IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

BH MEDIA GROUP INC., *et al.*,

Plaintiffs,

v. CASE NO. 3:19-CV-692

HAROLD CLARKE,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The First Amendment to the United States Constitution guarantees a right of public access to criminal court proceedings. The United States Supreme Court has made clear, however, that this constitutional right of access does not extend beyond the prison door. And for well over a century, Virginia has mandated—by statute—that executions be conducted in private, on the other side of a prison door. Particularly considering that Virginia has long since closed off wholesale public access to executions, there is no First Amendment "right" to witness an execution in this Commonwealth. If this were true, states could be compelled to broadcast executions for public viewing, a position that has been universally rejected by every court to have considered it.

Because there is no First Amendment right to witness an execution, the claims presented here are—at most—that the Virginia Department of Corrections is not fully complying with a state statute allowing a limited number of individuals, admitted at the discretion of the Director of the Department, to be "present" during an execution. Resolution of this issue presents a pure question of state law that does not arise under the Federal Constitution and is therefore not properly before this Court.

Moreover, because the policy at issue was changed and implemented more than two years ago, the complaint is barred by the applicable two-year statute of limitations. As has been alleged on the face of the complaint, Virginia's execution policy was amended in February 2017, and applied at a single execution since that time, which occurred in July 2017. There have been no executions in Virginia since, and none are presently scheduled. Considering the lapse in time between the policy change, and the date this suit was filed, the First Amendment claim should be dismissed on the additional ground that it is time-barred.

For these reasons, and as discussed in more detail below, Virginia respectfully requests that the complaint be dismissed for failure to state a claim upon which relief can be granted.

STATEMENT OF FACTS

"[W]hen ruling on a defendant's motion to dismiss, a [trial] judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). So viewed, the essential allegations of the complaint—as supplemented by the public record—are as follows.

1. Plaintiff BH Media Group, Inc., publishes the *Richmond Times-Dispatch*, a Virginia newspaper that began publishing as the *Richmond Compiler* in 1815, and merged with other newspapers to form the *Times-Dispatch* in 1903. Compl. ¶ 9. Reporters from the *Times-Dispatch* have been present and reported regularly on past executions in Virginia. *Id.*

2. Plaintiff The Associated Press (AP) is "a nonprofit news cooperative incorporated and based in the State of New York." Compl. ¶ 10. Reporters from the AP "witness executions" and "report[] extensively on the death penalty," although they are not alleged to have been present during any Virginia execution. *Id.* They are alleged to have "covered" the July 2017 execution of William Morva. *Id.*

3. Plaintiff Guardian US "is a digital news service" organized in the State of New York, and it was established "in 2011 by the London-based newspaper *The Guardian*." Compl. ¶ 11. The Guardian US "has reported extensively on the death penalty," including the July 2017 execution of William Morva, although its reporters are not alleged to have been present during any Virginia execution. *Id.*

4. Plaintiff Gannett Co., Inc., is the owner of Multimedia, Inc., "a private company that publishes The News Leader, the primary daily newspaper for the Cities of Staunton and

Waynesboro." Compl. ¶ 12. The newspaper "has reported extensively on the death penalty" and has previously attended executions. *Id.*

5. Defendant Harold Clarke is the Director of the Virginia Department of Corrections (VDOC). By statute, he is authorized to "promulgate[] and control[] Virginia's lethal injection execution procedures." Compl. ¶ 13.

History of Execution-Related Statutes in Virginia (pre-1908)[1]

6. Prior to 1908, the primary method of execution in the Commonwealth of Virginia was hanging. Compl. ¶ 14.

7. Responsibility for the housing and sentencing of prisoners had long been vested in the sheriffs of individual localities.[2] Executions were therefore conducted by local county officials, rather than in a centralized location. *See, e.g.*, Va. Stat. at Large, Vol. XI (1782-84) (Hening), pp. 88-89 (reporting 1782 law that criminal defendants "committing capital offences" should be tried by juries in "the counties in which the offences are committed," and otherwise only mandating that at least six weeks pass before the pronouncement of a sentence of death and a resulting execution) (copy attached as Exhibit 3).

8. The first Virginia statute expressly mandating the manner of an execution appears to have been passed in 1796, and it provided that "[e]very person convicted of murder of the first degree, his or her aiders, abettors and counsellors, shall suffer death by hanging at the neck."

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[1] The historical legislative and statutory materials cited in this section are available in the law library maintained by the Supreme Court of Virginia. For the convenience of the Court, copies are attached as exhibits to this pleading.

[2] Prior to the Revolutionary War, however, capital trials occurred before the governor and the legislature, and executions were to occur in what is now Williamsburg, rather than at the local jails. *See, e.g.*, Va. Stat. at Large, Vol. I (1619-60) (Hening), Act XLVI of 1642 (giving the local sheriffs authority to construct local jails); Act V of 1655 (providing that capital cases "be tryed at quarter courts before the Governor and Concill," but that if the defendant is condemned and to be executed, the execution occur in "James Cittie") (copies attached as Exhibits 1 and 2).

Va. Stat. at Large, Vol. II (1796-1802) (Shepherd), p.8 (copy attached as Exhibit 4). Any remaining details for an execution remained vested with the local sheriff.

9. In 1856, however, the General Assembly took the first steps towards directing that executions should be conducted in private, expressly providing that a "sentence of death" should be executed in an "enclosed yard" at the local jail, unless the sentencing court "direct otherwise." Va. Acts of Assembly (1855-56), Chap. 43, § 1 (copy attached as Exhibit 5).[3] Also by statute, the General Assembly directed that the individuals who should be "present" during an execution were "the attorney for the commonwealth," the court clerk, and "twelve respectable citizens, including a physician or surgeon," and the executing authority could allow, in his discretion, "counsel of the convict," "such ministers of the gospel as he shall desire," and "such of the convict's relations as the officer shall deem prudent." *Id.* § 2.[4]

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[3] The statute was presumably enacted in the wake of increasing criticism, including from the press, regarding the propriety of public executions. In 1843, for example, the *Richmond Enquirer* commented: "We are more than ever convinced of the propriety of making these capital punishments private. . . The law which condemns the murderer to the gallows is a righteous one, but we believe a deeper impression is made, simply by announcing throughout the community the *awful fact*, that at such an hour and minute, a fellow being *is to die*, than when a promiscuous crowd is admitted, to glut their hideous curiosity for a time, and then to go away hardened, and more reckless than when they came." Harry M. Ward, *Public Executions in Richmond, Virginia, A History, 1782-1907* (2012), at pp. 45-46. Similarly, in 1852, the *Daily Dispatch*—a predecessor publication for the *Richmond Times-Dispatch*—opined 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. We consider that public gibbeting exercises a hardening and hurtful effect." Ward, *supra*, at p. 60. At the same time, still another Richmond newspaper, the *Richmond Republican*, commented that "[i]f there is truth in history, public executions are demoralizing in every respect, and should be frowned down by every intelligent man and woman in the community." *Id.*

[4] The 1856 legislation was codified in the 1860 publication of the Code of Virginia, at Title 55, Chapter 209, § 10 (copy attached as Exhibit 6). Following the Civil War, the legislation was re-adopted, without alteration, in an 1867 extra session of the General Assembly, Va. Acts of Assembly (1866-67), p. 938 (copy attached as Exhibit 7), and it appears in the 1873 publication of the Code of Virginia, codified at Title 55, Chapter 203, § 10 (copy attached as Exhibit 8).

10. In 1878, the Virginia General Assembly took the additional step of passing "An ACT to prohibit public executions," expressly providing that "it shall not be lawful hereafter in this state to execute the death penalty on any condemned criminal in a public manner, but only in the presence of such officers of the law as may be necessary to see that the sentence of the court is properly carried into effect." Va. Acts of Assembly (1878-79), Chap. 119, § 1 (copy attached as Exhibit 9).[5]

11. The 1878 legislation was codified in the 1887 publication of the Code of Virginia, at Title 53, Chapter 198, § 4063 (copy attached as Exhibit 10). The 1887 Code makes clear that, if there is no suitable enclosure at the local jail, the "officer executing the sentence shall erect at some suitable place a temporary enclosure which shall exclude the public view, and the sentence shall be executed within that enclosure." *Id.*[6]

History of Execution-Related Statutes in Virginia (1908-1994)

12. In 1908, the General Assembly mandated that the manner of execution in Virginia would be "by electrocution," and death by hanging therefore ceased to exist. Va. Acts of Assembly (1908), Chap. 398 (copy attached as Exhibit 11).[7]

13. In the 1908 legislation, the General Assembly also directed the superintendent of the State Penitentiary "to provide a permanent death chamber within the confines of said

[5] Although Virginia had attempted, by statute, to require greater privacy for executions, publications had continued to sensationalize and publicize the details of executions. In 1870, for example, the *Dispatch* (a predecessor for the *Times-Dispatch*) promised a "graphic and thrilling account" of a Richmond-area execution, and pledged to republish that account in subsequent edition because of the anticipated "great demand" for the article. Ward, *supra* n.3, at 114.

[6] The Plaintiffs have alleged, without citation, that Virginia "executed George Robinson by public hanging in front of a crowd of three to four thousand onlookers" in 1902. Compl. ¶ 15. The allegations appear to correspond to an execution that has been reported as having occurred in Wise County, Virginia. If that execution occurred as alleged, then it violated the express provisions of Virginia law.

[7] The 1908 legislation appears in Pollard's 1908 printing of the Code of Virginia, at pages 737-38 (copy attached as Exhibit 12).

penitentiary," which "shall have all the necessary appliances for the proper execution of felons by electrocution." *Id.* § 1. All condemned inmates, state-wide, were to be executed in that chamber. *Id.*

14. According to the 1908 legislation, the individuals who were to be "present" during the execution were "the superintendent," the "surgeon of the penitentiary," and "twelve respectable citizens." The superintendent could also admit, in his discretion, "counsel for the convict and a minister of the gospel." *Id.* § 4.

15. The 1908 legislation additionally 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." *Id.* § 10.[8]

16. In 1910, the Virginia Code was amended, slightly, to specify that the persons to be present during an execution were to include "a number of respectable citizens numbering not less than six nor more than twelve." Va. Acts of Assembly (1910), Chap. 348 (copy attached as Exhibit 13). The remaining provisions of the statute were substantively unaltered, including the section prohibiting publication of the details of an execution. Pollard's Supp. to the Code of Virginia (Sessions of 1906, 1908, and 1910), Chap. 398 (copy attached as Exhibit 14).

17. The 1908 and 1910 legislation was recodified in the 1919, 1924, 1936, 1950, 1960, and 1974 versions of the Code of Virginia, without substantive alteration. *See* Va. Code Tit. 41, Chap. 196, §§ 4941-4942 (1919) (copy attached as Exhibit 15); Va. Code §§ 4941-4942 (1924) (copy attached as Exhibit 16); Va. Code §§ 4941-4942 (1936) (copy attached as Exhibit 17); Va. Code §§ 19-275 & -276 (1950) (copy attached as Exhibit 18); Va. Code §§ 19.1-302 & -

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[8] This statue did not prohibit the *Times-Dispatch* from printing, in 1916, "a full-page analysis of 'how it feels to die in the electric chair,'" based on "a near death experience" of an individual "who had stepped on a live wire" and claimed that "he had a sensation of 'burning up.'" Ward, *supra* n.3, at 161.

303 (1960 Repl. Vol.) (copy attached as Exhibit 19); Va. Code §§ 53-317 & -318 (1974 Repl. Vol.) (copy attached as Exhibit 20).

18. In 1978, the Code was amended slightly to provide that the individuals "present" at an execution should be "the Director," a physician employed by VDOC, "such other employees" of VDOC as "may be required," and "at least six citizens." Va. Code § 53-318 (1978 Repl. Vol.) (copy attached as Exhibit 21). The Director was authorized to admit, in his discretion, "counsel for the convict and a minister of the Gospel." *Id.* The Code section prohibiting publication of the details of an execution remained in effect, seventy years after it was originally enacted. *See* Ex. 21, Va. Code § 53-322 (1978 Repl. Vol.).

19. In 1982, Title 53 of the Virginia Code was repealed, and replaced with Title 53.1. At that time, the 1978 version of the statute was recodified, without alteration to the numbers or types of individuals allowed to be present. *See* Va. Code § 53.1-233 & -234 (1982 Rep. Vol.) (copy attached as Exhibit 22). However, the statutory prohibition on publicizing the details of an execution was not reenacted.

20. In 1989, the execution statutes were amended to allow the death chamber to be relocated from the Penitentiary to "a state correctional facility." Va. Code § 53.1-233 (1991). Virginia's execution chamber was then relocated to Greensville Correctional Center, where it remains to date.

History of Execution-Related Statutes in Virginia (1995-present)

21. In 1994, the General Assembly amended Virginia's execution statutes to allow for execution by lethal injection. The provisions of the Code relating to the individuals who were allowed to be present during an execution remained unchanged. Va. Code §§ 53.1-233 & -234 (1994).

22. Although there have been various amendments to the execution statutes since that time period—for example, the 2007 amendments to shield the identities of the persons who participate in an execution, and the 2016 amendments authorizing the procurement of lethal injection drugs from compounding pharmacies—the provisions of the Virginia Code describing individuals who may be "present" during an execution have not changed.

23. The only non-statutory alteration to the individuals allowed to be present during an execution involved a 1994 executive order from the Governor of Virginia, which established "a policy that close family members of the victim of a capital murder should, whenever feasible, be afforded the opportunity to witness the execution of the person who murdered their loved one." Exec. Mem. 10-94 (reprinted in1994 Va. Reg. Vol. 10, issue 24, pp. 5929-30) (attached as Exhibit 23). The executive order directed VDOC to "determine a maximum number of family members who will be allowed to witness an execution," establish an application procedure for family members who would like to witness an execution, and "ensure that family members are physically separated from other witnesses." *Id.*

24. Under current law, then, the following individuals are allowed to be present during an execution in Virginia: (1) the Director of VDOC; (2) a VDOC physician; (3) such other VDOC employees who are required; (4) six citizens; (5) family members of the victims, who are admitted through an application process; and, in the discretion of VDOC, (6) counsel for the inmate, and (6) a clergyman. Va. Code § 53.1-234.

25. Virginia's General Assembly has never made a separate provision for the admittance of media "witnesses" or "representatives" to an execution. Rather, the only manner in which media have been separately treated pertains to Virginia's seventy-four-year statutory ban on publicizing the details of an execution.

Execution Viewing Procedures

26. The most current version of Virginia's execution manual was adopted on February 7, 2017. Compl. ¶ 23 & Ex. A.

27. Under the existing VDOC protocol, enacted under the authority of Code § 53.1-234, VDOC may admit, to an execution, (1) six citizens, (2) up to four media representatives, and (3) family members of the victim. Compl. ¶ 24.

28. Under the existing protocol, prior to the execution, the curtain to the witness room is closed. The condemned inmate is then escorted into the execution chamber, where he is strapped to the execution table or the electric chair. Compl. ¶¶ 25-26.

29. For lethal injection executions, the front curtain remains closed while the IV lines are being placed and the heart monitor strips applied. The front curtain is then opened, the death warrant is read to inmate, and the inmate is given a chance to say his final words. The lethal drugs are then administered from behind a separate, back curtain, so that the executioner remains out of sight of the individuals present during the execution. The front curtain remains open until a physician announces the time of death. Compl. ¶¶ 27-30.

30. During the version of the execution manual in effect prior to February 2017, for executions by lethal injection, the curtain was not closed until after the inmate was brought to the execution table. At that point, the curtain was closed while the IV lines were being placed. Compl. ¶ 39.

31. For executions by electrocution, certain preparatory actions are taken while the front curtain remains closed. The front curtain then opens. Members of the execution team attach the helmet, mask, and electrodes to the inmate, and the Lead Warden then turns a key to initiate the electrocution. The front curtain remains open until time of death is announced. Compl. ¶¶ 35-37.

32. The complaint does not detail whether the February 2017 execution manual changed any of the specifics relative to an execution by electrocution.

ARGUMENT AND AUTHORITIES

The complaint suffers from a fatal analytical flaw: There is no First Amendment right to witness an execution. And there is no other federal constitutional provision that could serve as a source of any "right" to compel greater access to a procedure that, in the Commonwealth of Virginia, has been closed to the public for over a century and a half. Absent a constitutional violation, 42 U.S.C. § 1983 is not implicated, and this Court lacks subject matter jurisdiction to adjudicate what is, at the very most, a state-law policy dispute.

Moreover, considering that more than two years have elapsed since the 2017 execution policy modifications, the statute of limitations on any constitutional claim has elapsed. The VDOC execution policy was last applied in July 2017, and there are no executions presently scheduled to occur. The complaint should therefore be dismissed on the additional ground that it is untimely-filed.

I. Standard of Review: Rule 12(b)(1)

Federal district courts are courts of limited jurisdiction. "Thus, when a district court lacks subject matter jurisdiction over an action, the action must be dismissed." *United States v. Jadhay*, 555 F.3d 337, 347 (4th Cir. 2009). A challenge to a court's subject matter jurisdiction can be raised at any time and is properly considered on a motion under Rule 12(b)(1) of the *Federal Rules of Civil Procedure*. The burden of proving subject matter jurisdiction in response to a Rule 12(b)(1) motion rests with the plaintiff, the party asserting jurisdiction. *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

II. Standard of Review: Rule 12(b)(6)

"[T]he purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint." *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and if there is "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556); *see also* Fed. R. Civ. P. (8)(a)(2); *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009). Also, although the Court must consider all of the factual allegations of the complaint as true, the Court is not bound to accept a legal conclusion couched as a factual assertion, *Iqbal*, 556 U.S. at 663-64, nor should the Court accept a plaintiff's "unwarranted deductions," "rootless conclusions of law" or "sweeping legal conclusions cast in the form of factual allegations." *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996).

Generally, a Rule 12(b)(6) motion to dismiss "cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred." *Goodman v. PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). However, a court may determine the merits of a statute of limitations defense under Rule 12(b)(6) if "all facts necessary to the affirmative defense clearly appear[] on the face of the complaint." *Id.*; *see also United States v. Kivanc*, 714 F.3d 782, 789 (4th Cir. 2013) ("The statute of limitations is an affirmative defense that may be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim."); *Dean v. Pilgrim's Pride Corp.*, 395 F.3d 471, 474 (4th Cir. 2005).

III. The First Amendment does not apply.

The Supreme Court has never created or otherwise endorsed a First Amendment "right of access" to non-judicial government proceedings, particularly ones that occur behind closed doors. This Court should decline Plaintiffs' invitation to do so now.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court first held that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice," *id.* at 573, and grounded the right of public attendance at criminal trials in the First Amendment "right of access to places traditionally open to the public"—specifically, the courtroom. *Id.* at 575, 577-78. Similarly, in *Press-Enterprise v. Superior Ct. of Cal.*, 464 U.S. 501 (1984) (*Press-Enterprise I*), the Supreme Court held that this right to an open criminal trial extended to the voir dire phase of a criminal trial. And in *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1 (1986) (*Press-Enterprise II*), the Supreme Court recognized that "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Id.* at 7. To determine whether there was a "First Amendment right of access" to a closed preliminary hearing in a "criminal proceeding," the *Press-Enterprise II* Court then set out a two-pronged inquiry, analyzing "whether the place and process have historically been open to the press and the general public," along with "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

Neither the Supreme Court nor the Fourth Circuit has taken the First Amendment right of access to a courtroom, as explained in *Richmond Newspapers*, *Press-Enterprise I* and *II*, and related cases, and extrapolated that right into the context of non-judicial records or proceedings. *See, e.g.*, *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (referring to *Richmond Newspapers* as having established the "public-trial right"); *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (referring to *Press-Enterprise II* as having established "a right of access to criminal

proceedings secured by the First Amendment"); *Wilson v. Layne*, 526 U.S. 603, 613 (1999) (holding that a media "ride along" during the execution of a search warrant violated the Fourth Amendment and was not otherwise authorized under the First Amendment right of "access" recognized in *Richmond Newspapers*); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam) (Puerto Rico court could not close a preliminary hearing because that hearing was "sufficiently like a trial," so as to mandate a public right of access); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 603 (1982) (interpreting *Richmond Newspapers* as "firmly establish[ing] for the first time that the press and general public have a constitutional right of access to criminal trials"); *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019) (noting the general rule that the First Amendment does not provide a public right of access to government information, although a "narrow exception exists with respect . . . to criminal proceedings"); *In re Wall St. Journal*, 601 F. App'x 215 (4th Cir. 2015) (per curiam) (referring to the First Amendment right of "access" as applying to "criminal trials," criminal "pretrial proceedings," and "documents submitted in the course of a trial, including documents filed in connection with a motion to dismiss an indictment and other pretrial filings"); *United States v. Appelbaum*, 707 F.3d 283 (4th Cir. 2013) (no First Amendment right to access electronic communications obtained during a criminal investigation and then sealed by court order, reasoning that although the court orders were judicial records, they did not otherwise satisfy the *Press-Enterprise II* test); *ACLU v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011) (referring to the First Amendment "right of access to criminal trials and certain criminal proceedings," and noting that the Fourth Circuit has "recognized that the First Amendment right of access extends to civil trials and some civil filings"); *Fisher v. King*, 232 F.3d 391, 397 (4th Cir. 2000) (interpreting *Richmond Newspapers* and its progeny as standing, collectively, "for the proposition that the general public and press

enjoy a qualified right of access under the First Amendment to criminal proceedings and transcripts thereof"); *In re Time Inc.*, 182 F.3d 270 (4th Cir. 1999) ("A First Amendment right of access applies to a criminal trial, including documents submitted in the course of a trial."); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989) (no First Amendment right to access a sealed search warrant affidavit; although the affidavit qualified as a judicial record, it did not otherwise satisfy the *Press-Enterprise II* test); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (concluding that the First Amendment right of access applied "to documents filed in connection with a summary judgment motion in a civil case").

Thus, although the Supreme Court has plainly held that there is a First Amendment right to access a criminal trial, and although the Fourth Circuit has slightly expanded that right into the civil context, neither has extended the *Richmond Newspapers* "right of access" outside of a judicial context. This makes sense, as the right of access established in *Richmond Newspapers* was predicated on the right to access the very public place where those trials were held—the courtroom.

By contrast, in an unbroken line of cases, the Supreme Court has repeatedly declined to recognize a constitutional right of "public access" to areas or events inside of a prison. In *Pell v. Procunier*, 417 U.S. 817 (1974), for example, the Supreme Court upheld, against a First Amendment challenge, a state regulation limiting face-to-face interviews with particular inmates. In doing so, the Court rejected an argument from members of the media that they had a "right to gather news without governmental interference," *id.* at 829, concluding that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public," *id.* at 834.

The Supreme Court reaffirmed this general principle in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), rejecting an argument that, under the First Amendment, members of the media should be given full and complete access to all areas of a prison and allowed to take photographs and video footage from inside the prison. Although the media representatives in that case argued that "public access to penal institutions is necessary to prevent officials from concealing prison conditions from the voters and impairing the public's right to discuss and criticize the prison system and its administration," *id.* at 8, the Supreme Court concluded that "[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control," *id.* at 9. The Court further distinguished the requested "privilege of *access* to information" from "a right to publish information which has been obtained," explaining that, although "the government cannot restrain communication of whatever information the media acquire," the Court had never "remotely impl[ied] a constitutional right guaranteeing anyone access to government information beyond that open to the public generally." *Id.* at 10. The Court reasoned,

> [f]or example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information*.

Id. at 12 (quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)). So although "[t]he public's interest in knowing about its government is protected by the guarantee of a Free Press," that "protection is indirect," for "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 14. And, in closing, the Supreme Court expressly rejected "the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions," reasoning that this "assumption finds no support in the decisions of this

Court or the First Amendment." *Id.* at 13-14; *accord Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977) ("[T]he first amendment does not accompany the press where the public may not go."); *Entertainment Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1019 (S.D. Ind. 2001) (denying request to livestream the federal execution of Timothy McVeigh, in a pay-per-view format, for widespread public viewing).

Weighing these two lines of precedent, the following becomes clear. Although there is a First Amendment right to access certain stages of a criminal prosecution, derived from the public right to access a courtroom, there is no First Amendment right to access the interior of a prison. This principle was emphasized in *Richmond Newspapers*, itself, which noted that "penal institutions, [] by definition, are not 'open' or public places," for "[p]enal institutions do not share the long tradition of openness" that exists in courtrooms. 448 U.S. at 577 n.11. An execution is not a phase of a criminal prosecution, *Schwab v. Berggren*, 143 U.S. 442, 451 (1892), and—in the Commonwealth of Virginia, at least—it occurs within the secure confines of a correctional facility. It follows that the First Amendment does not apply to guarantee a public right of access to an execution in this Commonwealth.

This reasoning is further cemented by the Supreme Court's decision in *Holden v. Minnesota*, 137 U.S. 483 (1890), which involved a challenge to a Minnesota statute that, *inter alia*, made executions private and restricted the number of persons who were allowed to witness an execution. There, the Court observed:

> Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, . . . and whether the enclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction . . . as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of

> newspapers. These are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe . . . .

Id. at 491. If there had been a public "right" to witness an execution, the Supreme Court was certainly given the opportunity to say so. They did not.

At least two decisions from other federal courts are instructive on this point. First, in *Oklahoma Observer v. Patton*, 73 F. Supp. 3d 1318 (D. Okla. 2014), a federal district court judge considered—and rejected—claims virtually identical to the ones presented here. Specifically, the media plaintiffs in that case challenged "a new execution protocol" that "included various changes in the ability of media representatives to view executions." *Id.* at 1320. The plaintiffs sought "declaratory and injunctive relief broadly seeking a determination that that they have the right, if selected as media representatives, to view and hear the entire execution process from beginning to end, which they describe as the time from when the inmate to be executed enters the execution chamber until he leaves the chamber, dead or alive." *Id.* Weighing the arguments presented by the parties, the court concluded that the media plaintiffs could not establish the existence of a First Amendment right to access an execution, and therefore denied their motion for a preliminary injunction while granting the defendant's Rule 12 motion to dismiss.

As to the holdings of *Richmond Newspapers* and *Press Enterprise I* and *II*, the Oklahoma court explained that "there is considerable doubt" that the First Amendment exception developed in those cases "even potentially applies" in the context of an execution, considering that, "[t]o date, the Supreme Court has not applied the exception outside the criminal adjudication process," and further recognizing that, "[u]nlike the tradition of openness which exists as to criminal trials, the Court has emphasized the closed nature of prisons." *Id.* at 1324. The court concluded, therefore, that "the *Press-Enterprise* exception does not extend to the circumstances existing here, which are outside the criminal adjudication process." *Id.* at 1325.

Even if the two-pronged *Press-Enterprise II* "test" potentially applied, the Oklahoma court held, in the alternative, that the prerequisites for establishment of a right of access did not exist. As to the first prong, although "there is historical evidence to suggest that public access to executions has existed at some times in the past," it is also "quite clear that the historical practice is not the same 'unbroken, uncontradicted history' of access that the Supreme Court found persuasive in *Richmond [Newspapers]* and its progeny." *Id.* at 1325-26. The court noted that, as of 1908, Oklahoma had a statute requiring executions to be conducted out of public view, *id.* at 1326, and that Oklahoma has, "since 1915, conducted its execution inside a prison, . . . rather than in a more public venue," *id.* at 1327.

The Oklahoma court also rejected the plaintiffs' argument that the allowance for twelve citizen observers meant that those observers "act as proxies for the general public and that public access should therefore be deemed present." *Id.* Specifically, although the twelve members of a criminal jury function "as the public's representatives in the process," members of the general public retained the right to attend the criminal trial notwithstanding the presence of the jury. *Id.* By contrast, because members of the general public did not retain any "right" to attend executions when Oklahoma enacted its statute allowing for twelve citizen observers, the court concluded that the two situations were materially different. *Id.*

Second, as to the "logic" prong of the *Press-Enterprise II* analysis, the Oklahoma court reasoned that the plaintiff's failure to establish the first prong ("experience") was fatal to the overall analysis, for both elements needed to be present to create a public right of access. *Id.* at 1328. The Oklahoma court therefore concluded that, even if *Press-Enterprise II* applied, it was not satisfied, and no public right of "access" existed.

Similarly, in an unreported decision, an Arkansas federal court reached the same conclusion. *See Arkansas Times, Inc. v. Norris*, No. 5:07cv00195, 2008 U.S. Dist. LEXIS 3500 (E.D. Ark. Jan. 7, 2008). In the Arkansas case, the media plaintiffs challenged execution procedures that "prevent witnesses from observing all stages of a lethal injection execution." *Id.* at *1. Emphasizing that "[t]he Supreme Court has never recognized a First Amendment right of access to executions," the district court granted the defendant's Rule 12 motion to dismiss. *Id.* at *5. Like the Oklahoma court, the Arkansas court found that, even if the two-pronged "experience and logic" test derived from *Richmond Newspapers* and *Press-Enterprise II* potentially applied, that test could not be satisfied in the execution context. The Arkansas court reasoned that, "[i]n contrast to the unbroken, uncontradicted history of public access to criminal trials, in the 1830s, executions in the United States became private events and moved from the public square to inside prison walls." *Id.* at *13. The court additionally noted that, "[s]ince 1887, Arkansas law has provided that executions carried out by the State will be private." *Id.* And although six to twelve "respectable citizens" are required to be present, "the presence of six to twelve citizen witnesses does not transform a private execution into a public proceeding comparable to a criminal trial." *Id.* at *13-14.

These decisions are on all fours with the situation presented here. As previously discussed, neither the Supreme Court nor the Fourth Circuit has expanded the First Amendment right of access beyond judicial proceedings, and into an area—a prison—in which there has historically been *no* right of access. The *Press-Enterprise II* test is, therefore, inapplicable. Even if this Court were to analyze the constitutional question using the *Press-Enterprise II* analysis, the Plaintiffs cannot establish the "unbroken" line of public access needed to justify creation of a First Amendment right. Certainly, executions were, at one time, conducted in

public areas. But by 1856, the Commonwealth enacted a statute evidencing legislative preference for private executions. In 1878, the Commonwealth enacted a blanket prohibition on public executions. And in 1908, the Commonwealth mandated that all executions be conducted in a centralized death chamber, to be located inside the state penitentiary, with a limited number of persons—who were statutorily prohibited from reporting any details of the executions—allowed to be present. The Commonwealth has never returned to any "public" form of an execution, in more than a century, and executions in other parts of the country have also been privately-conducted for almost a century, at the very least.

Defendant Clarke recognizes that the Ninth Circuit, alone among the federal courts of appeals, has opined that there is a First Amendment right of access to executions in that jurisdiction. The Ninth Circuit precedent traces back to *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002), a case in which the Ninth Circuit broadly assumed—without discussion—that "[i]t is well-settled that the First Amendment guarantees the public—and the press—a qualified right of access to government proceedings." *Id.* at 873. As support for this proposition, the Ninth Circuit cited the Supreme Court cases discussed above, involving the right of public access to criminal trials. The Ninth Circuit then decided that, because the Supreme Court never expressly said that the public can be barred from entering prisons, the *Press Enterprise II* test should apply. Reasoning that executions were historically "open to all comers," *id.* at 875, and that "representatives" of the public are still allowed to witness executions, the Ninth Circuit then concluded that "there is a tradition of at least limited public access to executions," *id.* at 876.

The Ninth Circuit did not reconcile, however, the Supreme Court's express language in *Richmond Newspapers*, which distinguished prisons as being materially different from

courtrooms because prisons, "by definition, are not 'open' or public places,'" and therefore do not "share the long tradition of openness" that exists in courtrooms. 448 U.S. at 577 n.11. That a government building allows, on occasion, members of the public to enter a certain area, does not transform that government building into a public space for which the public can claim a "historical" and "unbroken" right of access. By concluding, in essence, that prisons are public spaces to which the public can claim a constitutionally-protected right of access, the Ninth Circuit disregarded Supreme Court precedent and over-extended the holdings of *Richmond Newspaper* and its progeny.

No other federal court of appeals has adopted the Ninth Circuit approach—despite the invitation to do so. *See, e.g.*, *Phillips v. DeWine*, 841 F.3d 405, 419 (6th Cir. 2016) ("It is worth noting that we have neither adopted nor rejected the Ninth Circuit's position . . . that the public has a right of access to executions under *Richmond Newspapers*."); *Zink v. Lombardi*, 783 F.3d 1089, 1112 (8th Cir. 2015) ("[U]nlike the Ninth Circuit, we have not ruled that an execution constitutes the kind of criminal proceeding to which the public enjoys a qualified right of access under the First Amendment."). And it is worth noting that one Ninth Circuit opinion, relying on the rationale advanced in *California First Amendment Coalition v. Woodford*, was summarily vacated by the Supreme Court. *See Ryan v. Wood*, 573 U.S. 976 (2014), *vacating* 759 F.3d 1076 (9th Cir. 2014).

Defendant Clarke submits that the Oklahoma and Arkansas decisions, analyzed above, took a more faithful view of controlling Supreme Court precedent, and this Court should follow their lead. Because there is no "unbroken, uncontradicted" history of public access to executions in the Commonwealth of Virginia, it follows that there is no First Amendment right to access that proceeding. There being no First Amendment right, there is no constitutional question

remaining in this case, and the Court should dismiss these proceedings for failure to state a claim and for lack of subject matter jurisdiction.

IV. The complaint does not plausibly allege a denial of access.

Even if this Court were to find some First Amendment right to be present and witness at least part of an execution, the complaint fails to plausibly allege a potential breach of that right. Specifically, the complaint does not allege that, following the enactment of the 1908 statute establishing an execution chamber, witnesses to an execution were allowed to view the entire unbroken sequence of events leading up to an execution. That does not appear to have ever been the case in the so-called "modern era" of executions. Even under *Press-Enterprise II*, Plaintiffs cannot assert a right of access beyond what was historically open to the public.

The only alleged alteration to the execution viewing procedures, as adopted in 2017, is that witnesses no longer see the inmate physically walking into the execution chamber. However, witnesses see and hear the reading of the death warrant, which does not occur until after the curtain is opened, and which signals that the execution is otherwise ready to proceed. Considering that an execution cannot go forward until the death warrant is read to the inmate, and the death warrant is visibly read in the presence of those limited individuals permitted by statute to view the execution, this illustrates, consistent with the statute, that those selected individuals are permitted the function of viewing the execution.[9]

Under the 2017 execution procedures, individuals who are "present" for an execution have an unobstructed line-of-sight of the condemned prisoner from the moment that the death warrant is read until time of death is pronounced. To the extent that there might be a First

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[9] Holding that the pubic has a right to see an inmate physically walk into the execution chamber would suggest, by implication, that the public also has the right to watch an inmate arrive in his holding cell on the morning of his criminal trial, or walk down an inner hallway to the courtroom— "rights" that have never been suggested, even in the *Press-Enterprise II* context.

Amendment "right" to view an execution, the procedures Virginia has put into place adequately provide that "right." The complaint, therefore, fails to plausibly allege that the 2017 version of Virginia's execution manual violates any First Amendment right to "access" an execution.

V. The complaint is time-barred.

Even if this Court were to conclude that the complaint potentially stated a constitutional claim, this case should be dismissed as time-barred.

The Federal Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . ." 28 U.S.C. § 2201. The Declaratory Judgment Act does not provide an independent jurisdictional basis for a federal action—rather, it simply supplies an additional remedy. *See, e.g.*, *City Nat'l Bank v. Edminsten*, 681 F.2d 942, 945 n.6 (4th Cir. 1982) ("[I]t is clear that § 2201 is remedial only, and is not itself a basis for federal subject matter jurisdiction."). For this reason, and because "[t]he Federal Declaratory Judgment act contains no statute of limitations," *Ace Prop. & Cas. Ins. Co. v. Sup. Boiler Works, Inc.*, 504 F. Supp. 2d 1154, 1159-60 (D. Kan. 2007), the applicable limitations period for a suit seeking declaratory relief is determined by "the basic nature of the suit in which the issues involved would have been litigated if the Declaratory Judgment Act had not been adopted." *118 East 60th Owners, Inc. v. Bonner Props., Inc.*, 677 F.2d 200, 202 (2d Cir. 1982).

Here, Plaintiffs are seeking redress for alleged violations of their federal constitutional rights, and they have filed suit under 42 U.S.C. § 1983. For this reason, the statute of limitations governing their suit under 42 U.S.C. § 1983 also applies to their claims for declaratory relief.

When an inmate files suit under 42 U.S.C. § 1983, the governing statute of limitations is borrowed from state law. *Owens v. Okure*, 488 U.S. 235, 239 (1989); *Wilson v. Garcia*, 471 U.S. 261, 266-69 (1985); *Nasim v. Warden*, 64 F.3d 951, 955 (4th Cir. 1995). For cases arising out of Virginia, federal courts borrow the two-year statute of limitations for personal injury actions, codified at Virginia Code § 8.01-243(A). *Shelton v. Angelone*, 148 F. Supp. 2d 670, 677 (W.D. Va. 2001); *see also Banks v. Fowlkes*, No. 1:13cv926, 2014 U.S. Dist. LEXIS 163621, at *7-8 (E.D. Va. Nov. 20, 2014). Accordingly, for a § 1983 action arising out of Virginia to be timely, it must be filed within two years after the cause of action accrues.

Although "the limitation period is borrowed from state law, the question of when a cause of action accrues under 42 U.S.C. § 1983 remains one of federal law." *Nasim*, 64 F.3d at 955. And, "[u]nder federal law a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *Id.*

Here, the Plaintiffs have alleged that VDOC's execution policies were changed in February 2017. They have alleged that those policies were applied during the July 2017 execution of William Morva. These Plaintiffs timely reported on that execution, as well as the changes to VDOC's protocol.[10] Yet they waited until September 2019 to file this suit.

By July 2017, at the very latest, the Plaintiffs possessed "sufficient facts about the harm done" that a "reasonable inquiry" would have "reveal[ed] [their] cause of action." *Id.* The policy change was announced, publicized, and then applied. For over two years, the VDOC policy has lain dormant, there being no further scheduled executions in the Commonwealth of Virginia. And for over two years, the Plaintiffs took no action to vindicate their alleged rights. By so doing, they allowed the statute of limitations to elapse. As the Eleventh Circuit recently

[10] *See, e.g.*, Frank Green, *After Delay in Ricky Gray Execution Department of Corrections Changes Execution Protocol*, RICHMOND TIMES-DISPATCH (Mar. 15, 2017).

held, in the context of a challenge to whether an attorney should be allowed to have a cell phone during an execution, the "statute of limitations began to run when the [state] regulation at issue was enacted," because at that point the plaintiff "knew or should have known of the injury for which he seeks relief." *Arthur v. Comm'r, Dep't of Ala.*, 680 F. App'x 894, 905 (11th Cir. 2017).

Because more than two years have elapsed since the VDOC policy was amended and applied, the First Amendment claim presented is barred by the applicable statute of limitations, and this presents an additional justification for dismissal of the complaint. *See, e.g.*, *Lawrence v. Cooper*, 298 F. App'x 884 (4th Cir. 2010) (per curiam) (affirming district court judgment that claims for declaratory relief were barred by the statute of limitations).[11]

CONCLUSION

Because there is no First Amendment right to access an execution, this complaint fails at the outset. Although Plaintiffs have alleged that they report widely on execution-related matters, and although "the death penalty is a matter of wide public interest, . . . the protections of the first amendment [do not] depend upon the notoriety of an issue." *Garrett*, 556 F.2d at 1279.[12] Neither the Supreme Court nor the Fourth Circuit has expanded the public's right to access a courtroom beyond the judicial context, much less beyond the prison walls and into the private execution chamber. Particularly considering the length of time that Virginia executions have been conducted out of the public eye, creation of that "right" is unwarranted.

[11] Particularly considering that Virginia presently has no scheduled executions, Defendant does not concede that the Plaintiffs can carry their burden of satisfying the requirements of Article III, and he reserves the right, if so needed, to raise those arguments in subsequent pleadings or briefing in this matter.

[12] *See also Houchins*, 438 U.S. at 13 ("We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment.").

What Plaintiffs have presented, is, at best, a question of state policy: whether Virginia should allow persons who are "present" for an execution, as provided for by statute, to physically observe additional preparatory steps that occur prior to the reading of the death warrant. There being no First Amendment right that can be vindicated, this case should be dismissed.

For these reasons, and those discussed in more detail above, Defendant Clarke respectfully requests that this Court GRANT his motion to dismiss and enter any other such order as this Court may deem just.

Respectfully submitted,

HAROLD CLARKE, Defendant.

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2019, I electronically filed the foregoing Memorandum in Support of Defendant's Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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And I hereby certify that I have mailed the document by United States Postal Service to the following non-filing user: N/A

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