correctional Facility and Defendant in this action;
39. Stewart, Sandra J., former Assistant Attorney General during the direct appeal;
40. Strange, Luther, former Alabama Attorney General;
41. The Associated Press, an Intervenor in this case;
42. The Montgomery Advertiser, an Intervenor in this case, which is a part of the USA Today Network, whose parent corporation is Gannett Co., Inc., which is a media company incorporated in Delaware and headquartered in Virginia, a publicly traded company with no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns ten percent or more of Gannett's stock;
43. Thomas, Kim, former Commissioner of Alabama Department of Corrections;
44. Thompson, John G., counsel for Intervenors in this case;
45. Tran, Delbert, law student intern for Intervenors in this case; and
46. Williams, Martha E., trial and direct appeal counsel for Hamm.

/s/ Gabriella E. Alonso
Gabriella E. Alonso
Attorney for Intervenors

STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request oral argument to address the public's common-law right of access to those records submitted to courts in connection with substantive motions.

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PRELIMINARY STATEMENT

This appeal challenges a straightforward application of this Circuit's well-settled precedent governing the public's common-law right of access to judicial records. Appellants argue the wrong legal standard and present no valid basis to reverse the sound discretion exercised by the district court in unsealing its records.

In the underlying lawsuit, death-row inmate Doyle Lee Hamm sought to prevent Alabama from execute him via lethal injection, claiming his veins were so debilitated from drug use, hepatitis C, and untreated lymphoma that any attempt at lethal injection would be so prolonged and painful as to violate the Eighth Amendment. To resolve his claim the Alabama execution protocol was submitted to the district court, subjected to expert testimony, debated at hearings and expressly relied upon by the court in resolving Hamm's claims. It was, however, never filed with the clerk.

After an attempt to execute Hamm by lethal injection had to be called off for reasons that Hamm had predicted, three news organizations asked the court to unseal the protocol, along with other records and transcripts discussing it, to understand more fully why the courts had allowed the execution to proceed. They asserted both a constitutional and a common-law right to inspect the sealed records. The district court agreed that the common-law access right applied and ordered redacted records to be unsealed without reaching the constitutional claim.

The Commissioner of the Alabama Department of Corrections and other appellants (collectively, "Appellants" or "Alabama" or "the State") now argue that the district court violated a "bright-line" rule requiring that a document be formally "filed" before any common-law access right can exist, and further contend that the news media should not have been allowed to assert any access rights in the first place. Their appeal is entirely misdirected.

The bright-line rule Alabama advances has never been adopted by this Court. To the contrary, this Court and district courts throughout this Circuit have held that the public's common-law right of access attaches to documents that are both submitted to a court and relevant to its exercise of judicial power on a substantive issue, even when those documents are not formally "filed." And courts routinely allow news organizations to intervene for purposes of enforcing the public access right, even after—sometimes years after—a case is over. The district court order should be affirmed in all respects.

STATEMENT OF THE ISSUES

1. Whether a record submitted to a court in connection with a substantive, non-discovery motion is subject to the public's common-law right of access, regardless of whether it is formally filed.

2. Whether the district court correctly held that the defendants in this case failed to meet their burden to overcome the public's right to inspect judicial

records detailing Alabama's lethal injection protocol, with only those limited redactions necessary to safeguard security measures and the privacy of those involved in Alabama's lethal injection executions.

3. Whether the district court correctly held that three news organizations were entitled to intervene in a civil lawsuit for the limited purpose of enforcing the public's qualified right to inspect judicial records.

COUNTER STATEMENT OF THE CASE

A. Doyle Lee Hamm's "As Applied" Challenge to Alabama's Lethal Injection Protocol

Doyle Lee Hamm was sentenced to death by an Alabama jury in 1987. *Hamm v. Alabama*, 564 So.2d 453, 464–69 (Ala. Crim. App. 1989). Over the next twenty-nine years, Hamm filed a series of unsuccessful direct and collateral challenges to his conviction and sentence in state and federal court. *See Hamm v. Alabama*, 498 U.S. 1008 (1990) (denying certiorari); *Hamm v. Alabama*, 546 U.S. 1017 (2005) (denying certiorari); *Hamm v. Comm'r, Alabama Dep't of Corr.*, 620 F. App'x 752 (11th Cir. 2015) (affirming denial of federal habeas relief), *cert. denied*, 137 S. Ct. 39 (2016). On December 13, 2017, the Supreme Court of Alabama set Hamm's execution for February 22, 2018. *See* Appellants' App. Tab 3; Mem. Order 5, ECF No. 30.

The same day that the Alabama Supreme Court scheduled his execution, Hamm filed a § 1983 action challenging the constitutionality of Alabama's lethal

injection protocol as applied to him, seeking an injunction to prevent the use of the protocol for his execution. *See* Appellants' App. Tab 2; Compl., ECF No. 1.[1] As amended, Hamm's complaint alleged that, in 2014, he had been diagnosed with large cell lymphoma and had undergone massive radiation therapy to his cranium and other medication treatments. Am. Compl. at 2, ECF No. 15. Hamm alleged that those treatments, along with Hamm's medical history and age, had "severely compromised" his veins. *Id.* If Alabama proceeded with its planned lethal injection execution, Hamm claimed he would "almost certainly . . . suffer a painful, bloody, and prolonged death in violation of the Eighth Amendment." *Id.* at 1-2. Hamm specifically disavowed any facial challenge to Alabama's lethal injection method; instead, he claimed "only that [Alabama's] lethal injection protocol, as applied to him, w[ould] violate his [Eighth Amendment] rights because of his unique and serious medical conditions." *Id.* at 2.[2]

On January 19, 2018, Alabama moved for summary judgment. *See* Mot. for Summ. J., ECF No. 16. The district court ordered expedited briefing on Alabama's

[1] ECF numbers herein refer to docket entries in the docket below, *i.e.* in *Hamm v. Dunn*, No. 17-cv-02083 (N.D. Ala.).

[2] Hamm also claimed that his prolonged detainment on death row violated his Eighth Amendment rights. *See* Am. Compl. at 30, ECF No. 15.

motion and scheduled an evidentiary hearing for January 31, 2018. *See* Revised Briefing Schedule, ECF No. 17.

Recognizing the centrality of the protocol to the resolution of Hamm's claim, the district court notified the parties that "it would need to review Alabama's lethal injection protocol" at a pre-hearing status conference in chambers. Appellants' App. Tab 13; Mem. Order at 2, ECF No. 122.[3] Alabama agreed to produce the protocol for the court's *in camera* review before the hearing, and also agreed to provide Hamm's counsel with a redacted copy of the protocol, subject to a confidentiality order. *Id.* On January 30, 2018, the parties filed a joint motion for a protective order, which the court entered, and Alabama submitted paper copies of the lethal injection protocol to the court and produced a redacted version to Hamm's attorney the next day. *Id.*; *see* Joint Mot. for Protective Order, ECF No. 26; Agreed Confidentiality Order, ECF No. 28.

The evidentiary hearing proceeded as scheduled on January 31, 2018. Part of the afternoon session was conducted *in camera* and "revolved around the confidential lethal injection protocol." Appellants' App. Tab 13; ECF No. 122 at 2-3. Among other issues, the court took testimony on whether "Mr. Hamm still ha[d]

[3] Prior to filing his § 1983 lawsuit, Hamm's counsel repeatedly requested access to the protocol, but Alabama refused to produce the protocol. *See* Ex. Nos. 16, 18, 19, 20, 21, 22, 25, ECF No. 24.

enough good quality peripheral veins for the State to execute him using the procedures described in its confidential lethal injection protocol." Appellants' App. Tab 2; Mem. Order at 8, ECF No. 30.

A week after the hearing, the district court entered an order denying Alabama's motion for summary judgment and temporarily staying Hamm's execution. Appellants' App. Tab 2; Mem. Order, ECF No. 30. Finding "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," the court concluded that an independent medical examination was necessary to resolve the issue. *Id.* at 20 (emphasis in original; internal citations and quotation marks omitted); *see also id.* at 19–25. Meanwhile, the protocol remained under seal.

On Alabama's appeal, this Court vacated the stay of execution but agreed that an independent medical evaluation should be conducted. *See* Order, *Hamm v. Dunn*, No. 18-10473 (11th Cir. Feb. 13, 2018). It remanded the case, directing the district court to immediately appoint an independent medical examiner and to make any concomitant factual findings by February 20, 2018. *Id.*

On remand, the district court appointed a medical expert to conduct an examination of Hamm. *See* Sealed Order Appointing Medical Expert, ECF No.

48. On February 16, 2018, the court held an *in camera* hearing to take testimony from the medical expert. The district court closed the hearing to the public to protect the identity of the expert and the confidentiality of the lethal injection protocol, which the court "anticipated the parties would discuss extensively." Appellants' App. Tab 13; Mem. Op. at 3, ECF No. 122. At the conclusion of the hearing, the district court denied Hamm's request for a preliminary injunction, based in part on Alabama's stipulation that it would "not attempt peripheral venous access in Mr. Hamm's upper extremities." Mem. Op. and Order 4, ECF No. 58; *see* Appellants' App. Tab 13; Mem. Op. at 3, ECF No. 122.

The court subsequently entered a memorandum opinion and order memorializing its decision on February 20, 2018. Appellants' App. Tab 4; Mem. Op., ECF No. 58-2. It explained that, in light of the medical expert's report and Alabama's stipulation, "[n]othing about Mr. Hamm's condition . . . present[ed] a risk that Alabama's current lethal injection protocol as applied to him [was] sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Id.* at 4 (internal alteration omitted). Nor could Hamm "show any medical factors that would make the Alabama lethal injection protocol, as applied to him, more likely to violate the Eighth Amendment than it would for any other inmate who would be executed following that protocol." *Id.* at

6. Hamm appealed the district court's denial of his request for a preliminary injunction.

On appeal, this Court expressed some remaining concerns regarding the execution protocol to be used and ordered Alabama to submit a sworn affidavit confirming whether it would have ultrasound technology and a doctor present at the execution. Order, *Hamm v. Comm'r, Ala. Dep't of Corr.*, No. 18-10636 (Feb. 21, 2018). In response, the warden of the Holman Correctional Facility submitted an affidavit assuring the Court that both would be present. State's Obj. to Court's Order Ex. A, *Hamm v. Comm'r, Ala. Dep't of Corr.*, No. 18-10636 (Feb. 21, 2018). Based on that representation, as well as those Alabama made to the district court, this Court affirmed the district court's denial of Hamm's request for a preliminary injunction. It held that Hamm failed to demonstrate a likelihood of success on his claim that Alabama's lethal injection protocol, as applied to him, would violate his constitutional rights. Order, *Hamm v. Comm'r, Ala. Dep't of Corr.*, No. 18-10636 (Feb. 22, 2018). Hamm petitioned the Supreme Court for a stay and writ of certiorari but was denied. *See Hamm v. Dunn*, 138 S. Ct. 828 (2018).

On February 22, Alabama attempted to execute Mr. Hamm. According to the expert report of the doctor who examined Mr. Hamm pursuant to the district court's order, Mr. Hamm suffered through a prolonged, painful and bloody process

as Alabama unsuccessfully sought to implement the execution protocol. Two men first spent about thirty minutes inserting needles into Mr. Hamm's lower extremities, including ten minutes of "extremely painful" probing of his right calf during which Mr. Hamm could feel the men "rolling and mashing" the tissue in his leg and his right shinbone reached by a needle. Notice of Submission of Expert Report of Dr. Mark Heath, ECF No. 93, Appendix A at 2. When those attempts at IV access failed, the focus moved to Mr. Hamm's groin region and he felt multiple needle insertions "penetrating deep into his groin and pelvis." *Id*. Mr. Hamm began to hope the doctor "could 'get it over with' because he preferred to die rather than to continue to experience the ongoing severe pain." *Id.* After "a large amount of blood" accumulated in Mr. Hamm's groin region the execution was called off. *Id*. Guards had to support Mr. Hamm by his arms to return him to his cell because he was in too much pain to support himself. *Id.* at 2-3. The doctor who subsequently examined Mr. Hamm noted 11 puncture wounds and observed that the bleeding from his groin region was "consistent with arterial puncture." *Id.* at 4.

The failed attempt to execute Mr. Hamm received national media coverage. For example, NBC reported "a frantic scene in the death chamber" and published pictures of Mr. Hamm's lower legs and feet showing discoloration and puncture

wounds.[4] A debate played out in the press between Mr. Hamm's attorney, who described the effort to implement the protocol as a "botched and bloody" process, and Alabama officials who disputed that characterization and contended that the problem had been "more of a time issue."[5]

On March 5, 2018, Hamm moved to amend his complaint for a second time "to include the facts of Alabama's botched execution attempt" because it bore "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. Hamm filed the second amended complaint on March 26, 2018, ECF No. 103, but later that same day, the parties "jointly stipulate[d] to the

[4] Tracy Connor, *Doyle Lee Hamm Wished for Death During Botched Execution, Report Says*, NBCNews.com (Mar. 5, 2018, 3:40 PM, updated Mar. 5, 2018, 8:19 PM), https://www.nbcnews.com/storyline/lethal-injection/doyle-lee-hamm-wished-death-during-botched-execution-report-says-n853706.

[5] David Brennan, *Doyle Lee Hamm: Botched Execution Death Row Prisoner Sues Alabama, Asks for Vacated Sentence*, Newsweek.com (Mar. 18, 2018, 6:40 PM), https://www.newsweek.com/botched-execution-death-row-prisoner-sues-alabama-asks-vacated-sentence-836127; *see also*, *Alabama Postpones Execution of Motel Clerk Killer at 11th Hour*, CBSNews.com (February 23, 2018, 1:12 AM), https://www.cbsnews.com/news/alabama-postpones-execution-motel-clerk-killer-doyle-hamm-veins-botched/ (Mr. Hamm's attorney contending that the failed execution vindicated his concerns about the use of the protocol but Alabama's Corrections Commissioner stating the execution was halted out of "an abundance of caution").

voluntary dismissal of [the litigation]." Appellants' App. Tab 5; Joint Stipulation of Voluntary Dismissal at 1, ECF No. 104. The district court entered an Order dismissing the action two days later, on March 28, 2018. Appellants' App. Tab 6; Order to Dismiss, ECF No. 105.

B. Press Intervenors' Motion to Intervene and Unseal Judicial Records, Including the Lethal Injection Protocol

The same day the district court dismissed the § 1983 action, appellees Alabama Media Group, the *Montgomery Advertiser*, and the Associated Press (collectively, "Press Intervenors") moved to intervene and unseal the records, transcripts, and briefs discussing Alabama's execution protocol. Appellants' App. Tab 7; Mot. to Intervene and Unseal, ECF No. 107.[6] Press Intervenors demonstrated that those records are judicial records subject to First Amendment and common-law rights of public access, and that neither the constitutional nor the common-law right is overcome for the records sought. Appellants' App. Tab 8; Mem. in Supp. of Mot. To Intervene and Unseal, ECF No. 108 at 9–24.

[6] Specifically, Press Intervenors moved to unseal Alabama's lethal injection protocol and the sealed transcripts (located at ECF Nos. 53, 70, 71, and 72) of the January 31, February 7, February 14, and February 16 hearings. *See* Appellants' App. Tab 8; Mem. in Supp. Of Mot. to Intervene and Unseal at 7, ECF No. 108. Press Intervenors also requested an order authorizing the parties to release unredacted versions of briefs filed in the Eleventh Circuit and the Supreme Court. *See id*.

On March 30, 2018, the district court granted the motion to intervene as a matter of right under Federal Rule of Civil Procedure 24(a), but reserved ruling on the merits of Press Intervenors' motion to unseal. Appellants' App. Tab 9; Order Granting Mot. to Intervene, ECF No. 111. On April 3, 2018, the district court ordered Alabama to show cause "why the court should not grant the Intervenors' motion to unseal the lethal injection protocol and court records related to it." Appellants' App. Tab 10; Order to Show Cause, ECF No. 113.

Alabama responded on April 17, 2018, arguing that the lethal injection protocol was not a judicial record, that there is no First Amendment right of access to judicial records, and that any First Amendment or common-law right of access to Alabama's lethal injection protocol was overcome. Appellants' App. Tab 11; Defs.' Resp. at 8, ECF No. 119. Alabama also asked the district court to reconsider its decision granting intervention, arguing that Press Intervenors' motion was not timely and that their interests would not be impaired by a denial of intervention. *Id*. at 8–10.

The district court directed Press Intervenors to respond to the request for reconsideration. Order, ECF No. 120. Press Intervenors replied on April 23, 2018, demonstrating that intervention is the widely applied and proper mechanism through which to assert constitutional and common-law rights of access to judicial records. Appellants' App. Tab 12; Press Intervenors' Reply, ECF No. 121.

C. The District Court Order at Issue

On May 30, 2018, the district court denied Alabama's request for reconsideration on the issue of intervention and largely granted Press Intervenors' motion to unseal judicial records. Appellants' App. Tab 13; Mem. Op., ECF No. 122. With regards to intervention, the district court held that Press Intervenors satisfied both the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a) and the requirements for permissive intervention under Rule 24(b). *Id.* at 5. It rejected Alabama's argument that Press Intervenors' motion was not timely, stating that Alabama failed to explain how it was prejudiced by the motion. *Id.* at 7–8. The district court also rejected Alabama's argument that denying the motion would not impede Press Intervenors' interest, explaining that Alabama may not submit the protocol in another case and that the common-law right of access guarantees a right of access to the records in this case. *Id.* at 8–9.

Turning to the merits of the access request, the district court rejected Alabama's argument that the lethal injection protocol was not a judicial record in Hamm's § 1983 lawsuit. *Id.* at 9–14. The court was unambiguous that it "needed and relied upon the protocol to resolve Defendants' motion for summary judgment and Mr. Hamm's request for preliminary injunctive relief." *Id.* at 12. It "relied heavily on the protocol in finding that genuine issues of material fact existed about the merits of Mr. Hamm's as-applied claim." *Id.* For example, the district court

"had to rely on the lethal injection protocol to know exactly what type and number of veins [Alabama] would need to access during Mr. Hamm's execution." *Id.* "The court could not have analyzed the effect the condition of Mr. Hamm's veins would have on his execution if the court did not know the details about how Mr. Hamm would be executed." *Id.* at 13.

The centrality of the lethal injection protocol to the district court's decision is evident from the extent to which the court and litigants discussed it in the judicial records and proceedings in this case. *Id.* For instance, part of the January 31 hearing was held "*in camera* precisely because it involved the confidential protocol." *Id.* "And Mr. Hamm's sealed motion for leave to supplement[] his first amended complaint quotes extensively from both the protocol itself, and from the January 31 *in camera* hearing." *Id.*

The court explained that the parties failed to formally file the protocol only because of "the rush to address Mr. Hamm's as-applied claim before his scheduled execution date." *Id.* at 11. "In the press of time, the parties and the court did not cross all Ts or dot all Is to have the protocol filed of record." *Id.* Under these circumstances, the court held that "the failure to formally file the protocol d[id] not make it a non-judicial record." *Id.*

The court then found that Alabama failed to demonstrate that the public's common-law right of access to the judicial records requested was overcome. The

court began by noting that, under Eleventh Circuit precedent, the public has a presumptive common-law right of access to judicial records and courts must determine whether there is good cause to deny that right. *Id.* at 15. Drawing on Eleventh Circuit precedent, the district court analyzed six relevant factors before finding that Appellants had not overcome the common-law access right. *Id.* at 15–19. The court found that the first four factors all favored public access: (1) the protocol concerns a matter of great public interest—capital punishment and its implementation, *id.* at 15–16; (2) access to the protocol would promote public understanding of a historically significant event—Mr. Hamm's failed execution, *id.* at 16; (3) the press did not already have substantial access to the protocol and likely would never have substantial access absent access to the court's records, *id.* at 16–17; and (4) far from seeking access to the protocol for an "improper purpose," Press Intervenors' purpose is consistent with "[t]he public['s] need[] to know how the State administers its laws," *id.* at 17–18.

Taking up the fifth factor, the district court agreed that Appellants had "exhibited behavior consistent with reliance on the Agreed Confidentiality Order." *Id.* at 18 (internal citation and quotation marks omitted). But, in the court's view, "the fact that Defendants zealously guard information about a matter of great public concern does not tip the scales against disclosure," and the "considerations in favor of unsealing the records greatly outweigh" Appellants' interest in secrecy.

Id. Finally, turning to whether access would disclose sensitive security or personal information, the court found that Appellants' stated concerns—the need to protect the security of the process and the identities of those involved in it—could be dealt with by redacting the records appropriately before their release. *Id*.

The district court ordered the lethal injection protocol unsealed subject only to those redactions necessary (a) to prevent the tracking of locations of personnel before, during, and after an execution and (b) to protect the identities of people involved in Alabama's executions. *Id.* at 18–19. It also ordered the transcripts from the closed hearings held on January 31 and February 16, 2018, unsealed, as well as Hamm's motion for leave to supplement his first amended complaint, subject to those redactions necessary to protect the identity of the court's independent medical examiner, confidential security measures, and the identities of personnel involved in executions. Appellants' App. Tab 14; Order Granting Mot. to Unseal, ECF No. 123.

On June 6, 2018, Alabama filed a notice of appeal, ECF No. 125, and moved the district court to stay its decision, pending the appeal before this Court, Appellants' App. Tab 16; ECF No. 126. The district court granted Alabama's motion and stayed its order granting Press Intervenors' motion to unseal. Appellants' App. Tab 17; Order Granting Stay Pending Appeal, ECF No. 127.

STANDARD OF REVIEW

The determination of whether a record is a "judicial record" subject to the public's common-law right of access is a question of law that this Court reviews *de novo*. *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013); *accord. Flynt v. Lombardi*, 885 F.3d 508, 511 (8th Cir. 2018); *United States v. Sealed Search Warrants*, 868 F.3d 385, 390–91 (5th Cir. 2017).

On the merits, "the decision as to access is one best left to the sound discretion of the trial court.'" *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 61 (11th Cir. 2013) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978)). Accordingly, this Court "review[s] a district court's order lifting or modifying a protective order and unsealing a document only for abuse of discretion." *Id.*[7]

Likewise, "the decision whether to allow permissive intervention is committed to the sound discretion of the district court, and will not be disturbed absent a clear abuse of discretion." *United States v. Dallas Ct'y Comm'n*, 850 F.2d

[7] A district court abuses its discretion only when it "applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous," or when it "misconstrues its proper role, ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support." *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 61 (11th Cir. 2013) (internal citations and quotation marks omitted).

1433, 1443 (11th Cir. 1988). This Court reviews a district court's judgment on intervention as of right *de novo*. *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1292 (11th Cir. 2017).

SUMMARY OF THE ARGUMENT

Decades of this Court's precedent make it abundantly clear that Alabama's execution protocol is a judicial record in this case because it was submitted for the court's use in deciding a substantive, non-discovery motion. Contrary to Alabama's contention, this Court has never held that documents must be formally filed to be considered judicial records. The Court has recognized that formal filing is typically *sufficient* to render documents subject to the public's right of access, but it has not held that formal filing is *necessary* for any access right to exist. To the contrary, this Court and district courts in the Eleventh Circuit have found documents submitted to courts in connection with substantive motions to be judicial records subject to the public access right even when they were not formally filed. The district court was plainly correct in finding that Alabama's execution protocol is a judicial record subject to the common-law right of access in this case since it was submitted to the court, used at evidentiary hearings and oral arguments, and integral to the judicial resolution of Mr. Hamm's as-applied challenge to it.

Nor did the district court abuse its discretion in finding that Alabama failed to articulate a compelling government interest in secrecy sufficient to overcome the public's common-law right of access to the judicial records. Following the guidance of the Supreme Court and this Court, the district court considered six factors in weighing Alabama's asserted interests in secrecy against the value of public access. It found that four of those factors weighed solidly in favor of access, and that a fifth factor—whether allowing access would disclose sensitive information—could be addressed by limited redactions to protect the location and identities of personnel involved in executions. None of those findings was an abuse of discretion.

Finally, the district court properly rejected Alabama's contention that intervention was improper. This Court has repeatedly made clear that parties must be permitted an opportunity to assert their access rights even after a case has closed, and, as the district court found, Alabama is not prejudiced as a result of the intervention by Press Intervenors in this case.

For these reasons, this Court should affirm in its entirety the district court's order granting intervention and unsealing redacted copies of the lethal injection protocol and related court records.

ARGUMENT

I. ALABAMA'S EXECUTION PROTOCOL IS A JUDICIAL RECORD IN THIS CASE

The district court correctly held that Alabama's lethal injection protocol is a judicial record in this lawsuit because the protocol was actually presented to the court, discussed at hearings and relied upon in resolving the merits of Hamm's claims. In the Eleventh Circuit, such documents "integral to the judicial resolution of the merits of any action[] are . . . subject to the common-law right" of access. *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 64 (11th Cir. 2013) (internal quotation marks omitted). As this Circuit has explained in multiple decisions over several decades, this rule stems from the presumption that the public must have access to judicial proceedings—and therefore to documents central to those proceedings—in order to safeguard the integrity and credibility of the courts. This Court and its district courts have consistently applied this principle in holding that documents central to a judicial proceeding, whether formally filed or not, are judicial records and therefore presumptively available to the public. The district court did not err in applying this well-settled rule.

A. Documents Integral to the Judicial Resolution of an Action Are Judicial Records Subject to a Right of Public Access

This Court's rule that documents integral to the resolution of the merits of an action are judicial records stems from its broader recognition that the public must be afforded meaningful access to judicial proceedings. Access to the documents

integral to a judicial proceeding is essential for informed access to the proceeding, promotes the proper operation of the courts, and maintains public confidence in the judiciary.

The right of access to judicial proceedings acknowledges that "[o]nce a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case." *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992). As this Court has observed, "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern . . . and [t]he 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.*, 480 F.3d 1234, 1245 (11th Cir. 2007) (internal citations and quotation marks omitted). It is also well-settled that the First Amendment independently protects the public's right of access to judicial proceedings. *See, e.g.*, *Press-Enterprise Co. v. Sup. Ct. of Cal. for Riverside Ct'y*, 478 U.S. 1 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *United States v. Valenti*, 987 F.2d 708, 712-13 (11th Cir. 1993).[8]

[8] Press Intervenors asserted a First Amendment right of access to the protocol records below, but the district court did not reach the issue. If this Court should hold that the common-law right of access is overcome, it should remand for consideration of whether the First Amendment right independently protects access to the protocol records and whether Alabama has met the higher bar necessary to abridge the First Amendment right of access.

The right of access to judicial proceedings necessarily encompasses a right of access to documents central to court operations and to the exercise of judicial power. In *Newman v. Graddick*, this Court underscored the point, explaining that the "right to inspect and copy judicial records[,] . . . like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system." 696 F.2d 796, 803 (11th Cir. 1983). Thirty years later, this Court reiterated that "[w]hat transpires in the court room is public property, and both judicial proceedings and judicial records are presumptively available to the public." *Perez-Guerrero v. U.S. Att'y Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013) (internal citations and quotation marks omitted).

This is not merely an abstract principle; it is the means by which continued public confidence in the judicial system is maintained. "Judges deliberate in private but issue public decisions after public arguments based on public records . . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *Id.* at 1235 (quoting *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006)) (alteration in original). Or, as Justice Blackmun explained:

> 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).

Recognizing the overriding interest in open judicial process, the Eleventh Circuit has construed "judicial record" broadly and ruled that a wide variety of documents are subject to the common-law right of access. In *F.T.C. v. AbbVie Products LLC*, for example, this Court held that "access to the complaint is almost always necessary if the public is to understand a court's decision." 713 F.3d 54, 62 (11th Cir. 2013). Quoting its decision in *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, the Court reiterated that the right of access applies to "materials that invoke 'judicial resolution of the merits,' such as complaints, motions to dismiss, or motions for summary judgment." 713 F.3d at 63 (quoting 263 F.3d 1304, 1312 (11th Cir. 2001)).

Similarly, in *Brown v. Advantage Engineering, Inc.*, this Court addressed "the public's right of access to judicial records" in the context of a civil case in which the district court rejected a motion for summary judgment and then sealed the trial court record as part of the court-approved settlement. 960 F.2d 1013, 1014 (11th Cir. 1992). This Court reversed the district court's decision to keep the trial court record sealed after an intervenor sought "to review pleadings, motions, and evidence openly submitted in district court." *Id.* at 1014. The guiding principle of

this Court's jurisprudence is that documents submitted to obtain judicial resolution of the merits of a dispute are judicial records subject to the access right because access to such documents is essential to meaningful access to the judicial process itself.

District courts in this Circuit have applied this principle repeatedly in ruling that a wide variety of documents in civil cases are judicial records and therefore subject to the right of access. For example, the Middle District of Alabama, quoting *Brown*, held that documents filed in conjunction with summary judgment motions are subject to the right of access. *McCall v. Montgomery Hous. Auth.*, No. 2:10-CV-367-MEF, 2011 WL 4390049, at *1 (M.D. Ala. Sept. 21, 2011) (quoting 960 F.2d at 1016). The Middle District of Florida cited *Brown* in denying defendants' motion to seal an exhibit to their motions in limine that contained "deposition testimony . . . regarding private and personal facts related to . . . past criminal convictions and related violations." *Stoneeagle Servs., Inc. v. Pay-Plus Sols., Inc.*, No. 8:13-CV-2240-T-33MAP, 2015 WL 12844438, at *1 (M.D. Fla. Apr. 7, 2015). The Middle District of Florida also cited *Brown* in denying a defendant's motion to seal deposition transcripts that were submitted to the court in connection with a motion for summary judgment, motions to exclude expert witness testimony, and motions in limine. *Diaz-Granados v. Wright Med. Tech.,*

Inc., No. 614-CV-1953-ORL28TBS, 2016 WL 1090060, at *1–*2 (M.D. Fla. Mar. 21, 2016).

B. Documents Submitted to Obtain Judicial Resolution of an Action Are Judicial Records, Whether or Not They Are Formally Filed with the Court

Applying the controlling principle that documents submitted to obtain judicial resolution of a dispute are subject to the public access right, courts in the Eleventh Circuit have found documents that were never formally filed with the court to be judicial records.

In *Newman v. Graddick*, the Middle District of Alabama presided over a class-action lawsuit in which Alabama prison inmates alleged they were victims of unconstitutional prison over-crowding. *See* 696 F.2d 796, 798–99 (11th Cir. 1983). The district court granted injunctive relief and a consent decree was entered pursuant to which state officials would reduce the number of prisoners in county jails. *Id.* When overcrowding worsened, "the district court ordered the Department of Corrections to submit periodic lists of 250 prisoners 'least deserving of further incarceration.'" *Id.* at 799.

These lists were not formally filed with the court and do not appear on the district court docket. *See United States v. Noriega*, 752 F. Supp. 1037, 1042 (S.D. Fla. 1990) (noting that the prisoner lists in *Newman* "were not part of the court file"). Nevertheless, this Court agreed that two Alabama newspapers were entitled

to inspect and copy these prisoner lists because they were "submitted to the court and became part of the court proceedings" and were thus subject to the "common-law right to inspect and copy judicial records." *Newman*, 696 F.2d at 802–03. Far from applying any distinction between filed and unfiled documents, this Court applied the very principles it has always applied in determining whether a document is a judicial record. It focused on the fact that disclosing material submitted to the court was important to public understanding of the judicial actions taken. *Id.* at 803. It then ordered that the newspapers be given access to the records, finding "the evidence that might support a denial of access to the prisoner lists . . . insufficient." *Id.* at 804.

District courts have relied upon *Newman* to rule that various documents submitted in connection with substantive motions, but never formally filed with the court, were nonetheless judicial records subject to the common-law right of access. In *United States v. Noriega*, for example, CNN obtained recordings, made by the United States government, of imprisoned former Panamanian dictator Manuel Noriega speaking with his attorneys. 752 F. Supp. at 1038. After Noriega moved to enjoin CNN from broadcasting the recordings, the district court had court-employed translators make transcriptions of the tapes in order to establish a written record and assist the court in its determination. *Id.* at 1038–39. When other media organizations moved for access to those transcripts, CNN argued, in part, that the

transcripts were not judicial records because they "were never a part of the public record." *Id.* at 1040. The district court, citing *Newman*, quickly dispatched the argument: "[w]hether the transcripts were formally entered on the docket or placed in the court file is not dispositive as to whether they are judicial records to which the press has a right of access." *Id.* at 1042.

Having squarely rejected the existence of any bright-line rule that the transcripts could not be judicial records because they were never filed, the district court went on to explain, in familiar terms, why the transcripts *were* judicial records. First, it noted that the transcripts were relied upon by the court "in reaching its determination as to whether disclosure of their contents would impair Noriega's right to a fair trial." *Id.* at 1042. The court further noted that "[t]he tapes' contents . . . provided the basis for the Court's decision to lift its restraining order on the tapes' broadcast. In this function, the transcripts served as an important part of the record before [the] court." *Id.*

Similarly, the District Court for the Southern District of Alabama found that letters sent to the court in advance of a sentencing hearing were judicial records because of their role in the judicial process, even though they were not filed with—or even in the possession of—the court. In preparing to sentence a former Mississippi sheriff pursuant to a plea agreement, the district court in *United States v. Byrd* received many letters from the public "volunteering insights as to Byrd's

history and characteristics, as well as input concerning sentencing (the 'Sentencing Letters')." 11 F. Supp. 3d 1144, 1146 (S.D. Ala. 2014). "Pursuant to local practice, these unsolicited letters from third parties were not docketed in the court file and were not filed with the Clerk of Court; rather, they were housed with the original [Presentence Investigation Report] in a separate sentencing folder maintained by the U.S. Probation Office." *Id.* While the letters were neither filed with the court, nor even stored in the courthouse, the district court nevertheless "reviewed and considered the PSR and Sentencing Letters, as well as the defendant's sentencing memorandum and the entire court file, in preparation for Byrd's sentencing hearing." *Id.* at 1146.

When the *Sun Herald* newspaper filed a motion requesting access to the letters after the sentencing hearing, the district court began by addressing the "obvious preliminary question [of] whether the Sentencing Letters . . . qualify as judicial documents within the boundaries of the common-law right of access." *Id.* at 1148. To qualify as a judicial document, the court explained, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *Id.* at 1148–49 (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)). Because sentencing letters are "meant to [a]ffect the judge's sentencing determination," "designed to have a direct impact on the [c]ourt's sentence," and "directly relevant to the performance of the judicial function," the

district court "conclude[d] that the Sentencing Letters [we]re judicial records . . . subject to the public right of access set forth in the common law." *Id.* at 1149.[9]

In sum, this Court made clear in *Newman* that documents submitted in connection with a substantive, litigated dispute are judicial records subject to the public's right of access whether or not they are formally filed. And district courts in the Eleventh Circuit have appropriately applied that principle to ensure that the public has meaningful access to the judicial process.

C. Appellants Misread *AbbVie*, Which Does Not Adopt the "Bright-Line" Test They Propose

Against the clear weight of authority, Alabama offers only a superficial and strained reading of this Court's decision in *F.T.C. v. AbbVie Products LLC*, 713 F.3d 54 (11th Cir. 2013). But a closer inspection of *AbbVie* confirms that this Court did not adopt the "bright-line" test Alabama reads into that opinion and did not contradict this Circuit's decades-long history of precedent to the contrary. Far from demanding filing as a necessary pre-requisite to an access right, *AbbVie* is entirely consistent with—and, indeed, directly states—this Circuit's rule that documents "integral to the judicial resolution of the merits of any action[] are . . . subject to the common-law right" of access. *AbbVie*, 713 F.3d at 64.

[9] Having found the sentencing letters to be judicial records the district court then conducted the common-law balancing test and decided that the letters should not be disclosed.

In *AbbVie*, a pharmaceutical company came under investigation by the Federal Trade Commission because the FTC suspected that the company's settlement of a lawsuit with several competitors violated antitrust laws. *Id.* at 58. As part of that investigation, the company voluntarily disclosed a confidential document, and the FTC subsequently attached that document to its antitrust complaint against the company. *Id.* The company argued that the document contained sensitive financial information whose dissemination could harm its business interests, and the district court agreed to place the document under seal. *Id.* The FTC's lawsuit was eventually dismissed, but when the Supreme Court granted a writ of certiorari, "the FTC returned to the district court and asked for the [document] to be unsealed so that the FTC and its amici could discuss the document openly in the Supreme Court." *Id.* The district court granted the FTC's motion to unseal, and this Court rejected the company's argument that the district court had abused "its considerable discretion to modify its own protective order." *Id.*

In affirming the district court, this Court reiterated the distinction it drew in *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.* between unfiled discovery materials—which are part of an essentially private process—and materials submitted to invoke the exercise of judicial power—which are subject to the public

access right.[10] *AbbVie* noted that "[t]he holding in *Chicago Tribune* established a bright-line rule exempting discovery materials from the common-law right of access." *Id.* at 64. As this Court went on to explain, "[t]he rationale" for that rule is that "an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power," and "[t]he overwhelming majority of documents disclosed during discovery are likely irrelevant to the underlying issues and will not be heard or read by counsel or by the court or other judicial officer." *Id.* at 63 (internal citation and quotation marks omitted). Elsewhere, this Court has explained that the need for public access to the documents exchanged in discovery is low because discovery is "essentially a private process . . . the sole purpose [of which] is to assist trial preparation." *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986).

Eliding this context, as well as the plain language of *AbbVie* and *Chicago Tribune*, Appellants claim to have located in *AbbVie* "a simple, bright-line rule that

[10] In *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, this Court overruled a lower court's holding that "because . . . documents were filed with the court they are judicial records and therefore subject to the common-law right of access." 263 F.3d 1304, 1312 (11th Cir. 2001). Instead, the Court endorsed "a more refined approach [that] . . . accounts both for the tradition favoring access, as well as the unique function discovery serves in modern proceedings." *Id.* "The better rule," this Court concluded, "is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and [this Court] so h[e]ld." *Id.*

courts 'determine whether a document is a judicial record depending on the type of filing it accompanied' and *not* 'whether it played a discernable role in the resolution of the case.'" Appellant's Br. at 19-20) (emphasis in original) (quoting *AbbVie*, 713 F.3d at 64). This misstates the holding in *AbbVie*—the "bright-line rule" in that case was, again, "a bright-line rule exempting discovery materials from the common-law right of access." *AbbVie*, 713 F.3d at 64. Indeed, this Court's holding in *Chicago Tribune*, upon which *AbbVie* relies, was prompted by its *refusal* to allow a simplistic "filed-or-not-filed" distinction to become the primary factor in determining if a document is a judicial record. *See* 263 F.3d at 1312.

As this context makes clear, when this Court wrote in *AbbVie* that "we determine whether a document is a judicial record depending on the type of filing it accompanied," it was distinguishing documents filed in discovery proceedings from other filed documents, not announcing an entirely new rule barring documents that have not been formally filed from ever being classified as judicial records. 713 F.3d at 64. As *AbbVie*, *Newman*, *Noriega*, and *Byrd* make clear, this Court and district courts in this Circuit have, for decades, consistently recognized

that unfiled documents that are submitted in connection with the resolution of the merits of an action are judicial records subject to the public access right.[11]

D. Alabama's Execution Protocol Was Submitted to the District Court in Connection with the Resolution of the Merits of Hamm's Lawsuit and is Thus a Judicial Record

In light of this Court's straightforward precedent, the district court was bound to hold that Alabama's lethal injection protocol is a judicial record in this case. Not only was the protocol actually submitted to resolve a substantive motion, it was essential to the court's disposition of Hamm's § 1983 lawsuit.

Hamm's primary claim was that "[Alabama's] lethal injection protocol, as applied to him, w[ould] violate his [Eighth Amendment] rights because of his unique and serious medical conditions." Am. Compl. at 2, ECF No. 15. In

[11] For these same reasons, this Court's precedent ensures that the district court's decision will not "make it impossible for parties in civil cases to disclose sensitive documents in the course of discovery." *Cf.* Appellants' Br. at 22. Appellants' hypotheticals, including one in which Coca-Cola turns over trade secrets to Pepsi in discovery and becomes helpless to prevent public disclosure, present a true red-herring. Appellants' Br. at 22–23. This Court addressed these very concerns in *Chicago Tribune* and readily dispelled them: (1) a document shared in discovery, and never presented to the court, is not subject to the common-law right of access; (2) civil litigants who receive protective orders pursuant to Rule 26 of the Federal Rules of Civil Procedure do not automatically forfeit that confidentiality when sealed material is subsequently submitted in connection with a substantive motion because a court at that point "must first conduct the common-law right of access balancing test"; and (3) if trade secrets are at issue, the district court must balance the party's "interest in keeping the information confidential against the Press's contention that disclosure serves the public's legitimate interest in health and safety." 263 F.3d at 1312–15.

advance of the hearing on Appellants' motion for summary judgment and Mr. Hamm's request for injunctive relief, the district court notified the parties at a pre-hearing status conference that it would "need" to review the protocol. Appellants' App. Tab 13; Mem. Op. at 2, ECF No. 122. As the district court later explained, "[t]he lethal injection protocol was central to Mr. Hamm's as-applied challenge to the method of execution, and even if Defendants had not agreed to voluntarily disclose it, the court would have ordered them to produce it; the court needed to review the protocol as much if not more than Mr. Hamm did." *Id.* at 7. Indeed, in providing the protocol to the court, Alabama acknowledged that Hamm's claims, in part, concerned the protocol. Joint Mot. for Protective Order, ECF No. 26 at 1.

The lethal injection protocol then played a central role in the resolution of Hamm's claims. Six days after the January 31 hearing, the district court issued a decision that relied heavily on the protocol. *See* Appellants' App. Tab 3; Mem. Order, ECF No. 30. The court denied Appellants' motion for summary judgment "as to the merits of Mr. Hamm's as-applied claim because he . . . created genuine issues of material fact about whether Alabama's method of execution is sure or very likely to cause him needless suffering." *Id.* at 4. It devoted three paragraphs of its memorandum opinion to laying out details from the protocol that it found relevant to its analysis. *Id.* at 7–8. The district court also relied on the protocol in denying Hamm's request for a preliminary injunction. *See id.* at 22–23 (explaining

that Mr. Hamm had "not presented evidence *establishing* that he lacks the number and quality of peripheral veins needed for Defendants to execute him under Alabama's lethal injection" and that he had not "presented evidence *establishing* that he is experiencing lymphadenopathy, such that Defendants could not safely resort to the protocol's alternative method of execution using a central line" (emphasis in original)). As the district court later explained, "[a]ny gaps in [that] opinion's discussion of the interplay between the lethal injection protocol and the condition of Mr. Hamm's veins indicate only that the court did not have time to fully flesh out the opinion, not that the court did not rely on the lethal injection protocol or the evidence presented at the *in camera* hearing *about* the lethal injection protocol as applied to Mr. Hamm." Appellants' App. Tab 13; Mem. Op. at 12, ECF No. 122 (emphasis in original).

The district court could not have been more clear that, "[t]he court needed" and "relied heavily on the protocol," and "the protocol was vital" to resolving the merits of this case. *Id.* at 12-13. Appellants' attempt to downplay the importance of the execution protocol to the district court's rulings in Mr. Hamm's case is belied by the record and by the district court's own explanation of how it approached the case.

Appellants are left resting their entire argument on the allegedly dispositive fact that the execution protocol was never formally filed with the court. But, as

shown above, this Court's ruling in *Newman* forecloses that argument. *See also*, *Noriega*, 752 F. Supp. at 1042; *Byrd*, 11 F. Supp. 3d at 1149. Here, where the document at issue was provided to the court, discussed extensively at a hearing and identified by the trial court as central to its decision, it is unambiguously a judicial record subject to the public access right, notwithstanding the oversight in failing to file it with the clerk. *See* Appellants' App. Tab 13; Mem. Op. at 11, ECF No. 122. The trial court clearly did not err in holding the protocol to be a judicial record subject to the common-law right of access.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ALABAMA FAILED TO OVERCOME THE PUBLIC'S COMMON-LAW RIGHT OF ACCESS TO THE PROTOCOL AND OTHER SEALED RECORDS

Contrary to Alabama's argument, the district court did not abuse its discretion in finding that Alabama's asserted interests in secrecy do not overcome the public's common-law right of access to the protocol, except with respect to certain security measures and the identities of personnel. District court have "discretion to determine which portions of the record should be placed under seal," and that discretion "is guided by the presumption of public access to judicial documents." *Perez-Guerrero v. U.S. Att'y Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013). This discretion follows from this Court's recognition that "[d]istrict courts are in a superior position to decide whether to enter or modify protective orders, and it is well established that 'the decision as to access is one best left to the sound

discretion of the trial court.'" *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 61 (11th Cir. 2013) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978)) (citations and internal quotation marks omitted). Thus, this Court reviews "a district court's order lifting or modifying a protective order and unsealing a document only for abuse of discretion." *Id.*

The district court did not abuse that discretion. As the Supreme Court has noted, "[i]t is difficult to distill . . . a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate." *Nixon*, 435 U.S. at 598–99. Courts do not apply a bright-line rule. Rather, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599. Here, citing this Court's decision in *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), the district court properly identified and evaluated six factors in determining that Appellants did not overcome the strong presumption in favor of public access:

(1) whether the records concern a matter of great public interest, Appellants' App. Tab 13; Mem. Op. at 15–16, ECF No. 122;

(2) whether access is likely to promote understanding of a historically significant event, *id.* at 16;

(3) whether the press has had substantial access to the content of the record, *id.* at 16–17;

(4) whether intervenors seek access to the sealed records for an improper purpose, *id.* at 17–18;

(5) whether the parties have relied upon the existence of a confidentiality order; *id.* at 18; and

(6) whether the record contains sensitive security information or personal identifications, *id.*

The district court properly found that the first four factors weigh in favor of access, while the fifth and sixth justify redacting only those portions of the protocol the disclosure of which permit the tracking and identification of personnel involved in Alabama's executions.

1. Access Sheds Light on a Matter of Public Concern. As the district court noted, the records at issue shed light on a matter of public concern because "[c]apital punishment is a "hotly contested issue that involves an irrevocable punishment for prisoners convicted of terrible crimes" and "the public has a great interest in understanding how the State carries out its punishment." *Id.* at 15–16. "The fact that the death penalty may be a hotly contested issue does not lessen the public's presumptive right of access to court documents—to the contrary, it increases that presumptive right of access." *Id.* at 16.

2. Access Promotes Understanding of a Matter of Historical Concern.

The district court also correctly found that access to the execution protocol is likely to promote public understanding of historically significant events. *See id.* at 16. Beyond the historical significance of any execution in an era in which capital punishment is relatively rare, Mr. Hamm's unique circumstances lend particular historical significance to his case. Alabama's failed attempt to execute Mr. Hamm provoked intense public interest in, and media coverage of, his case.[12] The circumstances surrounding this failed execution are historically significant both on their own terms and because of the light they may shed on the procedures by which Alabama carries out the death penalty. As the district court concluded, "access to the lethal injection protocol may help the public to understand the context of the State's efforts to execute him. It may also help the public to understand how the same scenario might be repeated or avoided under the protocol as it currently stands." *Id.*

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[12] *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-painfulinmate-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, 7:37 P.M.), http://www.al.com/news/birmingham/index.ssf/2018/02/doyle_lee_hamm_attempted_execu.html; Travis Fedschun, *'Botched' Execution Was 'Torture' That May Have Punctured Alabama Inmate's Bladder, Lawyer Says*, FoxNews.com (Feb. 26, 2018), http://www.foxnews.com/us/2018/02/26/botched-execution-was-torture-that-may-have-punctured-alabama-inmates-bladder-lawyer-says.html.

3. The Press Has Not Had "Substantial Access" to the Protocol. The district court properly found that this factor, too, weighed in favor of unsealing. *Id.* at 16-17. In *Nixon*, the Supreme Court indicated that the public's need for access to exhibits in one of the Watergate prosecutions was less acute because the public would ultimately have "substantial access" to those records. 435 U.S. at 603–06. But in *Nixon*, as the district court noted, the Supreme Court was referring to a "congressionally prescribed avenue of public access"—*i.e* the Presidential Recordings Act—that would eventually make the relevant documents available to the public, even if they were not unsealed by a court. *Id*.

Here, in contrast, there is no similar route of access to the lethal injection protocol at the center of Hamm's case. Alabama, in all likelihood, "will keep the lethal injection protocol secret from the public unless the [district] court unseals it." Appellants' App. Tab 13; Mem. Op. at 17, ECF No. 122. Nor does the district court's description of the protocol suffice to give the public substantial access to the protocol. The district court noted that, "in an attempt to avoid sealing or redacting the memorandum opinion, the court kept its summary of the protocol deliberately vague." *Id.* at 16. While Alabama argues that "the order details the protocol at length," Appellants' Br. at 28, the district court underscored that its "vague summary of portions of the lethal injection protocol and its gaps cannot

truly substitute for the document itself," Appellant's App. Tab 13; Mem. Op. at 17, ECF No. 122.

4. Intervenors Do Not Seek to Unseal for an Improper Purpose. As the district court found, *see id.* at 17–18, Press Intervenors seek Alabama's execution protocol to shed light on a matter of public concern, not to promote public scandal or gain unfair commercial advantage. This is precisely the sort of circumstance this Court and the Supreme Court were describing when they discussed "sealed documents [that] involve public concerns that are at the heart of the interest protected by the right of access: 'the citizen's desire to keep a watchful eye on the workings of public agencies . . . [and] the operation of government.'" *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (quoting *Nixon*, 435 U.S. at 598).

Appellants turn this principle on its head by claiming that a desire to "cast Alabama's death-penalty practice in a negative light is precisely the type of 'scandal' envisioned by the Supreme Court." Appellant's Br. at 31–32. Appellants effectively contend that courts should disfavor access to judicial records if the requestors seek to influence public policy or public opinion in ways disfavored by the government. Unsurprisingly, they cite no Eleventh Circuit or Supreme Court case in support of this proposition.

But the Supreme Court in *Nixon* did provide examples of what types of scandals they envisioned to be relevant: "the publication of the painful and sometimes disgusting details of a divorce case," or the use of judicial files to serve as "reservoirs of libelous statements for press consumption." *Nixon*, 435 U.S. at 598 (internal citations and quotation marks omitted). Similarly, the Southern District of Florida, citing *Newman v. Graddick*, invoked the concern about scandal when it refused public access to discovery requests that were "better characterized as imputations of personal dalliances of . . . individuals [who were] not purported to have been involved in the matters that gave rise to this action and are not public figures." *Rossbach v. Rundle*, 128 F. Supp. 2d 1348, 1352 (S.D. Fla. 2000). Such attempts to use court records simply to damage the reputations of private individuals are the types of scandals courts must guard against; by contrast, a "desire to keep a watchful eye on the workings of public agencies . . . [and] the operation of government" is precisely the motive the access right is meant to vindicate. *See Romero*, 480 F.3d at 1246 (quoting *Nixon*, 435 U.S. at 598).

5. Defendants Are Not Prejudiced by Reliance on the Stipulated Confidentiality Order. The district court found this factor to weigh in favor of sealing because Alabama has "always sought to keep the lethal injunction protocol confidential." Appellants' App. Tab 13; Mem. Op. at 18, ECF No. 122. It nonetheless found that the other factors compelling public access to court records

"greatly outweigh" Alabama's interest in keeping the protocol private. *Id.* It correctly observed that, without other, stronger, factors weighing in favor of continued secrecy, "the fact that [Appellants] zealously guard information about a matter of great public concern does not tip the scales against disclosure." *Id.*

6. Limited Redactions Suffice to Address Alabama's Legitimate Security Concerns. Finally, the district court considered Appellants' argument that "the protocol contains security procedures and information that could be used to identify people involved in the execution of death sentences." *Id.* at 15. As the district court pointed out, this is not an argument for withholding the protocol, but rather an argument for appropriately redacting it. The need to "keep[] *parts* of the . . . protocol sealed . . . does not affect the analysis of whether to unseal the other parts of the protocol." *Id.* at 18 (emphasis in original). The district court concluded that the portions of the protocol implicating privacy and security concerns "can easily be redacted"—and, indeed, had *already* been redacted in the copy of the protocol provided to Mr. Hamm's counsel. *Id.*

In weighing these factors, the district court properly exercised its discretion and found that the protocol should be unsealed. Its careful review of the facts in light of relevant precedent demonstrates that there are no compelling interests weighing against the strong presumption that Alabama's lethal injection protocol ought to be unsealed and made available for public review.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR IN GRANTING PRESS INTERVENORS' MOTION TO INTERVENE

This Court should reject Alabama's passing objection that the district court erred in granting Press Intervenors' motion to intervene. The district court held that Press Intervenors were entitled to intervene as of right under Federal Rule of Civil Procedure 24(a) and, in the alternative, concluded that permissive intervention was appropriate under Rule 24(b). Appellants' App. Tab 13; Mem. Op. at 5, ECF No. 122. That decision tracks this Court's precedent, as well as consistent precedent from around the country, making clear that the press and public must be permitted to intervene under Rule 24 to assert right of access claims absent extraordinary circumstances.

A. The District Court Did Not Abuse Its Discretion in Authorizing Permissive Intervention under Rule 24(b)

Federal Rule of Civil Procedure 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." "The decision whether to allow permissive intervention is committed to the sound discretion of the district court, and will not be disturbed absent a clear abuse of discretion." *United States v. Dallas Ct'y Comm'n*, 850 F.2d 1433, 1443 (11th Cir. 1988); *accord. Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1292 (11th Cir.

2017) ("Denial of a motion for permissive intervention is reviewed for an abuse of discretion.").

Rejecting the argument Alabama raises on appeal that Press Intervenors' fail to satisfy Rule 24(b)'s commonality requirement, the district court properly concluded that intervention was appropriate under Rule 24(b). Press Intervenors' motion shares a common question of law or fact with the main action: namely, the propriety of the confidentiality order entered to protect the lethal injection protocol and its contents. In other words, whether the district court's protective order preventing disclosure of the protocol was justified is a common question of law and fact between the main action and Press Intervenors' right-of-access claim.

This Court has already made clear that this sort of nexus satisfies Rule 24(b)'s commonality requirement. In *Brown v. Advantage Engineering, Inc.*, a third party filed a Rule 24(b) motion for permission to intervene and unseal a summary judgment motion and related papers submitted in a personal injury lawsuit. 960 F.2d 1013, 1015 (11th Cir. 1992). The district court denied the motion to intervene. *Id.* On appeal, this Court reversed. It explained that, "because it is the rights of the public, an absent third party, that are at stake, any member of the public has standing to view documents in the court file that have not been sealed . . . *and to move the court to unseal the court file in the event the record has been improperly sealed*." *Id.* at 1016 (emphasis added).

The district court recognized as much, citing to the Eighth Circuit's decision in *Flynt v. Lombardi*, 782 F.3d 963 (8th Cir. 2015). Appellants' App. Tab 13; Mem. Opp. at 5, ECF No. 122. In *Flynt*, a publisher moved to intervene and unseal records in two cases brought by death-row inmates in Missouri challenging Missouri's lethal injection protocol. 782 F.3d at 965. The district court denied the publisher's motion to intervene, apparently reasoning that the publisher's generalized interest in the subject of the litigation didn't satisfy Rule 24(b)'s commonality requirement. *Id.* at 966. The Eighth Circuit reversed. *Id.* at 966–67. It explained that, "where a party is seeking to intervene in a case for the limited purpose of unsealing judicial records, most circuits have found that there is no reason to require . . . a strong nexus of fact and law" to satisfy Rule 24(b). *Id.* at 967 (internal quotation marks omitted). Instead, "for reasons of judicial efficiency," Rule 24(b) intervention is generally the appropriate mechanism for raising access claims. *Id.*

Other circuits agree. As the D.C. Circuit explained, "despite the lack of a clear fit with the literal terms of Rule 24(b), every circuit that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998); *see id.* (collecting cases). For example, when a newspaper intervened to unseal a settlement agreement that was subject to

a confidentiality order, the Third Circuit held that "[b]y virtue of the fact that the Newspapers challenge the validity of the Order of Confidentiality entered in the main action, they meet the [commonality] requirement of Fed. R. Civ. P. 24(b)." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994). Likewise, when an Illinois newspaper moved to unseal a settlement agreement, the Seventh Circuit held that

> the Newspaper assert[ed] a right directly and substantially related to the litigation, a right of access to court proceedings and documents born of the common law and the First Amendment. . . . [W]hen a district court enters a closure order, the public's interest in open access is at issue and that interest serves as the necessary legal predicate for intervention.

Jessup v. Luther, 227 F.3d 993, 998 (7th Cir. 2000). Though Rule 24(b)'s language was "undoubtedly crafted principally for other situations occurring more frequently in federal litigation," it is nonetheless a "logical and appropriate vehicle by which the public and press may challenge a closure order." *Id.* at 997–98; *see also, e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

The district court plainly did not abuse its discretion in following this Court's precedent and courts around the country in concluding that permissive intervention was proper.

B. The Court Also Correctly Held That Press Intervenors Were Entitled to Intervene as of Right

Press Intervenors also satisfied Federal Rule of Civil Procedure 24(a)'s requirements for intervention as of right, as the district court held. Rule 24(a)(2) provides that, "on timely motion," courts must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." In the Eleventh Circuit, a party seeking to intervene as of right under Rule 24(a)(2) must show:

> (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989). Alabama does not dispute that Press Intervenors have an interest in this case, or that their interest was not adequately represented by the parties; instead, Alabama argues only that Press Intervenors failed to timely file their motion and that Press Intervenors' interests are unlikely to be impaired. The district court rejected both arguments, and this Court should, too.

1. The district court did not abuse its discretion in determining that Press Intervenors' motion was timely.

"Timeliness" "is not a word of exactitude or of precisely measurable dimensions," and the determination of timeliness is "largely committed to the discretion of the district court." *Stallworth v. Monsanto*, 558 F.2d 257, 263 (5th Cir. 1977).[13] Accordingly, a district court's determination of timeliness is reviewed for abuse of discretion. *Walters v. Atlanta*, 803 F.2d 1135, 1150 n.16 (11th Cir. 1986); *Reeves v. Wilkes*, 754 F.2d 965, 968 (11th Cir. 1985).

This Court has held that, when considering whether a motion to intervene is timely, courts must consider four factors: (1) the length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *Salvors, Inc.*, 861 F.3d

[13] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

at 1294. Below, the district court found that the balance of these factors weighed in favor of finding Press Intervenors' motion timely. Appellants' App. Tab 13; Mem. Op. at 6–8, ECF No. 122.

Alabama challenges the district court's determination that the amount of time between when Press Intervenors learned of the protocol's sealed submission to the court and filed their motion to intervene was reasonable. Appellants' Br. at 36. This Circuit, however, has concluded that motions to intervene are timely even months and years after a court enters a protective order. *See Salvors, Inc.*, 861 F.3d 1278 (intervention was timely, though the contested order was entered 33 years earlier); *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986) (intervention was timely though suit was ongoing for 11 years); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013 (11th Cir. 1992) (intervention six months after dismissal was timely). That comports with other circuits' decisions holding that intervention in right of access cases is proper even years after a case is over. *See, e.g.*, *Carlson v. United States*, 837 F.3d 753, 756–57 (7th Cir. 2016) (granting a journalist's motion to intervene and adjudicating request to unseal 70-year-old grand jury records). As the Ninth Circuit has observed, "delays measured in years have been tolerated where an intervenor is pressing the public's right of access to judicial records." *San Jose Mercury News, Inc. v. U.S. Dist. Ct. – N. Dist.*, 187 F.3d 1096, 1101 (9th Cir. 1999) (overruled on other grounds). The district court did not abuse its

discretion in concluding that Press Intervenors' delay of two months between January 31 and March 30, 2018, does not render their motion untimely.[14]

Alabama also argues that the district court abused its discretion in concluding that Alabama would not be prejudiced by a decision granting Press Intervenors' motion to intervene. Appellant's Br. at 37–39. Alabama contends it "would not have voluntarily turned over the protocol to Hamm," or that it "could have taken a different approach to the joint dismissal of this case and the finalized settlement agreement with Hamm." *Id.* at 37-38. The district court persuasively rejected both arguments below. Appellants' App. Tab 13; Mem. Op. at 6–8, ECF No. 122. With respect to the first it explained that, had Alabama not volunteered to disclose the protocol, the court would have ordered Alabama to do so, given its centrality to Hamm's lawsuit. *Id.* at 7. As for the second, the court explained that Alabama could not have reached an agreement that would preclude the public from seeking to unseal the document. *Id.* The district court did not abuse its discretion in reaching those conclusions. *See Brown*, 960 F.2d at 1016 ("Once a matter is

[14] Particularly perplexing is Alabama's suggestion that the district court erred in imputing Press Intervenors with knowledge of the submission of the protocol on January 31. Appellants' Br. at 36. Instead, Alabama suggests that Press Intervenors knew of the protocol's role in the case by January 18. *Id.* But, as noted above, Alabama did not submit a proposed confidentiality order until January 30, 2018, or produce the protocol until the January 31, 2018, hearing.

brought before a court for resolution, it is no longer solely the parties' case, but also the public's case.").

Alabama's last argument on timeliness is that the district court abused its discretion in finding that Press Intervenors would suffer prejudice if they were denied leave to intervene. Appellant's Br. at 39–40. Alabama suggests that Press Intervenors need only intervene in another, ongoing case to obtain the lethal injection protocol. *Id.* That argument fundamentally misconstrues the nature of the public's common-law right of access. That right entitles it to the judicial records of this case; it is not some freestanding right to other copies of the protocol that may be available elsewhere in the future.

Moreover, even if obtaining a copy of Alabama's protocol elsewhere could substitute for the public's right of access to the judicial records in this case, there is no guarantee that other copies of the protocol at issue in this case will ever be made available elsewhere. As the district court explained, Alabama has made no representation that it regularly files or submits the protocol in litigation, and the statute of limitations has run for the majority of challenges to the protocol. Appellants' App. Tab 13; Mem. Op. at 8, ECF No. 122. Nor is there any guarantee that Alabama will not revise its protocol in the future, rendering the protocol central to this case irrelevant to future death penalty litigation.

Moreover, even if another copy of the protocol were made available in future litigation and access to that copy could substitute for the public's common-law right of access to the protocol in this case, Press Intervenors are still prejudiced by the delay in gaining access to that record. When information to which the public is entitled is sealed, each passing day constitutes a separate and cognizable infringement of its access right. *Cf., Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., Circuit Justice). Press Intervenors have suffered harm, and will continue to suffer harm if they must wait for a hypothetical future case to litigate their present-day claims.

2. The district court did not abuse its discretion in finding that Press Intervenors' rights would be impaired if intervention were denied.

In contesting the district court's determination that Press Intervenors' interests would be impaired were intervention denied, Alabama merely reprises its argument on prejudice to the Press Intervenors under the timeliness analysis. *See* Appellant's Br. at 40–41. This Court should reject that argument for the same reasons it should reject Alabama's prejudice argument under the timeliness prong: Press Intervenors have a right of access to the protocol submitted in this case; that protocol may not be filed going forward; and, even if it were, Press Intervenors are harmed by each day that passes before they obtain the protocol.

CONCLUSION

For these reasons, this Court should affirm the district court's decision to unseal the lethal injection protocol and related court records after applying appropriate redactions.

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[15] This brief was 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 COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that, on August 16, 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 Alonso
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