**No. 25-2025**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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**THE ASSOCIATED PRESS,**
**STATES NEWSROOM d/b/a The Indiana Capital Chronicle,**
**GANNETT CO., INC., CIRCLE CITY BROADCASTING I, LLC, and TEGNA INC.,**

*Plaintiffs-Appellants*,

v.

**RON NEAL and LLOYD ARNOLD *in their official capacities*,**

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:25-cv-00872-MPB-MJD

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# BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF APPELLANTS AND REVERSAL

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Appellate Court No: 25-2025

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**Attachment to Appearance & Circuit Rule 26.1 Disclosure Statement**

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*New York Times Co. v. United States*,
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*Richmond Newspapers, Inc. v. Virginia*,
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**Other Authorities**

Alan Brownstein & Vikram Amar, *Locating Free-Exercise Most-Favored-Nation-Status Reasoning in Constitutional Context*, 54 Loy. U. Chi. L. J. 777 (2022) ..... 25

Amanda Shanor, *The Constitutional Exceptionalism of Religion & the Press*, in THE FUTURE OF PRESS FREEDOM: DEMOCRACY, LAW, AND THE NEWS IN CHANGING TIMES (RonNell Andersen Jones & Sonja West eds., 2025) ..... 22, 23, 25

Austin Sarat et al., *Botched Executions and the Struggle to End Capital Punishment: A Twentieth-Century Story*, 38 Law &. Inquiry (2013) ..... 15

Austin Sarat, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY (Stanford University Press, 2014) ..... 12

Chris Greer, DELIVERING DEATH: CAPITAL PUNISHMENT, BOTCHED EXECUTIONS AND THE AMERICAN NEWS MEDIA, IN CAPTURED BY THE MEDIA: PRISON DISCOURSE IN POPULAR CULTURE (Paul Mason ed., 2006) ..... 14

Craig Brandon, THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY (McFarland Publishing, 1999) ..... 13

Dana Ford, *Another botched execution? Inmate gasps during two-hour execution*, CNN (Sept. 8, 2014), https://perma.cc/T2CH-8EWF ..... 15

David Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455 (1983) ..... 3, 5, 6

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Jack M. Balkin, *Which Republican Constitution?*, 32 Const. Comment. 31 (2017)..... 10

Jacob M. Schriner-Briggs, *Guaranteeing the Press*, 98 St. John's L. Rev. 903 (2025)..... 10

Leah Roemer, *News Resource: In Era of Secrecy, States Increasingly Restrict Media Access to Executions*, Death Penalty Info. Ctr. (Mar. 14, 2025), https://perma.cc/NT8C-CR9Q ..... 30

Mark Essig, EDISON AND THE ELECTRIC CHAIR: A STORY OF LIGHT AND DEATH (Walker Co., 2003)..... 13

Matthew Schafer, *An American Freedom: The Intelligentsia and Freedom of the Press After Blackstone*, 127 Penn. St. L. Rev. 455 (2023)..... 4

Matthew Schafer, *"The Press": A Response to Professor Volokh*, SSRN (2024), https://perma.cc/EK4K-9RPW..... 6

Melissa Brown, *Doyle Lee Hamm punctured at least 11 times in execution attempt, report states*, Montgomery Advertiser (Mar. 5, 2018), https://perma.cc/7AFU-SDWA..... 15

Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 Colum. L. Rev. 2397 (2021) ..... 24

Niha Masih, *Idaho Halts Serial Killer's Execution After 8 Failed Attempts to Insert IV*, Wash. Post (Feb. 29, 2024), https://www.washingtonpost.com/nation/2024/02/29/idaho-execution-thomas-creech-failed/..... 15

Patrick Charles & Kevin O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, 2012 Utah L. Rev. 1691 (2012)..... 4

Ramon Antonio Vargas, *Alabama Subjected Prisoner to "Three Hours of Pain" During Execution–Report*, The Guardian (Aug. 15, 2022), https://perma.cc/Y38D-QRBU ..... 15

Richard Moran, EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE AND THE INVENTION OF THE ELECTRIC CHAIR (Alfred A. Knopf, 2002) ..... 13

Robert Mellen, *The Colonial Virginia Press and the Stamp Act: An Expansion of Civic Discourse*, 38 Journalism Hist. 74 (2012) ..... 5

Robert Post, *The Press and American Democracy*, *in* THE FUTURE OF PRESS FREEDOM: DEMOCRACY, LAW, AND THE NEWS IN CHANGING TIMES (RonNell Andersen Jones & Sonja West eds., 2025) ..... 9, 19

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RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. Colo. L. Rev. 499 (2019) ..... 4, 9, 10

Scott Christianson, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER (University of California Press, 2010) ..... 13, 14

Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. Rich. L. Rev. 693 (2015) ..... 12

Sonja R. West, *The Majoritarian Press Clause*, 2020 U. Chi. Legal F. 311 (2020) ..... 5

Sonja West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025 (2011) ..... 3

Sonja West, *First Amendment Neighbors*, 66 Ala. L. Rev. 357 (2014) ..... 24

Sonja West, *The Stealth Press Clause*, 48 Ga. L. Rev. 729 (2014) ..... 5

Sonja West, *The "Press," Then & Now*, 77 Ohio St. L.J. 49 (2016) ..... 4

Stuart Banner, THE DEATH PENALTY: AN AMERICAN HISTORY (Harvard University Press, 2002)..... 12, 13

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THE PAPERS OF THOMAS JEFFERSON, VOL. 9, 1 NOVEMBER 1785–22 JUNE 1786 (Julian P. Boyd ed., 1954) ..... 10

Tim Tai, *The Most-Favored-Nation Press Clause*, SSRN (2025), https://perma.cc/DJJ5-H53T ..... 22

Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Rsch. J. 521 ..... 6, 7

Wendell Bird, RELIGIOUS SPEECH AND THE QUEST FOR FREEDOMS IN THE ANGLO-AMERICAN WORLD (Cambridge University Press, 2024) ..... 23

## INTEREST OF THE *AMICI*[1]

*Amici* are scholars whose research, teaching, and scholarship primarily focus on the First Amendment. These scholars, identified in the Appendix to this Brief, have studied the history, meaning, and past application of the First Amendment and have a particular interest in ensuring that its guarantee of the freedom of the press is upheld. *Amici* submit this brief to assist the Court in deciding the important issues concerning the Press Clause of the First Amendment presented by Indiana's bar on reporter access to executions.

## PRELIMINARY STATEMENT

The district court concluded that an Indiana law excluding reporters from the execution of condemned prisoners does not violate the First Amendment because neither the public nor the press has a First Amendment right to observe executions. This is incorrect on both scores. The First Amendment conveys a qualified right of public access to state executions and, even absent that right, the First Amendment's Press Clause requires Indiana to satisfy heightened scrutiny before it can bar reporters from observing executions that others are permitted to witness.

While the district court should be reversed for failing to find a qualified First Amendment right of access to executions under the "experience and logic" test, *see*

[1] No party or its counsel had any role in authoring this brief. No person or entity—other than *amici curiae* and their counsel—contributed money to fund the preparation of this brief. The parties consent to the filing of this brief.

Appellants' Br. 16-41, *Amici* submit this Brief to underscore that Indiana's law independently violates the First Amendment's guarantee of the freedom of the press. The Press Clause subjects to strict scrutiny any law that regulates core functions of the press unless the law is generally applicable and imposes only incidental burdens on those functions. Recent Supreme Court precedent makes clear that a law is not generally applicable if it restricts newsgathering activity but exempts non-newsgathering activities that similarly implicate the government's reasons for the restriction. Indiana's prohibition on reporters' access to an execution is not generally applicable because it grants access to others whose presence implicates the government's interest in restricting access in similar ways. The Indiana law violates the First Amendment unless its denial of press access can satisfy strict scrutiny. It cannot.

## ARGUMENT

### I. THE FIRST AMENDMENT GUARANTEES "FREEDOM… OF THE PRESS" BECAUSE REPRESENTATIVE DEMOCRACY REQUIRES IT TO FUNCTION PROPERLY

The Press Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. Const. amend. I. This distinct constitutional protection recognizes the fundamental role that newsgathering plays in a functioning democracy. Without someone to unearth and disseminate information, the electoral process cannot ensure government

accountability. *See* Sonja West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025, 1042-43 (2011) (describing the democracy-enabling role of the press). Simply put, the guarantee of a free press "assures the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

The First Amendment protects freedom "of the press" independent of the freedom of speech because "valuable public debate—as well as other civic behavior—must be informed" and this requires protection "not only for communication itself, but also for the indispensable conditions of meaningful communication." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring). The Press Clause recognizes that the investigative and reporting work done by journalists is indispensable to the "meaningful communication" necessary for democracy to thrive, and founding-era history confirms that this was its intended purpose. Indeed, "[f]reedom of the press—not freedom of speech—was the primary concern" of the Framers. David Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 533 (1983).

### A. The Founders Understood the Press Clause as Vital to the Success of a Republican Form of Government

The Founders recognized that "a free and vibrant press capable of disseminating knowledge and checking the government" was necessary for their endeavor to succeed. Floyd Abrams et. al., *The Press Clause: The Forgotten First Amendment*, 5 J. Free Speech L. 561, 616 (2024). They also recognized that

constitutional protection of press freedom would be necessary because press scrutiny invites retaliation. RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. Colo. L. Rev. 499, 543 (2019). The Press Clause emerged from the Founding generation's views about the contributions of newspaper practices in promoting representative democracy.

A great deal has been written about eighteenth-century press practices. Printers at that time were viewed as "indispensable arbiters of public debate in colonial America" and necessary to "expose the corrupt action of the government." J.A. Adelman, REVOLUTIONARY NETWORKS: THE BUSINESS AND POLITICS OF PRINTING THE NEWS 1763-1789, at 46, 50 (Johns Hopkins University Press, 2019). Leading up to the Revolutionary War, the "press" was known as "a community of newspapers and the men who made them," and newspapers had become a "social necessity." Sonja West, *The "Press," Then & Now*, 77 Ohio St. L.J. 49, 83 (2016); *see also* Patrick Charles & Kevin O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, 2012 Utah L. Rev. 1691, 1695 (2012) (discussing the pre-ratification significance of a free press built "through intellectual discourse and customary practice").

As recounted in the diary of John Adams, the colonial Stamp Act of 1765 caused the presses to "groan[]" and the people "even to the lowest ranks" to become "more attentive to their Liberties." Matthew Schafer, *An American*

*Freedom: The Intelligentsia and Freedom of the Press After Blackstone*, 127 Penn. St. L. Rev. 455, 459 (2023). The conflict promoted the notion that press freedom encompassed the right to criticize the government and established "a crucial precedent to the new nation's First Amendment guarantee of press freedom." Robert Mellen, *The Colonial Virginia Press and the Stamp Act: An Expansion of Civic Discourse*, 38 Journalism Hist. 74, 83 (2012). The Founders understood the importance of press freedom for self-governance and "deliberately sought to protect the right of the press to praise or criticize governmental agents." Sonja West, *The Stealth Press Clause*, 48 Ga. L. Rev. 729, 753 (2014).

After thoroughly documenting protections for freedom of the press in state constitutions, the legislative history of the Press Clause, and the context of its ratification, First Amendment scholar David Anderson found little doubt that the Framers viewed press freedom as "closely related to the experiment of representative self-government." Anderson, *Origins*, at 533. They saw freedom of the press as the "'bulwark of Liberty,'" that had to be protected to restrain government's "natural tendency toward tyranny and despotism." *Id*. Despite various views of the Press Clause held among the Framers, most saw freedom of the press as "inextricably related to the new republican form of government" and perceived that it "would have to be protected if their vision of government by the people was to succeed." *Id*. at 537; *see also* Sonja R. West, *The Majoritarian*

*Press Clause*, 2020 U. Chi. Legal F. 311, 314 (2020) (explaining that one of the Press Clause's tasks is "safeguarding our collective, majoritarian right to a republican form of government").[2]

### B. The Press Clause Extends Constitutional Protection to Core Press Functions That Sustain Democracy

Both sides of the ratification debate over the First Amendment recognized the value of a free press in "'checking the inherent tendency of government officials to abuse the power entrusted to them.'" Anderson, *Origins*, at 534 (quoting Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Rsch. J. 521, 538). Given this objective, the Press Clause has been described as playing a "structural role . . . in securing and fostering our republican system of self-government." *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J. concurring). It recognizes that "[a]n untrammeled press is a vital source of public

[2] Some scholars have posited that the Press Clause merely protects the freedom of everyone to publish speech using communication technology. *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459 (2012). That interpretation is not supported by the history, structure, or purpose of the First Amendment. *See, e.g.*, Matthew Schafer, *"The Press": A Response to Professor Volokh*, SSRN (2024), https://perma.cc/EK4K-9RPW. While the Founders may have understood the Press Clause as protecting a general right to use the printing press, they also recognized that press-specific protections benefited the public at large. *Id.* at 53-66. Viewing the Press Clause as merely protecting the technology of the press ignores that the primary use of the printing press at the Founding was the distribution of news crucial to a representative government. *See* Abrams, *The Press Clause*, at 619; Anderson, *Origins*, at 533.

information, and an informed public is the essence of a working democracy." *Minneapolis Star and Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 585 (1983) (citation omitted).

While the rights of speech, press, assembly, and petition protected in the First Amendment share a "common core purpose of assuring freedom of communication on matters relating to the functioning of government," *Richmond Newspapers*, 448 U.S. at 575, the Press Clause uniquely extends constitutional protection to three functions understood as necessary for a working democracy: serving as a watchdog for government abuse, informing and convening public discourse, and acting as a proxy for the public at government functions.

1. The Framers recognized that the press operates as an important check on the abuse of government power. As Professor Blasi has demonstrated, the Founding generation "built its whole philosophy of freedom of the press around the checking value." Blasi, *The Checking Value*, at 527, 538. They understood that governments tend to abuse their power and that an informed public opinion is necessary to restrain such abuse in a democracy. *Id.* at 533. They protected freedom of the press so that the press could "acquir[e] enough information to pass judgment on the actions of government" and disseminate that information and judgment in support of the People's ultimate "veto" over government power. *Id.* at 541.

The Supreme Court has acknowledged and repeatedly celebrated this watchdog function of the press. In *Mills v. Alabama*, for example, it described the constitutional values the "press serves and was designed to serve" as "a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." 384 U.S. 214, 219 (1966) (striking down restrictions on the publication of newspaper editorials). Justice Black invoked this same understanding of the Press Clause in the Pentagon Papers case, explaining that "[t]he Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

Most notably, in *Minneapolis Star*, the Court held that a tax on paper and ink used in producing newspapers presumptively violated the Press Clause because it frustrated the ability of the press to perform its checking function. The Press Clause, the Court explained, reflects "the basic assumption of our political system that the press will often serve as an important restraint on government" through "critical comment, " and the government violates the First Amendment when it seeks to undermine this "basic assumption." 460 U.S. at 585. This holding recognizes that the press is "a unique institution operating to restrain government

misconduct" and thus enjoys "a unique constitutional role." Robert Post, *The Press and American Democracy*, *in* THE FUTURE OF PRESS FREEDOM: DEMOCRACY, LAW, AND THE NEWS IN CHANGING TIMES 17-27 (RonNell Andersen Jones & Sonja West eds., 2025).

2. A second core function of the press involves the related roles of convening and informing public discourse. The Supreme Court has long recognized that the "free press stands as one of the great interpreters between the government and the people." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The press helps structure public discourse by identifying issues of public interest and contextualizing information. *See* Jones, *Press Speakers*, at 523-27. It informs public discourse by gathering and disseminating information. *See id.* at 520-22. While journalists' role in informing public discourse is often taken for granted, "[w]ithout the information provided by the press, 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. v. Cohn*, 420 U.S. 469, 491-92 (1975); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (underscoring role of the press in enabling the "public discussion of the stewardship of public officials").

3. The press also plays a fundamental role in serving as a proxy for members of the public who, through practical constraints, may be kept from

exercising their own First Amendment rights. Jones, *Press Speakers*, at 537-38; Abrams, *The Press Clause*, at 620. As explained in *Cox Broadcasting*, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." 420 U.S. at 491; *see also Richmond Newspapers*, 448 U.S. at 586 n.2 (Brennan, J., concurring) (observing that the press is the "chief beneficiary" of the First Amendment access right "because it serves as the 'agent' of interested citizens").

These three press functions—checking government power, convening and informing public discourse, and acting as proxy for the public—are protected by the Press Clause because they are vital to the Founders' vision for a republican form of government where elected officials are responsive to public will, held accountable for corruption, and serve the public good. *See* THE PAPERS OF THOMAS JEFFERSON, VOL. 9, 1 NOVEMBER 1785–22 JUNE 1786, at 239-40 (Julian P. Boyd ed., 1954) ("Our liberty depends on the freedom of the press, and that cannot be limited without being lost."); *see also* Jack M. Balkin, *Which Republican Constitution?*, 32 Const. Comment. 31, 45 (2017); Jacob M. Schriner-Briggs, *Guaranteeing the Press*, 98 St. John's L. Rev. 903, 953-56 (2025).

### C. The Role of the Press in the Evolution of Execution Practices Well Illustrates the Importance of the Press Clause to Self-Governance

The long history of press access to executions demonstrates the vital ways the press checks government power, informs public discourse, and acts as a proxy for the public. An execution is the ultimate exercise of government power and must be conducted in compliance with the Eighth Amendment's prohibition against cruel and unusual punishment and other legal constraints. Just as reporting on trials diminishes the likelihood of abuse, promotes the performance of participants, and allows the public to develop an informed opinion about whether justice is being done, *Richmond Newspapers*, 448 U.S. at 569-70, the historic access of reporters to executions has enabled the public—and the courts—to ensure that the execution system is operating properly.

Reporters have had access to executions in the United States throughout most of our nation's history. *See, e.g.*, *California First Amend. Coal. v. Woodford*, 299 F.3d 868, 875-76 (9th Cir. 2002) (examining long history of public access to executions and finding that First Amendment protects such access); *First Amend. Coal. of Ariz. v. Ryan*, 938 F.3d 1069, 1075-76 (9th Cir. 2019) (same); *Philadelphia Inquirer v. Wetzel*, 906 F. Supp. 2d 363, 370-71 (M.D. Pa. 2012) (same). Reporters have presented detailed, first-hand accounts of the conduct of executions and the reliability of the procedures used. They also have been free to provide their observations about the nature, level, and length of the pain inflicted during the

execution. *See generally* Stuart Banner, THE DEATH PENALTY: AN AMERICAN HISTORY 183 (Harvard University Press, 2002) ("DEATH PENALTY"); Austin Sarat, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 69, 83, 156 (Stanford University Press, 2014).

Until 1830, virtually all executions in America were done by hangings conducted outdoors, open to all and publicized in advance. Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. Rich. L. Rev. 693, 696-97 (2015); *see also Woodford*, 299 F.3d at 875. Discontent over the realities of hangings that the public and press were allowed to witness caused many communities to change their hanging methods during the 17th and 18th centuries. DEATH PENALTY, at 45-46 (discussing transition from hanging by pushing off a ladder, to using horses to pull a cart from under the condemned, to building a trap door to speed the fall).

During the 19th century, states began to replace public hangings with hangings inside jail yards, largely out of distaste for the carnival atmosphere at public executions. However, jail-yard hangings were still generally conducted in the presence of journalists who attended as representatives of the wider public. DEATH PENALTY, at 162. Reports of gruesome hangings continued to circulate widely. For example, in 1868, when Thomas Welsh writhed for five minutes before dying at a Newark execution, a reporter described how "the cry of 'shame!'

if not spoken, was written on fifty faces." DEATH PENALTY at 173. And after William Bergen's noose slipped and he fell half-strangled to the floor in 1877, the *Cincinnati Commercial* reflected, "[e]xecution by hanging is as much a relic of barbarism as slavery or polygamy." *Id*.

Press accounts played a significant role in public debate about the acceptability of hangings as a method of execution. For example, *The New York Times* published fifty long and graphic descriptions of hangings in 1882 and published another forty-one in 1883. Craig Brandon, THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY 32 (McFarland Publishing, 1999). Such reporting led the American public increasingly to see hanging as excessively cruel and led to states abolishing hanging in favor of electrocution or the gas chamber in the late 19th and early 20th. *Id.* at 34; Scott Christianson, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 11, 60 (University of California Press, 2010).

When states began to change their execution method to prison-based electrocution, reporters were allowed to attend with the specific understanding that they would publish their observations of the executions for the benefit of the public. *See, e.g.*, Richard Moran, EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE AND THE INVENTION OF THE ELECTRIC CHAIR 28 (Alfred A. Knopf, 2002); Mark Essig, EDISON AND THE ELECTRIC CHAIR: A STORY OF

LIGHT AND DEATH 253 (Walker & Co., 2003). Eyewitness accounts of reporters continued to inform public debate over the electric chair throughout its use. In Florida, for example, descriptions of electrocutions caused many to "express[] horror at the barbarity of the spectacle," and led even proponents of the death penalty to denounce electrocution. Chris Greer, DELIVERING DEATH: CAPITAL PUNISHMENT, BOTCHED EXECUTIONS AND THE AMERICAN NEWS MEDIA, IN CAPTURED BY THE MEDIA: PRISON DISCOURSE IN POPULAR CULTURE 84, 95 (Paul Mason ed., 2006).

Reporting on gas chamber executions caused similar concerns. For example, a reporter described a gas chamber execution in North Carolina in 1936 that took eleven minutes to induce death as "the most barbarous thing I've ever seen." Christianson, THE LAST GASP, at 110-12. A scientific study subsequently commissioned by the local newspaper concluded that the hydrocyanic acid used by North Carolina made slow and painful death more likely, causing the state to change the composition of the acid solution. *Id.* And in 1960, eyewitness press accounts of the gas chamber execution of Caryl Whittier Chessman at San Quentin prison triggered a wave of protests and became a rallying cry in the emergent Free Speech Movement. *Id.* at 190.

Press coverage of electrocutions and lethal gas executions informed public opinion and again helped bring about a change in execution methods, as states

moved to lethal injection as more "humane." *See, e.g.*, Austin Sarat et al., *Botched Executions and the Struggle to End Capital Punishment: A Twentieth-Century Story*, 38 Law &. Inquiry 694, 711 (2013). Although less visually gruesome than other execution methods, the lethal injection process presents unique flaws that can be assessed only through observation. As with earlier killing methods, the image of a painless death by lethal injection is shattered when reporters observe a prisoner suffering during a botched injection.

Recent years have seen many such reports of long, apparently painful deaths as states have altered the formula of drugs used in their executions. *See, e.g.*, Dana Ford, *Another botched execution? Inmate gasps during two-hour execution*, CNN (Sept. 8, 2014), https://perma.cc/T2CH-8EWF; Ramon Antonio Vargas, *Alabama Subjected Prisoner to "Three Hours of Pain" During Execution–Report*, The Guardian (Aug. 15, 2022), https://perma.cc/Y38D-QRBU. Reports have also documented executioners having trouble finding a vein into which they can insert a line to deliver the lethal drugs, causing a prolonged and painful execution process. *See, e.g.*, Niha Masih, *Idaho Halts Serial Killer's Execution After 8 Failed Attempts to Insert IV*, Wash. Post (Feb. 29, 2024), https://www.washingtonpost.com/nation/2024/02/29/idaho-execution-thomas-creech-failed/; Melissa Brown, *Doyle Lee Hamm punctured at least 11 times in*

*execution attempt, report states*, Montgomery Advertiser (Mar. 5, 2018), https://perma.cc/7AFU-SDWA.

History shows that first-hand reporting on executions lies "at the core of First Amendment values." *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). Press access to executions has been vital to informing public discourse and engendering reform. It well illustrates the importance of the rights secured by the Press Clause to democratic self-governance.

## II. THE PRESS CLAUSE COMMANDS STRICT SCRUTINY OF LAWS DENYING PRESS ACCESS TO GOVERNMENT PROCEEDINGS THAT OTHERS ARE PERMITTED TO OBSERVE

The Court observed in *Branzburg v. Hayes* that "news gathering is not without its First Amendment protections" 408 U.S. 665, 707-08 (1972) (noting that the First Amendment would prohibit the government from "disrupt[ing] a reporter's relationship with his news sources" for no proper purpose). In decisions arising in various contexts and spanning decades, the Court has recognized First Amendment protection for the core press functions of checking the government, informing the public, and serving as the public's proxy. Denying reporters access to official government proceedings impedes their ability to perform those vital functions and undermines "First Amendment interests of the highest order." Blasi, *The Checking Value*, at 610.

A law restricting newsgathering is thus subject to strict scrutiny unless it is generally applicable and imposes only incidental burdens on press functions. Such a law is not generally applicable if it permits others to engage in activity implicating the same interests asserted to justify the restriction on the press.

### A. Laws That Impede Core Press Functions Require Strict Judicial Scrutiny Unless They Are "Generally Applicable" and Place No More Than an Incidental Burden on the Press

In *Branzburg*, the Court held that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." 408 U.S. at 682 (upholding universal requirement of compliance with grand jury subpoena). Cognizant of the First Amendment's protection of the press, however, the Supreme Court has repeatedly struck down laws restricting core press functions if they are not generally applicable or uniquely burden journalists' ability to gather and report the news. In *Minneapolis Star*, for example, the Court struck down a tax levied on ink and paper used by newspapers because it was not generally applicable, even absent any censorial motive. 460 U.S. at 591. The Court reasoned that the tax's differential treatment of the press tax short-circuited the typical political guardrails restraining government action and additionally censored the press's ability to check government conduct. *Id.* at 588.

Other examples abound. In *Grosjean v. American Press Co.*, the Court struck down a Louisiana law imposing a tax on large circulation newspapers as "a deliberate and calculated device" to limit newspaper reporting, an effort it viewed with "grave concern" because "informed public opinion is the most potent of all restraints upon misgovernment." 297 U.S. at 250. In *City of Lakewood v. Plain Dealer Publ'g Co.*, the Court struck down a city's permitting system that gave the mayor unbridled discretion to grant or deny permits to place newsracks on public property because it was directed at newspapers and the discretion given the mayor "raise[d] the specter" of censorship of disfavored publications. 486 U.S. 750, 763, 769 (1988). And in *Florida Star v. B.J.F.*, the Court struck down a law that prohibited only the "instruments of mass communication" from disclosing the name of a victim of sexual assault because the underinclusive law impeded press functions without effectively protecting victim privacy, its only purpose. 491 U.S. 524, 526 (1989). As Justice Scalia put it, the "law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself." *Id.* at 542 (Scalia, J., concurring).

In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court concluded that "generally applicable laws" having only "incidental effects" on the press's "ability to gather and report the news" do not offend the First Amendment. *Id.* at 669. Applying this principle, it held that the First Amendment did not bar a claim

against a newspaper for breaching a promise of confidentiality brought under Minnesota's law of promissory estoppel by the source for a controversial story. Strict scrutiny was not required because the law applied equally to "all Minnesota citizens' daily transactions," it did "not target or single out the press," and it did not have more than an incidental impact on the press. *Id.* at 664, 670. Indeed, applying the law to reporters' promises of confidentiality was likely to *enhance* rather than limit reporters' ability to gather news in the future. *Id.* at 670-71.

One common thread through these decisions is that the First Amendment requires strict scrutiny when a law restricts core press functions and is not generally applicable. *See generally*, Post, *The Press and American Democracy*, (explaining that disparate treatment of the press is suspect because it eliminates important constraints on government action). A First Amendment challenge to a law limiting journalists' ability to gather and report the news thus requires an assessment of whether the law is "generally applicable" or imposes more than an "incidental" burden on core press functions.

### B. A Law That Restricts the Press Is Not Generally Applicable if It Exempts Others Who Similarly Implicate the Government's Reasons for the Restriction

The Supreme Court has provided little guidance on what constitutes a "generally applicable law" in the Press Clause context. Recent Supreme Court decisions involving the Free Exercise Clause, however, have clarified the meaning

of this term. The Court's reasoning about when a law is "generally applicable" for purposes of assessing freedom of religion challenges applies fully to claims involving freedom of the press.

In *Tandon v. Newsom*, 593 U.S. 61 (2021) (*per curiam*), the Court enjoined a COVID-19 restriction that prohibited all in-home gatherings (secular and religious) of more than three households but exempted gatherings in larger commercial spaces, such as retail businesses, restaurants, and concert venues. *Id.* at 63. Because the law permitted secular gatherings with more than three households in commercial spaces but prohibited in-home religious gatherings with more than three households, the law was not generally applicable. *Id.* The Court declared that "government regulations are not neutral and generally applicable and therefore trigger strict scrutiny under the free exercise clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 62 (emphasis in original).

Two activities are comparable, the Court explained, if they both implicate the interests asserted by the government to "justify the regulation at issue." *Id.* Because religious and secular activities both implicated the government's interest in reducing the risk of COVID-19 transmission in similar ways, the First Amendment required California to justify its failure to grant the same exemption to large in-home religious gatherings that it granted to large commercial secular

gatherings. *Id.* The law failed to survive strict scrutiny because California could not demonstrate that religious gatherings posed a greater risk to public health than secular gatherings. *Id.*

The Court reaffirmed *Tandon*'s conception of "generally applicable" laws in *Fulton v. City of Philadelphia*, explaining that a law "lacks general applicability" and must be subjected to strict scrutiny "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 593 U.S. 522, 534 (2021). In *Fulton*, a Catholic foster care agency challenged Philadelphia's termination of its contract for refusing to place children with LGBTQ foster parents in violation of the city's nondiscrimination policy. The Court applied and expanded upon the rule from *Tandon*, explaining that the nondiscrimination policy was not "generally applicable" because it permitted a city commissioner to grant individualized exemptions. *Id.* at 535. Even if no exemptions were ever granted, a system allowing individualized exemptions was not generally applicable and thus subject to strict scrutiny, requiring the City to show a compelling interest "in denying an exception" to the foster agency. *Id.* at 537, 541.

Scholars have long referred to the general-applicability framework applied in *Fulton* and *Tandon* as the "Most Favored-Nation" approach. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 49. Under this

approach, laws that burden religious conduct do not escape strict scrutiny as "generally applicable" if they provide exemptions for secular conduct that implicates the government's interests similarly, or even grant discretion to allow individualized exemptions. Tim Tai, *The Most-Favored-Nation Press Clause*, SSRN, at 35 (2025), https://perma.cc/DJJ5-H53T.

Laws that burden newsgathering similarly ought not escape strict scrutiny as "generally applicable" if they provide exceptions for non-newsgathering conduct that implicates the same government interests. Applying the Most-Favored Nation approach to protect freedom of the press is supported by the origins of the doctrine, the common history of religion and press rights, and the public interests each right serves. *See* Amanda Shanor, *The Constitutional Exceptionalism of Religion & the Press*, in THE FUTURE OF PRESS FREEDOM: DEMOCRACY, LAW, AND THE NEWS IN CHANGING TIMES 170-181; Isaac May, et ano., *Finding Religion? Most-Favored-Nation Doctrine and the Press*, 40 WTR Comm. Law. 15, 18 (2025).

The Most-Favored-Nation approach to protecting freedom of religion has its origins in the Court's freedom of the press precedent. In *Employment Division v. Smith*, the Supreme Court relied on reasoning from its press decisions in *Grosjean* and *Minneapolis* Star to reject a Free Exercise Clause claim brought by members of the Native American Church to a state law prohibiting the possession of peyote because the prohibition was a law of "general applicability." 494 U.S. 872, 878

(1990). The Court again relied expressly on its press decisions in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, citing *Cowles Media* and *Minneapolis Star* in concluding that a law prohibiting animal sacrifice that exempted slaughterhouses was not "generally applicable" and thus subject to strict scrutiny. 508 U.S. 520, 543 (1993). Applying the Most-Favored-Nation approach, the law was not generally applicable because it exempted "nonreligious conduct that endangers" the state's interests to the same degree as the regulated religious conduct. *Id.* at 543.

This coordinated approach to the freedoms of religion and press has deep roots in history. The ideas of free press and free exercise have been linked since at least the seventeenth century, when Protestants in England feared their ability to practice and disseminate religious texts under the Catholic Stuarts. Wendell Bird, RELIGIOUS SPEECH AND THE QUEST FOR FREEDOMS IN THE ANGLO-AMERICAN WORLD 48-50 (Cambridge University Press, 2024). The drafting of the First Amendment and its final text reflect the intrinsic interconnection between freedom of religion and freedom of the press recognized by the Founders. *See* THE PAPERS OF JAMES MADISON, VOL. 12, 2 MARCH 1789–20 JANUARY 1789, at 196-210 (Charles Hobson & Robert Rutland eds. 1979) (Madison introducing the Bill of Rights and describing the rights of conscience and freedom of the press as "those choicest privileges of the people."); Shanor, *Constitutional Exceptionalism of*

*Religion & the Press* (explaining that religion and press were the two most essential institutions for organized self-determination and countering state oppression at the Founding); Sonja West, *First Amendment Neighbors*, 66 Ala. L. Rev. 357, 357-58 (2014).

The Most-Favored-Nation approach recognizes that First Amendment rights should be enforced to provide protection for groups that may face government disfavor—whether religious or otherwise. *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 Colum. L. Rev. 2397, 2438-48 (2021). Requiring that laws imposed on politically vulnerable groups be applied to all provides an "effective practical guaranty against arbitrary and unreasonable government." *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *see also* Douglas Laycock & Steven Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 24-25 (2016). It also prevents the government from making value judgments among disparate groups or expressions. *See Tandon*, 593 U.S. at 64 (expressing concern that the state might assume the worst when people go to worship but assume the best when they go to work); *see also* Laycock, *Generally Applicable Law*, at 23; Tebbe, *The Principle and Politics of Equal Value*, at 2443.

The Court has recognized that the same rationales apply fully to the Press Clause. Indeed, the need to protect disfavored groups vulnerable to government

hostility is precisely what compelled the Court to strike down the Minnesota law targeting newspapers for differential tax treatment in *Minneapolis Star*. 460 U.S. at 582-85. The rule of general applicability is essential for those engaged in newsgathering because they are constantly at risk of government retaliation given their watchdog role. RonNell Andersen Jones & Sonja West, *The Disappearing Freedom of the Press*, 79 Wash. & Lee L. Rev. 1377, 1460 (2022) (explaining that while the "American press is not necessarily weak," its role as a check on government power makes it a target of government disfavor). The need for this protection is only magnified by the far more limited economic and political capital of journalists today to vindicate their interests through the political system. Abrams, *The Press Clause*, at 568-584.

In short, case law, text, history, and policy all support applying the Most-Favored-Nation approach used in Free Exercise Clause cases to Press Clause cases. Indeed, because freedom of the press more directly facilitates democratic self-governance than freedom of religion, the approach is particularly appropriate in the Press Clause context. *See* Shanor, *The Constitutional Exceptionalism of Religion & the Press*; Alan Brownstein & Vikram Amar, *Locating Free-Exercise Most-Favored-Nation-Status Reasoning in Constitutional Context*, 54 Loy. U. Chi. L. J. 777, 822 (2022). Under this approach, a law that burdens core press functions cannot escape strict scrutiny as "generally applicable" if it provides exemptions for

conduct by others that implicates the government's interest in a similar way or grants discretion to allow such exemptions.

## III. INDIANA'S EXCLUSION OF THE PRESS FROM EXECUTIONS IS SUBJECT TO, AND CANNOT SURVIVE, STRICT SCRUTINY

### A. Strict Scrutiny is Required Because Indiana Excludes Reporters from Executions It Permits Others to Observe

Indiana Code § 35-38-6-6(a) and its implementing regulation, ISP 06-26 (together, Indiana's "Execution Restriction"), forbid public attendance at an inmate's execution. It then exempts from this ban select groups of individuals, including up to eight members of the victim's family, five relatives or friends of the condemned (with approval from the warden), a spiritual advisor for the condemned, two physicians, and various prison officials. Ind. Code § 35-38-6-6(a). The press is not one of the exempt groups. *Id*. To the contrary, the Execution Restriction singles out the press to make clear that "Media personnel shall not be permitted to witness the execution or to be in the Execution Chamber." A18. A journalist can avoid this prohibition only by being listed among the five "relatives or friends" a condemned inmate asks the warden to approve as witnesses. *Id.*

The Execution Restriction prohibits journalists from viewing executions as a check on government conduct, informing the public about executions, and acting as a proxy for the public during a constitutionally consequential state action. This limitation on core press functions is subject to strict scrutiny because the Execution

Restriction is not generally applicable within the meaning of the Most-Favored-Nation approach required by the Press Clause.[3] It is not generally applicable under Supreme Court precedent, both because it provides exceptions for conduct that implicates the government's interests in similar ways and because it grants the warden discretion to make individualized exceptions.

The Execution Restriction suggests that limiting the number of witnesses protects "the safety or security of the state prison," Ind. Code § 35-38-6-6(d), and before the district court, the state said this limitation serves an interest in the timely administration of the death penalty, ECF 34, at 23.[4] The state, however, presented no reasonable basis to conclude that the presence of a reporter at an execution raises safety, security, or administrative concerns different than those raised by the presence of the non-prison employees who are permitted to attend. And the district court found none. A12.

The warden's discretion to allow a reporter invited by a prisoner to attend only confirms that the presence of a reporter does not raise any uniquely problematic concerns. A18. Because the presence of observers who are exempt from Indiana's general ban on public access to executions implicates the state's interests in the same way as would the presence of non-exempted journalists, the

[3] The Execution Restriction is independently subject to strict scrutiny because it imposes more than incidental burdens on the press. *See* Appellants' Br. 48-54.

[4] ECF citations refer to the district court docket.

law is not generally applicable and it is subject to strict scrutiny. *See Tandon*, 593 U.S. at 62; *Fulton*, 593 U.S. at 541. Moreover, the warden's authority to approve or reject a reporter's attendance is a "mechanism for individualized exemptions" like that in *Fulton* and independently negates Indiana's "generally applicable" defense, subjecting the law to strict scrutiny. *See Fulton*, 593 U.S. at 534.

The district court's reliance on *Pell v. Procunier*, 417 U.S. 817 (1974), to reach the opposite conclusion is misplaced. First, *Pell* involved a far narrower limitation on press access. The prison regulations challenged in *Pell* prohibited requests from journalists for face-to-face interviews with specific inmates; they did not prohibit altogether the ability of journalists to witness official government actions inside a jail. To the contrary, the regulations in *Pell* allowed reporters into the prison and to write freely about everything they observed. *Id.* at 830. Reporters were even permitted a level of access "not available to other members of the public" by being allowed to speak occasionally with inmates they came across during a prison visit. *Id.* The Court's analysis thus rested on its finding that the regulations were "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting on those conditions." *Id.* The same cannot be said here.

Second, the Supreme Court found that there were compelling reasons in *Pell* for the state to deny reporters the right to arrange an interview with a specific

inmate while permitting an inmate's family, friends, attorneys, and clergy to do so. The Court upheld the press restriction based on representations by prison authorities that unrestrained press access to interview inmates of their choice had elevated some inmates to celebrity-like status inside the prison, who then encouraged disobedience and sparked an outbreak of violence and disciplinary problems. *Id.* at 832. No similar justification exists for Indiana's far broader exclusion of reporters from all executions.

The recent rulings in *Tandon* and *Fulton* provide the proper approach to analyzing Indiana's compliance with the Press Clause, not the inapposite reasoning of *Pell.* They require strict judicial scrutiny of Indiana's Execution Restriction.

### B. Indiana's Exclusion of Reporters from Executions Cannot Survive Strict Scrutiny

To survive strict scrutiny, Indiana must show that its Execution Restriction advances "interests of the highest order" and is "narrowly tailored to achieve those interests." *See Fulton*, 593 U.S. at 541; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Before the district court, the only interest Indiana argued the Execution Restriction advanced was an interest in "performing a complex operation that it is lawfully required to perform." ECF 34, at 23. Indiana claimed that "adding an unknown number of persons into the facility" greatly complicates the execution process. *Id.*

In assessing a law that limits First Amendment freedoms, "courts must scrutinize the asserted harm of granting specific exemptions" being requested, rather than "broadly formulated interests" in restricting access. *Fulton*, 593 U.S. at 541. Indiana fails to show how allowing a reporter to view executions would put the process at risk or complicate the process any more than the presence of others authorized to observe. Justifications based on speculation are not enough. *Id.* at 542.

Other states permit journalists to observe executions, while administering timely executions. Some states specify the types of outlets that may be present at an execution; others limit the number of media witnesses allowed at an execution. *See* Appellants' Br. 32-34; Leah Roemer, *News Resource: In Era of Secrecy, States Increasingly Restrict Media Access to Executions*, Death Penalty Info. Ctr. (Mar. 14, 2025), https://perma.cc/NT8C-CR9Q (summarizing states' media execution access policies). These restrictions allow prisons to maintain order in administering executions, while respecting First Amendment-protected press functions. Indiana's law does not, and its failure to do so violates the Press Clause.

## CONCLUSION

This Court should reverse the district court because it failed to apply strict scrutiny to a law that denies press access to a government proceeding that others are allowed to attend, without any compelling justification for doing so.

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# APPENDIX

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32, undersigned counsel certifies that the foregoing brief:

1. Complies with the type-volume limitation of Circuit Rules 29 and 32(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,965 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. Dated: August 5, 2025

By: /s/ *Matthew V. Topic*
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