No. 20-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs – Appellants

v.

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

Defendant – Appellee

On Appeal from a June 10, 2020 Memorandum Opinion
in the U.S. District Court for the
Eastern District of Virginia, Richmond Division
Case No. 3:19-cv-00692-REP (The Honorable Robert E. Payne)

**BRIEF OF AMICUS CURIAE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 23 MEDIA ORGANIZATIONS
SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL**

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STATEMENT OF IDENTITY OF AMICI

All parties have consented to the Reporters Committee for Freedom of the Press ("Reporters Committee") and other amici filing this amicus brief.

Amici curiae are the Reporters Committee, The Atlantic Monthly Group LLC, E.W. Scripps Company, International Documentary Association, Los Angeles Times Communications LLC, The Media Institute, The Association of Magazine Media, National Journal Group LLC, National Newspaper Association, National Press Photographers Association, National Public Radio, The News Leaders Association, News Media Alliance, The New York Times Company, North Carolina Press Association, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tribune Publishing Company, Tully Center for Free Speech, Virginia Coalition for Open Government, Virginia Press Association, and The Washington Post. Lead amicus the Reporters Committee is an unincorporated nonprofit association. It was founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The other amici are news organizations and organizations that advocate on behalf of journalists and the press.

All of the amici have a strong interest in the constitutionality of restrictions on access to information such as those being challenged here.

STATEMENT OF COMPLIANCE

No party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than amicus curiae or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) , and the line of cases that followed it, the Supreme Court of the United States recognized that the public has a qualified right of access to certain proceedings rooted in the First Amendment. Considerations of history and logic provide the framework for determining the scope of that right. *Press-Enter. Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 9 (1986).[1] Using the *Press-Enterprise II* framework, this Court has recognized that the First Amendment right of public access applies if (1) "the place and process have historically been open to the press and general public"; and (2) "public access plays a significant positive role in the functioning of the particular process in question." *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (citation omitted). The District Court erroneously declined to apply this established framework to determine whether the public has a right of access to the entirety of an execution. Contrary to the District Court's cramped analysis, the First Amendment presumption of access to proceedings is not so limited.

The public's qualified right of access to proceedings plays a structural role in our system of self-government. The Supreme Court and this Court have recognized that access to information is essential for an informed public that forms the basis of

[1] These considerations are also referred to as "experience and logic." *Id.*

our democracy. Accordingly, this Court and others have applied the history and logic framework outside of the narrow confines identified by the District Court to ensure that the public is informed about important matters of public concern. The press, as a surrogate for the public, has long exercised the public's right of access to ensure that everyone can be informed, even when the number of attendees is limited. In addition, the right of access is key to preserving other rights. Access to information about government proceedings allows voters, legislators, and judges to evaluate those proceedings and ensure they comply with other Constitutional guarantees. Finally, the District Court erroneously relied on the wrong opinion in *Houchins v. KQED, Inc*., 438 U.S. 1 (1978), and failed to properly consider the *Richmond Newspapers* line of cases in its opinion.

Appellants seek access to "the entire execution process," including important initial steps in the execution. Appellants' Brief at 5. On remand, the District Court must consider whether any or all components of an execution proceeding "have historically been open to the press and general public," and whether "public access plays a significant positive role in the functioning of the particular process in question." *Baltimore Sun*, 886 F.2d at 64 (citation omitted). If the District Court finds a qualified right of access, that right can be overcome only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 9 (citation

omitted). Amici urge this Court to reverse and remand this matter to the District Court to conduct that analysis.

ARGUMENT

I. The First Amendment Right of Access Plays a Structural Role in Our Representative Democracy.

"We the People" are the sovereigns and ultimate decisionmakers in our democratic republic. U.S. CONST. pmbl. One of the premises of our system of representative government is that "an informed public is the essence of working democracy." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). The way in which our Founders ensured that citizens would stay informed is through the protections of the First Amendment. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). The First Amendment protects "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Those "expressly guaranteed freedoms share a common core purpose of assuring freedom of communications on matters relating to the functioning of government." *Richmond Newspapers*, 448 U.S. at 575 (Burger, C.J.). The First Amendment does more than protect "the free discussion of governmental affairs" for the abstract value of discussion. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). It also plays a structural role in "ensur[ing] that the individual citizen can

effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 604.

A. The First Amendment guarantees the public a right of access to ensure an informed public debate.

The public's right of access arises from the recognition that "uninhibited, robust, and wide-open" public debate, to sustain a democracy, must also be *informed* public debate. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J.) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). The Supreme Court first recognized the structural role of the First Amendment in *Richmond Newspapers,* 448 U.S. at 587–88 (Brennan, J.). That holding was premised on the idea "that meaningful self-government requires an informed electorate." Eugene Cerruti, "*Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. Rich. L. Rev. 237, 239 (1995). Justice Brennan's concurring opinion expressly acknowledged the First Amendment's structural role in protecting the "process of communication necessary for a democracy to survive [and the] indispensable conditions of *meaningful* communication." *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J.) (emphasis added). Justice Brennan's concurring opinion "became the foundation for subsequent decisions in this area." Michael J. Hayes, Note, *What Ever*

Happened to "The Right To Know"?: Access to Government-Controlled Information Since Richmond Newspapers, 73 Va. L. Rev. 1111, 1117 (1987). Two years later in *Globe Newspaper*, the full Court expressly embraced the structural role that the First Amendment plays in protecting "our republican system of self-government." 457 U.S. at 604–05.

First Amendment scholars have also explained the structural role the Amendment plays in our democracy. "[A] broad consensus has emerged among constitutional scholars that the primary purpose of the First Amendment is to make self-governance possible." David S. Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835, 884 (2017); *see also* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 Nw. U. L. Rev. 1097, 1103 (2016) (arguing the First Amendment performs "instrumental, democratic functions"); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491, 497 (2011) ("[T]he value that best explains the pattern of free speech decisions is a commitment to democratic self-governance."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20–21 (1971) (arguing that freedom of speech is vital for "democratic organization"); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255 (1961) ("The First Amendment does not protect a 'freedom to speak.' It

protects the freedom of those activities of thought and communication by which we 'govern.'").

Legal scholar Robert Post suggests that the "participatory theory" of the First Amendment best explains the Court's decisions and protects the values associated with the First Amendment. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 Calif. L. Rev. 2353, 2371 (2000). Other scholars have likewise concluded that a right of access to information is "an integral part of the system of freedom of expression." *See, e.g.*, Thomas I. Emerson, *Legal Foundations of the Right To Know*, 1976 Wash. U. L. Q. 1, 2 (1976). Still others have concluded that a right of access is inherent in the concept of limited government. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 492 (1985) ("It would be anomalous for a constitutional regime founded on the principle of limited government not to impose some fundamental restrictions on the power of officials to keep citizens ignorant of how the authority of the state is being exercised."). Whatever the reasoning, there is widespread scholarly agreement that the First Amendment right of access is critical to the functioning of our democracy.

In addition to providing information to the public to inform their democratic choices at the ballot box, openness of official proceedings preserves trust in public institutions. *Richmond Newspapers*, 448 U.S. at 572 (Burger, C.J.) ("People in an open society do not demand infallibility from their institutions, but it is difficult for

them to accept what they are prohibited from observing."). This Court has likewise recognized the "value of openness itself, a value which is threatened whenever immediate access to ongoing proceedings is denied." *In re Charlotte Observer (Div. of Knight Publ'g Co.)*, 882 F.2d 850, 856 (4th Cir. 1989). Quoting *Press-Enter. Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 508 (1984), this Court has stated:

> The value of openness lies in the fact that people not actually attending [criminal proceedings] can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of [criminal proceedings] and the appearance of fairness so essential to public confidence in the system.

In re Charlotte Observer, 882 F.2d at 856 (emphasis omitted). While this Court was addressing the right of access to another criminal judicial proceeding, nothing about its decision or logic is limited to the judicial branch.

History and logic provide a workable framework for the District Court to determine if the entirety of execution proceedings are subject to the First Amendment right of access. The Ninth Circuit's application of the *Press-Enterprise II* analysis to execution proceedings demonstrates that it provides an appropriate framework in the execution context. *See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 873–77 (9th Cir. 2002). Indeed, there is an ample historical record of open executions for the District Court to consider on remand. *See infra* § I.B. And

the District Court can also consider whether public access "plays a significant positive role in the functioning of" executions, such as by "enhanc[ing] . . . public confidence in the system." *Press-Enterprise II*, 478 U.S. at 8–9. This Court should reverse and remand to allow the District Court to perform the proper analysis.

B. The press, as a surrogate for the public, has historically served a critical role in the development of capital punishment in the United States, including Virginia.

The press, as a surrogate for the public, has long played a critical role in the development of the public's views about capital punishment and, for the bulk of this nation's existence, has accessed executions in their entirety. Such access is predicated on the longstanding principle that the public is entitled to "information, or the means of acquiring [such information]," about governmental proceedings, including executions. *See Letter from James Madison to William T. Barry* (Aug. 4, 1822) (on file with the Library of Congress) https://founders.archives.gov/documents/Madison/04-02-02-0480; *see also Woodford*, 299 F.3d at 876 (emphasizing that "[i]ndependent public scrutiny—made possible by the public and media witnesses to an execution—plays a significant role in the proper functioning of capital punishment"). This Court need not assess the tradition of openness because Appellants have adequately alleged a history of openness in executions to survive a motion to dismiss. *See Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 145 (4th Cir. 2018) ("To survive a 12(b)(6) motion,

the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (citations omitted). However, the history of public access to executions is helpful to understand why the *Press-Enterprise II* framework can and should be applied to executions.

From colonial times through the early-to-mid nineteenth century, executions were "outside, open to the public, and embedded in ritual," and thousands of persons would attend. Stuart Banner, THE DEATH PENALTY: AN AMERICAN HISTORY at 3 (Harvard Univ. Press ed. 2003); *see, e.g.*, *Virginia Argus*, Apr. 28, 1807 at 2 (on file with the Library of Congress); *Richmond Enquirer*, Aug. 11, 1820 (on file with the Library of Congress); Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 Buff. L. Rev. 461, 469–72 (1995). However, by the late nineteenth century, "[p]ublic executions [were] widely criticized . . . and much of the criticism would be directed at the crowd, who would be accused of drunkenness, irreverence, rowdiness. . . ." Banner, *supra*, at 27. By the mid-nineteenth century, "[c]omment on the revulsion of public hangings [] began to appear in the press." Harry M. Ward, PUBLIC EXECUTIONS IN RICHMOND, VIRGINIA: A HISTORY, 1782–1907 at 58, 97 ("Again the local press issued a negative comment about public hangings."). Indeed, one newspaper advised that it would be "more wise, humane and judicious as well as in accordance with the enlightened spirit of the age to hang these criminals within the walls of the jail." Ward, *supra,* at

60 (citing *The Daily Dispatch*, April 10, 1852). Contrary to what the Commonwealth implied in its motion to dismiss, such critiques were not generally aimed at whether the public has a right to access executions, but rather were directed at the tenor of the atmosphere. Commonwealth Mot. to Dismiss at 4 n.3, ECF #19 at n.3; *see, e.g.*, *The Daily Dispatch*, Feb. 21, 1856 at 2 (on file with the Library of Congress) (discussing the "public decency" aims of the jailhouse execution statute).

In 1876—in response to these and other media critiques of public hangings, and following multiple efforts to render executions less public—the Virginia legislature passed "[a]n ACT to prohibit public executions," thus transforming executions from the public spectacles of the days of the Founders to executions in jail yards. 1879 Va. Acts 880, Ch. 119, § 1. Notably, for all practical purposes, "by 1870, all executions in Virginia were conducted in jail yards," though, "members of the press" still had access to these executions. Ward, *supra*, at 110. Other states likewise moved their executions behind jailhouse walls to "put an end to the vicious assemblages and demoralizing tendencies of public executions." Madow, *supra*, at 521 (describing New York's efforts to limit public access in the 19th century).

Although the general public was excluded from these jailhouse executions, the press remained a fixture, serving as surrogate for the public crowds of decades past. By the end of the nineteenth century the press began to serve as the proxy for the public, thereby enabling the public to still participate and engage with the

government-ordered procedure of execution. *Woodford*, 299 F.3d at 876 ("Further, when public executions were first abolished in America, the press was still allowed to attend."); *see also* Banner, *supra*, at 195 ("A few spots were reserved for representatives of the media, at first just newspapers and later radio and television as well"); Ward, *supra*, at 142 (Only "representatives of the press and county officials" were admitted as witnesses to an 1895 hanging); *id.* at 110 ("[M]ost tickets [to see an execution in the jail yard] were reserved to members of the press, clergyman, and officials."). Indeed, as legal historian Stuart Banner accounts in his seminal work on capital punishment, THE DEATH PENALTY: AN AMERICAN HISTORY: "Executions were reported in newspapers . . . so the public would have been well informed about capital punishment even without the opportunity to see it put into practice." Banner, *supra*, at 11; *see also* Ward, *supra*, at 112 ("[L]ocal newspapers reported [executions] with as many as six full columns," describing them in great detail to the public).

In sum, with the advent of jailhouse executions, "[t]he public lost direct access to executions," and societal changes, including "the growth of the press," "redefined the nature of the 'public' with respect to the death penalty." Banner, *supra*, at 161. "The public was still closely involved in capital cases," but in a different way. *Id.* at 161–62. Rather, the public "was transformed from an actual crowd into a collection of readers and writers, a crowd that never physically assembled," and who relied on

the press to engage in the governmental process of executions. *Id.* at 162. The press replaced the public crowds of days past, as "contemporaries recognized that the newspaper [served] as a substitute for public hanging." *Id.* .

In an attempt to counter this long history of public access to executions, the Commonwealth has pointed to Virginia's more recent history of restricting public access to executions. Virginia's modern secrecy does not insulate it from First Amendment scrutiny. The Commonwealth pointed to the 1908 law that directed that "[n]o newspaper or person shall print or publish the details of the execution of criminals under this act. Only the fact that the criminal was executed shall be printed or published." Commonwealth Mot. to Dismiss at 6, ECF #19 (citing 1908 Va. Acts 685, 686, ch. 398 § 10). Statutes like these were passed in many jurisdictions but "remained largely unenforced, and the press continued to report the details of executions." Banner, *supra*, at 163. That law remained on the books in Virginia until 1982. Commonwealth Mot. to Dismiss at 7, ECF #19. To be sure, when the District Court applies the history and logic framework it will have to consider the modern history of execution access. But Virginia's more recent restrictions on public access do not resolve the *Press-Enterprise II* analysis, which "does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that *type or kind* of hearing throughout the United States.'" *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (citation omitted) (emphasis in original).

This Court should remand so that the District Court can apply the history and logic framework to determine whether Virginia's policies abridge the public's—and by extension the press's—right of access to executions. Appellants have adequately alleged that history and logic demonstrate a First Amendment right of access to executions. On remand, Appellants can develop a robust record of public access to executions so that the District Court can properly apply the *Press-Enterprise II* framework.

C. The First Amendment intentionally protects the press as an institution for its unique role as a check on government power.

The press plays a key role in enforcing the public's right of access by reporting "in convenient form the facts of those [public] operations." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975). Members of the press provide "organized, expert scrutiny of government" activities. Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 634 (1975). The "free press stands as one of the great interpreters between the government and the people" because it brings to bear its institutional knowledge and editorial discretion to contextualize facts. *See Grosjean v. Am. Press. Co.*, 297 U.S. 233, 250 (1936). The "Framers of our Constitution thoughtfully and deliberately selected [the press] to improve our society and keep it free." *Mills*, 384 U.S. at 219. The press, then, performs two overlapping functions in our democracy: "(1) gathering and disseminating news to the public and (2) providing a check on the

government and the powerful." Sonja R. West, *The Stealth Press Clause*, 48 Ga. L. Rev. 729, 750 (2014).

The press as an institution provides a unique check against government power. "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). The press performs an important function of providing information, without which "most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Cox Broad. Corp.*, 420 U.S. at 492. Justice Potter Stewart referred to the press as a "fourth institution outside the Government" that provides "an additional check on the three official branches." Stewart, *supra* at 633–34. The Supreme Court has adhered to "the basic assumption of our political system that the press will often serve as an important restraint on government." *Leathers v. Medlock*, 499 U.S. 439, 446 (1991) (citation omitted). The press cannot perform that essential function if it is kept in the dark.

The press was intentionally protected in the First Amendment to guard against abuses of government power. James Madison, the author of the First Amendment, heartily defended the freedom to criticize government officials as essential to the process by which the electorate exercised its authority to hold such officials "in

contempt or disrepute" and vote them out of office. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar. Found. Res. J. 521, 536 (1977) (citation omitted). "[O]ne of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to the abuse power entrusted to them." *Id.* at 538. The Supreme Court has also recognized that "[t]he Constitution specifically selected the press . . . to serve as a powerful antidote to any abuses of power by government officials." *Mills*, 384 U.S. at 219. Virginia's secretive execution protocols threaten to remove the checking power of public access and the press, opening the door to potential abuses.

II. The First Amendment Right of Access Protects Other Constitutional Rights.

Public access to proceedings both enhances those proceedings and protects other fundamental rights. Because the First Amendment right of access protects other rights, there is no principled basis for the District Court's decision to categorically limit application of that right to the criminal adjudication process before judgment. Public and press access enhance all aspects of the criminal justice system, including executions, and any claimed right of access must be evaluated using the history and logic framework.

Central to the *Richmond Newspapers* line of cases is the understanding that public scrutiny protects the right to a fair trial. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper*, 457 U.S. at 606. And the Supreme Court has "repeatedly recognized" that "one of the important means of assuring a fair trial is that the process be open to neutral observers." *Press-Enterprise II*, 478 U.S. at 7. The related Sixth Amendment right of a defendant to a public trial "is a reflection of the notion, deeply rooted in the common law, that justice must satisfy the appearance of justice." *Richmond Newspapers*, 448 U.S. at 574 (Burger, C.J.) (citation omitted). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

By extension, public access to executions ensures that there is reliable information for the public and legislators to assess the continuing validity and efficacy of capital punishment. "Commentary and reporting on the criminal justice system is at the core of First Amendment values." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976). State policies limiting access to information about capital punishment "hamper[] . . . public evaluation of the process." *First Amendment Coal. of Ariz., Inc v. Ryan*, 938 F.3d 1069, 1072 (9th Cir. 2019). Full access to executions and reporting about them performs the important function of ensuring that voters are

educated about capital punishment and can make an informed choice at the ballot box. *See Richmond Newspapers*, 448 U.S. at 587 (Brennan, J.); John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 Fed. Comm. L.J. 355, 358–59 (1993). Just as the right to vote "is preservative of other basic civil and political rights," public access to information is preservative of other rights by ensuring that voters can intelligently exercise that right. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Without access to complete information on the execution process, voters cannot fully determine whether such punishments conform to their "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Access to information enhances the reliability of voter preferences and therefore legislative judgments, enabling courts to perform their important functions more effectively as well. For example, to determine whether any punishment is cruel or unusual under the Eighth Amendment, the Supreme Court looks to "objective indicia that reflect the public attitude toward a given sanction." *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (citation omitted). "First among these indicia are the decisions of state legislatures," as to the continuing validity of a punishment "because . . . the legislative judgment weighs heavily in ascertaining contemporary standards." *Id.* (citation omitted). That reliance is justified because voters

presumably elect state legislators who reflect their values, but voters can only do so if they are informed.

Public access to executions could also assist courts in evaluating whether specific procedures violate the Eighth Amendment. In *Lopez v. Brewer*, the Ninth Circuit reviewed a challenge to Arizona's execution protocols after an execution during which the State spent nearly an hour attempting to place intravenous lines in the condemned. 680 F.3d 1068, 1073 (9th Cir. 2012). Relying on only the State's description of events and the condemned's attorney's testimony about the meaning of the condemned's last words, that court concluded that the execution came "perilously close" to exceeding the bounds of the Eighth Amendment. *Id.* at 1075. This Court has similarly assessed the Eighth Amendment implications of IV placement without the benefit of public witnesses. *See Emmett v. Johnson*, 532 F.3d 291, 295 (4th Cir. 2008). It is impossible to know whether public observation would have bolstered states or challengers, but such evidence at least would have assisted the courts in conducting the analysis.

III. The District Court Erred by Relying Exclusively on *Houchins* to Deny Access.

The District Court misread Supreme Court and circuit precedent when it concluded that the First Amendment right of access applies only to prejudgment criminal adjudications. JA 166; 168. The District Court reached the wrong

conclusion by relying on the wrong plurality opinion in *Houchins v. KQED*. *See* JA 170. Instead, ample authority demonstrates that the history and logic framework is generally applicable to all government proceedings.

A. The District Court erroneously relied on a plurality opinion that did not express the holding of the Court

In granting the Commonwealth's Motion to Dismiss, the District Court found—as a matter of law—that there is no right of access under the First Amendment to the initial stages of an execution. *See* JA 174. To support this finding, the District Court relied upon the plurality opinion in *Houchins*, in which Chief Justice Burger wrote that there is "no constitutional right to have access to particular government information." 438 U.S. at 14. The District Court thus determined that "*Houchins* does not support the view that the Supreme Court would extend the public's First Amendment right of access to the penal portion of a criminal defendant's sentence." JA 170. Additionally, both of the decisions referenced by the District Court as "Support [for] the Defendant's Position" likewise relied on Chief Justice Burger's plurality opinion. *See* JA 170–71 (citing *Oklahoma Observer v. Patton*, 73 F. Supp. 3d 1318, 1328 (W.D. Okla. 2014), and *Arkansas Times, Inc. v. Norris*, No. 5:07CV00195 SWW, 2008 WL 110853, at *3 (E.D. Ark. Jan. 7, 2008)).

The District Court committed independent errors in relying on Chief Justice Burger's plurality opinion in *Houchins*. First, as discussed in the Brief of Appellants,

the plurality opinion in *Houchins* did not actually provide a definitive rule that would be dispositive of Plaintiffs' First Amendment claims here. Second, the District Court's reliance on Chief Justice Burger's plurality opinion was erroneous because that opinion was not the holding of the Supreme Court.

It is well-settled that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). With this principle in mind, the Fourth Circuit recently recognized that Justice Stewart's concurrence in *Houchins* is the controlling opinion—not Chief Justice Burger's plurality opinion. *See Fusaro v. Cogan*, 930 F.3d 241, 249 n.5 (4th Cir. 2019) ("*Houchins* was decided by seven members of the Supreme Court. Chief Justice Burger wrote the plurality opinion. Justice Stewart's concurrence is recognized as having controlling effect as the narrowest prevailing vote.") (citing *Marks*, 430 U.S. at 193).

Justice Stewart agreed with Chief Justice Burger that the First Amendment assures the general public and the press equal access to information and that the "preliminary injunction [at issue] was unwarranted . . . [b]ecause [it] exceeded the requirements of the Constitution." *See Houchins*, 438 U.S. at 16, 18 (Stewart, J., concurring). But Justice Stewart also suggested that the petitioner "was entitled to

injunctive relief of more limited scope." Indeed, Justice Stewart recognized that certain denials of access—even if "reasonably imposed" on individual members of the public—might be "unreasonable" under the First Amendment when applied to journalists "who are there to convey to the general public" what those excluded members of the public would otherwise see. *Id*. at 17.

The District Court misread Chief Justice Burger's plurality opinion as presenting a matter-of-law bar to the First Amendment right of access sought by the press in this case. Justice Stewart's concurrence—the actual holding of the Court—held only that there may be some instances where the press must be afforded greater access to certain information under the First Amendment than the general public. Here, however, members of the press are seeking an equivalent degree of access to the information at issue for themselves and members of the general public. Any reliance on the *Houchins* opinions is simply misplaced.

B. Nothing in *Richmond Newspapers* suggests it is limited to criminal prosecutions, and it makes no sense to say a First Amendment right applies only to a part of one branch of government.

In the seminal *Richmond Newspapers* case, Justice Brennan stressed the First Amendment encompasses a right of public access because "our republican system of self-government" mandates that public debate not only be "uninhibited, robust, and wide-open," but also that such debate "be informed." 448 U.S. at 587 (Brennan, J. concurring) (citing *New York Times*, 376 U.S. at 270).

This purpose—that the public be informed of government processes—underpins the right of access. *See Woodford*, 299 F.3d at 876 ("Independent public scrutiny—made possible by the public and media witnesses to an execution—plays a significant role in the proper functioning of capital punishment."). Accordingly, courts have broadly applied *Richmond Newspapers*. *See, e.g.*, *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 367 n.1, 375 (M.D. Pa. 2012) (granting full access to execution proceedings and recognizing that "'*Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings'"); *see also Woodford*, 299 F.3d at 877 (applying the considerations of history and logic to find "a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, *including those 'initial procedures' that are inextricably intertwined with the process*") (emphasis added).

Despite this precedent, the District Court erroneously concluded that *Richmond Newspapers* applies exclusively to "criminal adjudication process[es] before judgment," and then declined to conduct the history and logic analysis. *See* JA 168; 174–75. The District Court dismissed Plaintiffs' argument that the history and logic framework should apply to executions because such proceedings are a judicially-sanctioned part of the criminal justice process. *See* JA 168–70. Although the District Court explicitly acknowledged that appellate courts have deemed the right of access to apply to more than pre-judgment criminal adjudicatory

proceedings, the District Court summarily characterized such precedent as unpersuasive. *See* JA 167–68.

Contrary to the District Court's analysis, there is nothing in *Richmond Newspapers* that suggests, let alone holds, that the First Amendment right of access is limited to pre-judgment criminal adjudication processes. The District Court referenced no circuit court authority adopting this narrow constriction of the right of access. Nor could it; no such authority exists. To the contrary, and as the District Court recognized in its opinion, circuit courts have applied the history and logic framework to find a First Amendment right of public access to an array of governmental proceedings beyond the limited confines of a criminal trial. *See* JA 165–67 (acknowledging the Ninth Circuit has repeatedly held the right of access applies to executions); *see also Woodford*, 299 F.3d at 877; *Wetzel*, 906 F. Supp. 2d at 367 & n.1.; *In re The Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984) (granting access to pretrial proceeding) ("It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding . . . There is a significant benefit to be gained from public observation of many aspects of a criminal proceeding . . . .").

Both the Third and Sixth Circuits have applied the *Press-Enterprise II* considerations of history and logic outside of the context of in-court judicial proceedings. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 709 (6th Cir. 2002)

(finding First Amendment right to attend deportation proceedings by the Executive branch); *North Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 201, 204–21 (3d Cir. 2002) (applying the history and logic framework to deportation proceedings and reaching the opposite result); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (applying the history and logic framework and concluding that plaintiff had a right of access to a town planning commission meeting). The Second Circuit has applied the history and logic framework to administrative proceedings. *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 298-99 (2d Cir. 2012). In addition, the Ninth Circuit applied the history and logic framework to executions and concluded that the public has a right to view the entirety of the execution. *See Woodford*, 299 F.3d at 873–77. The Ninth Circuit recently reaffirmed that holding when, considering both history and logic, it concluded that the public has a right to hear the sounds of the execution. *See Ryan*, 938 F.3d at 1075.

Nor has this Court concluded that the right of access is as limited as the District Court held. This Court has applied the right of access to documents in a civil summary judgment proceeding. *Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004). It has held that the public and press have a presumptive right of access to civil docket sheets and other judicial records in civil cases. *Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014). While this Court

recently, in *Fusaro v. Cogan*, declined to find a First Amendment right of public access to voter rolls, that decision conflicts with this Court's earlier holdings, and, in any event, does not speak to the application of the history and logic framework to proceedings that are part of the criminal justice process, such as an execution. 930 F.3d at 250; *see also McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (this Court must "follow the earlier of the conflicting opinions"). In short, there is no basis for the District Court's restrictive application of the *Press-Enterprise II* framework.

In addition to erroneously finding *Richmond Newspapers* and its progeny to apply exclusively to pre-judgment criminal adjudicatory proceedings, the District Court misinterpreted *Richmond Newspapers* and its progeny as applying exclusively to criminal judicial proceedings and not to other governmental branches. *See* JA 161–62. The District Court's narrow application of access rights to pre-judgment criminal judicial proceedings finds no support in Supreme Court nor court of appeals authority, including precedent of this Court. Further, nothing in *Richmond Newspapers* either limits the First Amendment right of access to criminal judicial proceedings or forecloses the application of that right to other governmental branches. In fact, the *Richmond Newspapers* Court made a point to recognize that the right of access is not confined to criminal judicial proceedings. Rather, "the First Amendment protects the public and the press from abridgment of their rights of

access to information about the operation of their government, *including* the Judicial Branch." 448 U.S. at 580 n.17 (Burger, C.J.), 584 (Stevens, J.) (emphasis added); *see also Press-Enterprise I*, 464 U.S. at 517 (acknowledging the purpose of the right of access "is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader") (Stevens, J., concurring); *Wetzel*, 906 F. Supp. 2d at 367 (noting the history and logic right of access framework is "broadly applicable to issues of access to government proceedings," not just judicial proceedings or trials).

CONCLUSION

For the foregoing reasons, amici urge this Court to reverse the District Court's decision dismissing Plaintiffs' complaint and remand this matter so that the District Court can apply the generally applicable history and logic framework.

Dated: September 11, 2020

Respectfully submitted,

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I certify that on September 11, 2020, I caused a true and accurate copy of the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit through the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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