

WHO ARE TO BE OUR GOVERNORS? THE RIGHT OF  
ACCESS TO POLICE ID

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*In response to Black Lives Matter protests across the country in the summer of 2020, then-President Donald Trump sent federal agents into numerous American cities to “dominate” the protesters. These agents were largely unidentified, lacking both departmental insignia and badges displaying their personal identification information. As we have seen in the past, when law enforcement officers do not identify themselves, they can evade accountability for the constitutional violations they perpetrate upon private citizens. To remedy this problem, this Comment argues that the First Amendment right of access compels the identification of law enforcement officers when they perform official duties.*

INTRODUCTION

Donavan La Bella suffers from a depressed skull fracture in his frontal lobe, which impairs his ability to control his impulses and reduces his cognitive functioning.<sup>1</sup> This is not a condition he was born with.<sup>2</sup> On Saturday, July 11, 2020, La Bella was shot in the head by an unidentified federal agent in Portland, Oregon.<sup>3</sup> That evening, as he had done on many evenings before, La Bella joined with other peaceful protestors in front of the Mark O. Hatfield Federal Courthouse in downtown Portland to protest racism and police violence in the wake of the police murder of George

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1. Jonathan Levinson, Donavan La Bella, Man Shot by US Marshals in Portland, to Be Released from Hospital, OPB (July 25, 2020), <https://www.opb.org/news/article/donavan-labella-portland-condition-shot-head-federal-officer/> [https://perma.cc/9KUF-K3GL].

2. See Noelle Crombie, Donavan LaBella, Portland Protester Fired On by Feds, Plans to Sue Government for Millions, Oregonian (June 4, 2021), <https://www.oregonlive.com/portland/2021/06/donavan-labella-portland-protester-fired-on-by-feds-plans-to-sue-government-for-millions.html> (on file with the *Columbia Law Review*) (noting how La Bella’s life had been changed dramatically by the injury suffered from the bullet wound).

3. Tim Elfrink, Federal Officers Severely Wounded a Portland Protester. Local Leaders Blame Trump., Wash. Post (July 13, 2020), <https://www.washingtonpost.com/nation/2020/07/13/portland-protester-injured-federal/> (on file with the *Columbia Law Review*).

Floyd six weeks earlier.<sup>4</sup> As video from the scene reveals, La Bella was playing music from a boombox that he hoisted above his head when one of the agents threw a cannister of tear gas in his direction.<sup>5</sup> When La Bella rolled the cannister away, a federal officer shot him in the face with a “non-lethal” immunity.<sup>6</sup> La Bella spent the next several weeks in and out of the hospital, undergoing facial reconstruction surgery to repair the crack in his skull.<sup>7</sup>

Unfortunately, the actions of the federal agents in Portland were not isolated.<sup>8</sup> In response to Black Lives Matter protests across the country, then-President Donald Trump and Chad Wolf, then-Acting Secretary of DHS, sent federal agents into several American cities to act on the President’s desire to “dominate” the protesters.<sup>9</sup> These agents were largely unidentified, lacking both departmental insignia and badges displaying personal identifying information.<sup>10</sup> As a result, many protesters reported injuries or seriously violent interactions with these agents, despite not knowing who they were.<sup>11</sup> When government agents refuse to identify themselves, they evade accountability for constitutional violations.

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4. George Floyd was murdered on May 25, 2020. For nine minutes and twenty-nine seconds, Derek Chauvin, a police officer with the Minneapolis Police Department, knelt on Floyd’s neck until his body lay limp on the Minneapolis asphalt. For the fourth time that year, Black Americans and allies took to the streets en masse to protest the state-sanctioned police killing of a Black American. Eric Levenson & Aaron Cooper, Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd, CNN (Apr. 21, 2021), <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html> [<https://perma.cc/HT5D-VYHR>].

5. See T. Greg Doucette (@greg\_doucette), Twitter (July 12, 2020), [https://twitter.com/greg\\_doucette/status/1282347377672753154](https://twitter.com/greg_doucette/status/1282347377672753154) (on file with the *Columbia Law Review*) (containing a video of the incident).

6. *Id.*

7. KATU Staff, Portland Protester Seriously Injured by Federal Officers Back in Hospital, KATU (Aug. 7, 2020), <https://katu.com/news/local/portland-protester-seriously-injured-by-federal-officers-undergoes-another-surgery> [<https://perma.cc/3TF9-EUKK>].

8. See Melissa Chan, ‘My Faith In This World Is Gone.’ For Protesters Injured by Police, There’s No Real Recovery, Time (Oct. 9, 2020), <https://time.com/5894356/protesters-injured-police/> (on file with the *Columbia Law Review*) (“[A]t least 115 protesters were shot in the head, face and neck with various projectiles, including bullets and tear gas canisters, from May 26 to July 27.”).

9. Zolan Kanno-Youngs & Katie Benner, Trump Deploys the Full Might of Federal Law Enforcement to Crush Protests, N.Y. Times (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/politics/trump-law-enforcement-protests.html> (on file with the *Columbia Law Review*) (last updated June 12, 2020).

10. Garrett Haake (@GarrettHaake), Twitter (June 3, 2020) <https://twitter.com/GarrettHaake/status/1268233764070731778?s=20> (on file with the *Columbia Law Review*) (documenting the presence of unidentified federal agents in Washington, D.C.); see also Katie Shepherd & Mark Berman, ‘It Was Like Being Preyed Upon’: Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them, Wash. Post (July 17, 2020), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/> (on file with the *Columbia Law Review*) (highlighting how unmarked agents approached one protester).

11. Mark Pettibone, another Portland protester, was taken into custody by “men in green military fatigues and generic ‘police’ patches.” He did not know if they were actual

Recognizing this danger, Congress included in the FY2021 National Defense Authorization Act a requirement that federal law enforcement personnel identify themselves and the government entity employing them when responding to a “civil disturbance.”<sup>12</sup> Though this law seeks to address the specific events that transpired during the summer of 2020, its narrow application to *federal* agents and vague use of “civil disturbances” fail to contemplate other situations in which unidentified officers might be unlawfully deployed. For example, the Law Enforcement Identification Act (as the law is being called) would not apply to situations like that of Ferguson, Missouri in 2014, where *local* law enforcement officers routinely refused to wear name badges in the wake of the police murder of Michael Brown.<sup>13</sup> Fortunately, a constitutional remedy might exist for this oversight. Implicit within the First Amendment is a “right of access” to certain government action or information that many courts of this country have recognized.<sup>14</sup>

This Comment argues that the First Amendment right of access compels identification of law enforcement officers in interactions with citizens.<sup>15</sup> To date, the Supreme Court has only applied the First Amendment right of access to documents submitted in connection with judicial proceedings.<sup>16</sup> While many circuit courts have applied the right outside the

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police or a contingent of the far-right extremists who had also been parading around the streets of Portland. See Shepherd & Berman, *supra* note 10.

12. Kimberly Wehle, Opinion, Unnamed Law Enforcement Banned Under the New NDAA, Hill (Jan. 5, 2021), <https://thehill.com/opinion/national-security/532676unnamed-law-enforcement-banned-under-the-new-ndaa/> [<https://perma.cc/DJ4D-GDC3>].

13. Ben Mathis-Lilley, Police in Ferguson Haven’t Been Wearing Identification, Slate (Aug. 15, 2014), <https://slate.com/news-and-politics/2014/08/ferguson-police-nametags-reportedly-haven-t-been-worn.html> [<https://perma.cc/HG8L-WGDZ>]. Michael Brown was shot and killed by a local police officer in Ferguson, Missouri on August 9, 2014. His body was left lying in the street for four hours. He was eighteen years old. Julie Bosman & Joseph Goldstein, Timeline for a Body: Four Hours in the Middle of a Ferguson Street, N.Y. Times (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html> (on file with the *Columbia Law Review*).

14. Though the Court has also recognized a common law right of access, see *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 607 (1978), this Comment argues for the application of the First Amendment right because it offers greater protections. Under the First Amendment, the government must prove that restrictions on an individual’s right of access are necessary to serve a compelling interest, and those restrictions must be narrowly tailored to serve that interest. See *Press-Enter. Co. v. Super. Ct. of Cal. (Press-Enterprise II)*, 478 U.S. 1, 13–14 (1986). Under the common law right, by contrast, a judge need only find that the interests in closure outweigh the interests in access. See *Warner Commc’ns*, 435 U.S. at 602. Furthermore, constitutional rights, unlike common law rights, cannot be supplanted by statute. See Joseph Regalia, *The Common Law Right to Information*, 18 Rich. J.L. & Pub. Int. 89, 90 (2015).

15. This Comment recognizes that there are some instances in which an officer’s identity may be justifiably concealed. Those situations which have traditionally required the use of undercover agents provide an accessible example. Such situations are not implicated within the scope of this Comment.

16. See *infra* Part I; see also *Press-Enterprise II*, 478 U.S. at 1 (granting certiorari to determine whether the public has a right of access to a transcript of a criminal preliminary hearing and holding that, under the First Amendment, the public does have such a right).

judicial context,<sup>17</sup> the right has so far not been extended to the kind of situation discussed here, where a citizen seeks identifying information from an otherwise unidentified state actor while that actor is acting under the color of law.

Part I of this Comment traces the development of the First Amendment right of access, starting with the Supreme Court's "watershed" decision in *Richmond Newspapers, Inc. v. Virginia*.<sup>18</sup> Part II surveys post-*Richmond Newspapers* right of access case law in the United States Courts of Appeals and reveals three distinct doctrinal approaches to right of access cases: the restrictive approach (confining the right to the judicial context), the limited approach (extending the right to administrative proceedings that have trial-like characteristics), and the expansive approach (applying the right to other categories of government information outside the judicial branch).<sup>19</sup> Part II argues that the expansive approach is more consistent with the Court's reasoning in the right of access cases following *Richmond Newspapers*. Part III applies *Richmond Newspaper's* right of access standard to the police identification context to conclude that such information is of the kind protected under the First Amendment.

#### I. DEVELOPMENT OF THE FIRST AMENDMENT RIGHT OF ACCESS

The Supreme Court first acknowledged the First Amendment right of access in *Richmond Newspapers, Inc. v. Virginia*.<sup>20</sup> There, *Richmond Newspapers* sought access to a criminal trial that the judge had closed on motion by the defendant.<sup>21</sup> After unsuccessfully challenging the closure order in the trial court, *Richmond Newspapers* appealed to the Virginia Supreme Court, asserting that the trial judge's closure order violated its right of access under the First Amendment.<sup>22</sup> The Virginia Supreme Court denied the petition for appeal,<sup>23</sup> and *Richmond Newspapers* appealed to the Supreme Court of the United States.

In a plurality opinion,<sup>24</sup> Chief Justice Warren E. Burger wrote that, though born of the common law, "the right to attend a criminal trial is

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17. See *infra* sections II.B–C.

18. 448 U.S. 555, 580 (1980) (noting that the Court has never given constitutional protection to the "acquisition of a newsworthy matter").

19. These labels ("restrictive," "limited," and "expansive") were created by the author.

20. 448 U.S. 555.

21. *Id.* at 560. The proceedings were closed to "all parties except the witnesses when they testify." *Id.*

22. *Id.*

23. *Id.* at 562.

24. Justices Brennan, Stewart, and Blackmun concurred in the judgment but did not join the plurality opinion (written by Chief Justice Burger and joined by Justices White and Stevens). Even though Justice Powell had previously indicated his belief that the First Amendment protects access to criminal trials in his concurring opinion one year earlier in *Gannett v. DePasquale*, 443 U.S. 368 (1979), he took no part in the consideration of *Richmond Newspapers*. Justice Rehnquist was the sole dissenter.

implicit in the guarantees of the First Amendment.”<sup>25</sup> Much like the enumerated freedoms of speech, press, assembly, and protest, the right of access “share[s] a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”<sup>26</sup> Concurring in the judgment, Justice William J. Brennan Jr. wrote separately to highlight the “structural role” that the First Amendment “play[s] in securing and fostering our republican system of self-government.”<sup>27</sup> Under this “structural model,” the First Amendment is linked to that *process* of communication which is “necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.”<sup>28</sup>

Recognizing the potentially “endless” stretch of this new protection,<sup>29</sup> Justice Brennan proposed a two-part inquiry to assist courts in deciding when the First Amendment right of access attaches. In what came to be known as the “experience and logic” test, Brennan suggested that courts look first to history (“experience”) to determine whether there exists “an enduring and vital tradition of public entree to particular proceedings or information,”<sup>30</sup> and then to “logic” to assess “whether access to a particular government process is important in terms of that very process.”<sup>31</sup> In *Richmond Newspapers*, Justice Brennan was persuaded that the unbroken tradition of openness and the “fundamental role” that access to criminal trials plays in “assur[ing] the public that procedural rights are respected and that justice is afforded equally” were sufficient to support the First Amendment right alleged there.<sup>32</sup>

Two years later, in *Globe Newspaper Co. v. Superior Court*, a majority of the Court formally adopted Justice Brennan’s test.<sup>33</sup> In that case, the Court considered the constitutionality of a Massachusetts statute that mandated the closure of criminal trials involving sex crimes against minors.<sup>34</sup> The Massachusetts Supreme Judicial Court, considering the plurality opinion in *Richmond Newspapers*, noted that, even at common law, trials involving sexual assaults could be closed to the public, and that the state of Massachusetts had a compelling interest in encouraging victims to come forward and “preserv[ing] their ability to testify by protecting them from

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25. *Richmond Newspapers*, 448 U.S. at 580.

26. *Id.* at 575.

27. *Id.* at 587 (Brennan, J., concurring in the judgment) (drawing on the Court’s reasoning in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

28. *Id.* at 587–88 (emphasis added).

29. *Id.*

30. *Id.* at 589 (“[A] tradition of accessibility implies the favorable judgment of experience.”).

31. *Id.*

32. *Id.* at 595.

33. 457 U.S. 596, 605–06 (1982).

34. *Id.* at 598.

undue psychological harm.”<sup>35</sup> As a result, the Massachusetts court held that the state’s interests were sufficient to overcome the plaintiff’s alleged right of access.<sup>36</sup> On review at the Supreme Court, the Justices conceded that Massachusetts’ stated interests were compelling but found they “d[id] not justify a *mandatory* closure rule.”<sup>37</sup> Instead, the Court held that Massachusetts’ trial courts should determine “on a case-by-case basis” whether closure is necessary.<sup>38</sup>

Justice Brennan’s “experience and logic” test remains the standard for reviewing right of access cases under the First Amendment. Today, the leading case articulating that standard is *Press-Enterprise Co. v. Superior Court*, which went to the Supreme Court twice. In *Press-Enterprise I*,<sup>39</sup> decided just two years after *Globe Newspaper*, the Court considered whether the First Amendment requires a trial court to make transcripts of voir dire proceedings available to the media.<sup>40</sup> Drawing on the rationale of *Richmond Newspapers* and *Globe Newspaper*, the Court reiterated that the public nature of jury selection in England and in early America weighs in favor of open proceedings and that this “presumption of openness” can only be overcome “by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>41</sup> The Court held that closure was not narrowly tailored and that the alleged interests were “[in]sufficient to warrant prolonged closure.”<sup>42</sup>

*Press-Enterprise II* presented a similar issue: whether the transcript of a preliminary hearing was subject to the public’s right of access under the First Amendment.<sup>43</sup> There, the Court held that the considerations that led the Court “to apply the First Amendment right of access to criminal trials in *Richmond Newspapers* and *Globe Newspaper* and [to] the selection of jurors

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35. Id. at 600 (internal quotation marks omitted) (quoting *Globe Newspaper Co. v. Super. Ct.*, 401 N.E.2d 360, 369 (Mass. 1980)), vacated, 449 U.S. 894 (1980)).

36. *Globe Newspaper Co. v. Super. Ct.*, 423 N.E.2d 773, 779–80 (Mass. 1981), rev’d, 457 U.S. 596 (1982).

37. Id. at 607–08.

38. Id. at 608.

39. *Press-Enter. Co. v. Super. Ct. of Cal. (Press-Enterprise I)*, 464 U.S. 501 (1984).

40. Id. at 503. In the trial court, the prosecutor and defense counsel agreed that making the transcripts public would violate jurors’ right to privacy. Id. at 504. After the trial judge denied access to the transcript, the petitioner asked the California Court of Appeal to compel access to the transcript. Id. at 504–05. That petition was denied as well. Id. at 505.

41. Id. at 510.

42. Id. The Court further concluded: “Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.” Id. at 511.

43. *Press-Enterprise II*, 478 U.S. 1 (1986). A nurse was charged with twelve counts of murdering patients by administering massive doses of a heart drug. Pursuant to California Penal Code § 868 (1985), she moved to exclude the public from the preliminary hearing. A magistrate judge granted the motion, finding that closure was necessary because the case had attracted national publicity. *Press Enterprise* sought to have the transcript of the preliminary hearing released to the public and was denied. It subsequently filed a writ of mandamus with the California Supreme Court, which was also denied. The case then went to the Supreme Court. Id. at 3–6.

in *Press-Enterprise I*<sup>44</sup> mandate the right's application to preliminary hearings as well.<sup>44</sup>

Though the Supreme Court has not yet applied the First Amendment right of access outside of criminal proceedings, some courts of appeals have reasoned that the policy arguments the Court offered in the *Richmond Newspapers* line of cases justify expanding the right of access to other categories of government information. That analysis is the work of Part II.

## II. THE CIRCUIT SPLIT

Following the Supreme Court's lead in *Richmond Newspapers*, every federal court of appeals has recognized an implicit First Amendment right of access to judicial documents.<sup>45</sup> The courts of appeals disagree, however, on whether the right applies outside the judicial context. Three distinct approaches have emerged. The "restrictive approach," adopted by the Fourth, Fifth, Tenth, and D.C. Circuits, rejects attempts to apply the First Amendment right outside of the judicial context.<sup>46</sup> In contrast, the "expansive approach" of the Second, Third, and Ninth Circuits maintains that the Court's reasoning in *Richmond Newspapers* supports the right's applicability to government information more generally.<sup>47</sup> The "limited approach" of the Sixth Circuit is suspended somewhere between the two. The Sixth Circuit has found that the First Amendment right can be applied to administrative proceedings in the executive branch but has refused to go any further.<sup>48</sup> This Part explores each approach more fully below.<sup>49</sup>

### A. *The Restrictive Approach: Right of Access in the Fourth, Fifth, Tenth and D.C. Circuits*

The Fourth, Fifth, Tenth, and D.C. Circuits have declined to apply the First Amendment right of access outside the judicial context. The Fourth Circuit considered this question in the recent case of *Fusaro v. Cogan*.<sup>50</sup> There, a Virginia resident brought a claim against the Maryland State Board of Elections after the Board denied him a copy of Maryland's list of

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44. *Id.* at 10.

45. Lee Levine, Seth D. Berlin, Jay Ward Brown, Gayle C. Sproul & David A. Schulz, *Newsgathering and the Law* § 3.01[3] (4th ed. 2011) (citing cases).

46. See *infra* section II.A.

47. See *infra* section II.C.

48. See *infra* section II.B.

49. The First, Seventh, Eighth, and Eleventh Circuits have yet to decide the issue and, as such, are not included here. Though the First Circuit has not yet squarely ruled on the applicability of the right of access doctrine to government actions outside of criminal and civil proceedings, it has "seriously question[ed] whether *Richmond Newspapers* and its progeny carry positive implications favoring rights of access outside the criminal justice system" in dicta. *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 495 (1st Cir. 1992).

50. 930 F.3d 241 (4th Cir. 2019).

registered voters.<sup>51</sup> In analyzing Fusaro's claim that he had a First Amendment right of access to the list, the court held that, although "a narrow exception exists with respect to a 'limited First Amendment right of access' to criminal proceedings, that exception ha[d] no bearing on Fusaro's claims"<sup>52</sup> because the decision to make government information available to the public is generally "a question of policy."<sup>53</sup> The Fourth Circuit's view is generally in line with that of the Fifth Circuit, which held that "[t]he determination of who should have access to particular government held information and what constitutes a legitimate use of such information is 'clearly a legislative task'" left to the political processes.<sup>54</sup>

The Tenth Circuit considered the issue in a case involving access to information filed under the Criminal Justice Act (CJA). In *United States v. Gonzalez*, the court confronted the question of whether the intervenor-newspaper had a right of access to court-sealed fee, cost, and expense applications filed by court-appointed criminal defense attorneys.<sup>55</sup> The court held that "no First Amendment right of access applies . . . to administrative documents located in the executive branch"<sup>56</sup> or "to government processes in general."<sup>57</sup>

The D.C. Circuit has also restricted the reach of the right. In *Center for National Security Studies v. U.S. Department of Justice*, the court declined to extend the First Amendment right of access beyond judicial proceedings, highlighting a distinction between "investigatory information" acquired in the context of an administrative proceeding and "information relating to a governmental *adjudicative* process."<sup>58</sup> With regard to the former, "the First Amendment is not implicated."<sup>59</sup>

In rejecting these right of access claims, each of the circuits cited to "the general rule" of *Houchins v. KQED, Inc.* In *Houchins*, in a plurality decision in which no opinion commanded more than three votes, the Supreme Court rejected the notion that "the public and the media have a

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51. Id. at 244–45.

52. Id. at 250 (quoting *Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just.*, 331 F.3d 918, 934 (D.C. Cir. 2003)).

53. Id. (internal quotation marks omitted) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978)).

54. *Calder v. Internal Revenue Serv.*, 890 F.2d 781, 784 (5th Cir. 1989) (quoting *Houchins*, 438 U.S. at 12).

55. 150 F.3d 1246, 1250, 1254 (10th Cir. 1998).

56. Id. at 1255.

57. Id. at 1260 (citing *Houchins*, 438 U.S. at 15).

58. 331 F.3d 918, 935–36 (D.C. Cir. 2003) (citing *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694 (6th Cir. 2002)). In reaching this holding, the court acknowledged the Sixth Circuit's then-recent decision in *Detroit Free Press* (discussed below, see *infra* notes 64–66 and accompanying text) that the public has a constitutional right of access to INS deportation hearings. For discussion of *Detroit Free Press*, see *infra* notes 64–66 and accompanying text.

59. *Ctr. for Nat'l Sec. Stud.*, 331 F.3d at 935.

First Amendment right to government information regarding the conditions of jails and their inmates.”<sup>60</sup> The Fourth, Fifth, Tenth, and D.C. Circuits have read this case’s holding (and its dicta) to apply broadly to all requests for government information. But *Houchins*’s context is important. That case concerned whether the media had a constitutional right to access a *county jail* for the purpose of “recording[], film[ing], and photograph[ing].”<sup>61</sup> The Court has long noted—as it did in the *Houchins* opinion itself—that access to jails presents a different question than access to other government fora.<sup>62</sup> Consequently, *Houchins* is inapposite to cases concerning access to most forms of government information and should be read as a limited negative holding—that there is not an absolute right of the press (or the public) to access county jails specifically.<sup>63</sup>

Furthermore, as many judges and scholars have maintained, the Court’s later decisions in the *Richmond Newspapers* line of cases complicate any assertion of a broad denial of access to government information.<sup>64</sup>

60. *Houchins*, 438 U.S. at 14.

61. *Id.* at 3.

62. The Supreme Court has recognized that, while “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,” *Turner v. Safley*, 482 U.S. 78, 84 (1987), the right of access (and other constitutional rights) “must be exercised with due regard for the ‘inordinately difficult undertaking’ that is modern prison administration.” *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner*, 482 U.S. at 85). For more discussion on the restricted access of press and the public to prisons, see *Pell v. Procunier*, 417 U.S. 817, 829–35 (1974) (cited in *Houchins*, 438 U.S. at 2) (finding that a prohibition on interviews with incarcerated individuals does not violate the First Amendment because it “does not deny the press access to sources of information available to members of the general public”).

63. The circuits are split as to whether *Houchins* governs right of access to information outside the judicial context. This Comment acknowledges, but does not purport to resolve, that circuit split. In right of access cases, deciding whether to apply *Houchins* or *Richmond Newspapers* is the threshold question: Courts either decide that *Houchins* controls or that *Richmond Newspapers* controls; if the former, they do not get to the “experience and logic” test at all (and almost always side with the government). The courts of appeals that have adopted the “restrictive approach” have decided that *Houchins* controls.

64. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583–84 (1980) (Stevens, J., concurring).

It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*. . . . In any event . . . I agree that the First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government, including the Judicial Branch . . . .

*Id.*; see also *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694 (6th Cir. 2002) (questioning “the vitality of the standard articulated in *Houchins*” and observing that “the Court since has moved away from its position in *Houchins*”); David S. Ardia, *Court Transparency and the First Amendment*, 38 *Cardozo L. Rev.* 835, 853 (2017) (“Burger’s plurality decision in *Richmond Newspapers* diverged sharply from the Court’s parallel line of cases rejecting a First Amendment right of access to information controlled by the government.”); Erwin O. Switzer, *Applying Criticisms of the Warren Court to the Burger Court: A Case Study of Richmond Newspapers, Inc. v. Virginia*, 5 *U. Ark. Little Rock L. Rev.* 203, 220–25 (1982) (highlighting the inconsistencies inherent in the Court’s reasoning in *Houchins* and *Richmond Newspapers*).

B. *The Limited Approach: Right of Access in the Sixth Circuit*

The Sixth Circuit has recognized a limited public right of access to judicial records and documents grounded in the public's ability to communicate freely on "matters relating to the functioning of government."<sup>65</sup> In recognizing this limited right, the Sixth Circuit adopted Justice Brennan's familiar "experience and logic" test to determine whether a specific government process or document is protected under the First Amendment.<sup>66</sup> That is, the court will ask: (1) whether there is a history of public access to the type of proceeding/information in question and (2) whether granting access to the proceeding/information will play a positive role in the functioning of government.<sup>67</sup>

The court first fully considered whether to apply the right of access framework outside the judicial context in *United States v. Miami University*.<sup>68</sup> In that case, a student newspaper at Miami University in Ohio sought student disciplinary records from the University Disciplinary Board (UDB) to track "crime" trends on campus, arguing that they had a First Amendment right of access to such information.<sup>69</sup> The court rejected the student newspaper's right of access claim under both prongs of the *Richmond Newspaper* standard.<sup>70</sup>

A couple months after it decided *Miami University*, the Sixth Circuit considered *Detroit Free Press v. Ashcroft*.<sup>71</sup> There, an immigration judge ex-temporaneously closed the courtroom in the middle of a removal proceeding, prompting a lawsuit by Detroit Free Press and other newspapers for access to the records of the proceedings.<sup>72</sup> Finding both prongs of the *Richmond Newspaper* test satisfied, the court held that the right of access applies to administrative proceedings as well as to judicial proceedings.<sup>73</sup>

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65. In re Search of Fair Fin., 692 F.3d 424, 429 (6th Cir. 2012) (internal quotation marks omitted) (quoting *Richmond Newspapers*, 448 U.S. at 575).

66. Id. at 430.

67. *Press-Enterprise II*, 478 U.S. 1, 8–10 (1986); see also *Richmond Newspapers*, 448 U.S. at 588–89 (Brennan, J., concurring).

68. 294 F.3d 797, 820–23 (6th Cir. 2002).

69. Id. at 803.

70. Under the first prong, the court found the newspaper's characterization of the UDB's proceedings as "criminal proceedings" too tenuous because "student disciplinary proceedings do not present matters for adjudication by a court of law." Id. at 821–22. Under the second prong, the court found that public access to disciplinary proceedings did not play a significant positive role in the functioning of those proceedings because access "will not enhance [the] relational determination [between a student and the university], nor will it aid in the student's education." Id. at 823.

71. 303 F.3d 681 (6th Cir. 2002).

72. Id. at 684.

73. The Court held: (1) Though immigration proceedings do not enjoy as long a history as traditional judicial proceedings, they are comparable "in form and substance," and (2) "the beneficial effects of access to that process are overwhelming and uncontradicted." Id. at 701–02.

More recently, the Sixth Circuit has tried to rein in the outer limits of its approach in *Detroit Free Press*. In *Phillips v. DeWine*, the court rejected an attempt by incarcerated persons to challenge an Ohio law that treats as confidential the identities of individuals and entities that participate in the lethal injection process.<sup>74</sup> Refusing to evaluate the claim under the *Richmond Newspapers* standard—as it had in *Miami University* and *Detroit Free Press*—the court went back to the “baseline principle” of *Houchins*,<sup>75</sup> holding that the First Amendment right of access is “a qualified right to certain proceedings and documents filed therein and nothing more.”<sup>76</sup>

C. *The Expansive Approach: Right of Access in the Second, Third, and Ninth Circuits*

The Second, Third, and Ninth Circuits have read the Court’s right of access precedents to extend beyond judicial proceedings. In *New York Civil Liberties Union v. New York City Transportation Authority*, the Second Circuit explicitly noted that the First Amendment right of access “does not distinguish . . . among branches of government. Rather, it protects the public against the government’s ‘arbitrary interference with access to important information.’”<sup>77</sup> In reaching this holding, Judge Guido Calabresi decoupled the right of access from the judicial context by highlighting the significance of the right’s place in the First Amendment as opposed to the Sixth Amendment.<sup>78</sup> Quoting the district court, Calabresi noted that “[o]nce unmoored from the Sixth Amendment, there is no principle that limits the First Amendment right of access to any one particular type of government process.”<sup>79</sup>

The Third Circuit also applies the First Amendment right of access analysis outside of the judicial context. In *Whiteland Woods, L.P. v. Township*

74. 841 F.3d 405, 410 (6th Cir. 2016).

75. *Id.* at 418 (“*Houchins* recognized that ‘[t]he Constitution itself is neither a Freedom of Information Act or nor an Official Secrets Act[]’ . . . .” (first alteration in original) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978))).

76. *Id.* at 419 (internal quotation marks omitted) (quoting *Wood v. Ryan*, 759 F.3d 1076, 1092–93 (9th Cir. 2014) (Bybee, J., dissenting), vacated, 573 U.S. 976 (2014)). After *Phillips v. DeWine*, it is unclear exactly how far the right of access reaches in the Sixth Circuit. What the court’s reasoning in *Miami University* and *Detroit Free Press* makes clear, though, is that, if the proceeding has the qualities of a trial and serves similar functions as a trial, regardless of the branch in which it is located, it is entitled to a qualified right of access under the First Amendment.

77. 684 F.3d 286, 298 (2d Cir. 2012) (quoting *Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555, 583 (1980) (Stevens, J., concurring)).

78. *Id.* at 296.

79. *Id.* at 298 (alteration in original) (internal quotation marks omitted) (quoting *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 675 F. Supp. 2d 411, 431 (S.D.N.Y. 2009)). There were some arguments that the right of access stems from the Sixth Amendment’s public trial guarantee, but the district court judge clarified: “As *Richmond Newspapers* and its progeny make plain, the ‘right of access’ does not stem from the Sixth Amendment’s provision for a ‘speedy and public trial,’ but rather is enshrined in the guarantees inherent in the First Amendment.” *N.Y. C.L. Union*, 675 F. Supp. 2d at 431.

of *West Whiteland*, the court expressed “no hesitation”<sup>80</sup> in finding a right of public access to meetings held by the town’s Planning Commission.<sup>81</sup> But even in circumstances where the court denied public access to the contested government information, the Third Circuit has been clear that its precedents “foreclose . . . attempt[s] to confine the *Richmond Newspapers* approach to the Article III context.”<sup>82</sup>

Similarly, the Ninth Circuit has held that “the public has a First Amendment right of access to governmental proceedings in general.”<sup>83</sup> In *Leigh v. Salazar*, members of the print press sought access to cover a horse round-up hosted by the Bureau of Land Management.<sup>84</sup> After being denied access, the plaintiff filed an action alleging that such a restriction was a violation of her First Amendment right. The Ninth Circuit agreed, holding that the right of access framework is not “limited to attempts to access criminal trials.”<sup>85</sup>

D. *The Supreme Court’s Reasoning in Richmond Newspapers Supports the Expansive Approach*

Though the Supreme Court has not yet defined the outer limits of the right of access, its rationale in the *Richmond Newspapers* line of cases supports the more expansive approach adopted by the Second, Third, and Ninth Circuits.<sup>86</sup> In *Richmond Newspapers*, the Court articulated three distinct policy arguments supporting the existence of a First Amendment right of access to judicial documents, including “advancing several of the particular purposes of the trial,”<sup>87</sup> checking the “possible abuse of . . . power,”<sup>88</sup> and creating “public acceptance of both the process and its results.”<sup>89</sup> Similarly, in *Globe*

80. 193 F.3d 177, 180–81 (3d Cir. 1999).

81. *Id.* at 181 (“[W]e believe the Planning Commission meetings are precisely the type of public proceeding to which the First Amendment guarantees a public right of access.”).

82. *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 208 (3d Cir. 2002).

83. *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002). The Ninth Circuit affirmed *California First Amendment Coalition* in *Associated Press v. Otter*, 682 F.3d 821 (9th Cir. 2012).

84. 677 F.3d 892, 893–94 (9th Cir. 2012).

85. *Id.* at 899. The court recently affirmed this finding in *Index Newspapers LLC v. U.S. Marshals Servs.*, 977 F.3d 817, 830 (9th Cir. 2020). In that case, the court affirmed a lower court ruling that plaintiffs were likely to succeed on the merits of their claim alleging that they have a First Amendment right of access to observe and record protests because (1) there exists a long history of access to public fora like streets and sidewalks, and (2) public access plays a significant positive role in the functioning of our democracy.

86. For a more nuanced discussion of the opinions in the *Richmond Newspapers* line of cases that support a more expanded right, see George W. Kelly, *Richmond Newspapers* and the First Amendment Right of Access, 18 *Akron L. Rev.* 33, 35–38 (1984).

87. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 593 (1980) (Brennan, J., concurring in the judgment).

88. *Id.* at 596 (Brennan, J., concurring in the judgment) (internal quotation marks omitted) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

89. *Id.* at 571.

*Newspaper*, the Court recognized that “a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs.”<sup>90</sup> In each of these cases, the Court acknowledged that, without access to information about the government, citizens are denied an effective check on the judicial process.<sup>91</sup> Though these cases were decided in the criminal proceeding context, the reasoning applies with equal force to other areas of government action.<sup>92</sup>

As the Second Circuit observed nearly a decade ago, the First Amendment does not distinguish among the branches of government but restricts the government’s “arbitrary interference with access to important information” generally.<sup>93</sup> If the Supreme Court wanted to limit the public’s right of access to only judicial proceedings, it could have done so through the Sixth Amendment, which includes a public trial right for criminal cases.<sup>94</sup> Indeed, the Court did that exact thing in a substantially similar Sixth Amendment case just a year prior.<sup>95</sup> In anchoring *Richmond Newspapers* and its progeny in the First Amendment though, the Court paved the way for a right of access that applies more broadly.<sup>96</sup> For these reasons, this Comment urges courts to adopt the approach of the Second, Third, and Ninth Circuits.

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90. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

91. *Id.* at 606 (“[P]ublic access to criminal trials permits the public to participate in and serve as a check upon the judicial process.”); *Richmond Newspapers*, 448 U.S. at 596 (Brennan, J., concurring in the judgment) (“[P]ublic access to trials acts as an important check . . . [as] ‘public opinion is an effective restraint on possible abuse of judicial power.’” (quoting *In re Oliver*, 333 U.S. at 270)).

92. *Globe Newspaper*, 457 U.S. at 606.

93. *N.Y. C.L. v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (internal quotation marks omitted) (quoting *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring)).

94. U.S. Const. amend. VI, § 1 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

95. In *Gannett Co. v. DePasquale*, 443 U.S. 368, 370 (1979), the Supreme Court considered whether the public has an independent constitutional right to access a pretrial judicial proceeding. The Court ruled that the Sixth Amendment right to a “public trial” belongs to the defendant and does not guarantee the public or the press access to pretrial hearings or the trial. *Id.* at 379–80. A year later, the Court limited *Gannett*’s applicability with its ruling in *Richmond Newspapers* that the First Amendment protected the public’s right of access to criminal trials. *Richmond Newspapers*, 448 U.S. at 580. Six years after *Richmond Newspapers*, in *Press-Enterprise II*, the Court found that the public (and press) have a right of access to preliminary hearings under the First Amendment. *Press-Enterprise II*, 478 U.S. 1, 13 (1986).

96. Chief Justice Burger recognized the breadth of the First Amendment right in his *Richmond Newspapers* opinion. “[T]he First Amendment,” he quoted, “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *Richmond Newspapers*, 448 U.S. at 575–76 (alteration in original) (internal quotation marks omitted) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)); see also The Supreme Court, 1979 Term, 94 Harv. L. Rev. 77, 149, 155–59 (1980) (predicting the breadth of right of access claims outside of the criminal context in light of the Court’s decision in *Richmond Newspapers*).

Applying the approach of these courts, the next Part argues that the First Amendment right of access requires that law enforcement officers and agencies be identified when interacting with members of the public.

### III. THE RIGHT TO ACCESS POLICE IDENTIFICATION

Both prongs of the *Richmond Newspapers* test weigh in favor of a constitutional requirement for law enforcement identification. Under that test, courts consider “whether the place and process have historically been open” and “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>97</sup> If the answer to both questions is yes, a right of access attaches unless the government can demonstrate “an overriding interest based on findings that [withholding information] is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>98</sup> This Part analyzes each prong in turn.

#### A. *A History of Access to Police Identification*

Though the Court in *Richmond Newspapers* pointed to the “unbroken, uncontradicted history”<sup>99</sup> of public access to trials dating back even before the American Revolution, such an extensive history is not necessary to prevail under the first prong.<sup>100</sup> As the Sixth Circuit has noted, the “Supreme Court effectively silenced this argument in *Press-Enterprise II*, where the Court relied on exclusively post-Bill of Rights history.”<sup>101</sup> There is, in any case, an extensive history of policing to draw on, dating as far back as colonial America.

Following the British system of “watchmen” and constables, the early American colonies largely left law enforcement to the abilities of volunteers.<sup>102</sup> The first organized “Watch” was developed by a local court in

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97. *Press-Enterprise II*, 478 U.S. at 8.

98. *Id.* at 9 (internal quotation marks omitted) (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

99. *Richmond Newspapers*, 448 U.S. at 573.

100. *N.Y. C.L. v. N.Y.C. Transit Auth.*, 684 F.3d 286, 299 (2d. Cir. 2012) (“[W]e have good reason to think that this determination does not involve asking whether the proceedings in question have a history of openness dating back to the Founding.”).

101. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (citing *Press-Enterprise II*, 478 U.S. at 10–12); cf. *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 213 (3d Cir. 2002) (concluding that, while deportation hearings have been presumptively open since at least 1964 when federal regulations began to provide explicitly for public access, “a recent—and rebuttable—regulatory presumption is hardly the stuff of which Constitutional rights are forged”). For a discussion of the disparate ways lower courts have applied the experience prong, see Shira Poliak, Comment, *The Logic of Experience: The Role of History in Recognizing Public Rights of Access Under the First Amendment*, 167 U. Pa. L. Rev. 1561, 1572–89 (2019).

102. Gary Potter, *The History of Policing in the United States, Part 1*, EKU Online (June 25, 2013), <https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1/> [https://perma.cc/3HZR-6DFM].

Boston in 1631.<sup>103</sup> The following year, the Town of Boston “assumed the prerogatives of appointment and control of the Boston Watch.”<sup>104</sup> Because it was now a municipal function, the town’s appointments of watchmen were public information—citizens knew who these officers were. That practice of informal watchmen continued until the Massachusetts General Court (the state legislature) passed a code of laws governing the Watch in 1796.<sup>105</sup> Under that Code, the Watch went out each night “carrying with them *their badges of office*, a hook with a bill, and the rattle.”<sup>106</sup> The watchmen’s badges, like those of the constables, served to signal to citizens the presence and authority of their office.

Similar approaches were taken by other cities throughout the colonies. New York (then called New Amsterdam) organized its Watch in 1658,<sup>107</sup> and Philadelphia followed suit in 1700.<sup>108</sup> In New York, while the City’s policing forces were not required to be uniformed until 1854, early officers could be identified because they wore staves representing their office.<sup>109</sup> Not only did these staves identify that the carrier was a member of law enforcement, but they were also numbered, suggesting that individual officers could be identified.<sup>110</sup> The New York State Legislature abolished the night watch system in 1844 when it passed the Municipal Police Act, consolidating the constable system and the watch system into the modern

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103. A Brief History of the Boston, MA Police Department, BostonPoliceMuseum.com, <https://bostonpolicemuseum.com/history.html> [<https://perma.cc/4B9U-DR66>] (last visited Aug. 28, 2021).

104. *Id.*

105. *Id.*

106. *Id.* (emphasis added). The “rattle” referred to here is a percussion instrument made of a hard wood—usually oak—that was designed to create noise that would catch the attention of other watchmen and passersby when trouble arose. Edward J. Steenberg, *Police Rattles & Whistles*, Saint Paul Police Hist. Soc’y, <https://www.spphs.com/history/whistles/index.php> [<https://perma.cc/4SWL-5UDT>] (last visited Aug. 28, 2021).

107. Larry K. Gaines & Victor E. Kappeler, *Policing in America 67–70* (7th ed. 2011) (tracing historic developments in American policing from the establishment of the Constable in Boston in 1634 and the Watch in 1636 through the creation and proliferation of slave patrols in the American South).

108. *Id.*

109. Minutes from the Common Council for the City of New York (the predecessor to the present-day New York City Council) suggest that the constables and other law enforcement officials in New York City were required to wear white wands for identification at least as early as 1812. When the issue was presented to the Common Council, they required that “a white Wand one foot long and one Inch in Diameter with the arms of the City painted thereon and the word Marshal, Constable, High Constable or First Marshal” be “worn by said Marshals & Constables as a Badge of Office.” Report from the Committee on the Subject of Badges for Police Officers (June 25, 1812), *in* 7 Minutes of the Common Council of the City of New York, 1784–1831, at 183 (1917).

110. Report from the Mayors First Marshal (Dec. 28, 1807), *in* 4 Minutes of the Common Council of the City of New York, 1784–1831, at 183 (1917). On December 28, 1807, the Council decided that officers’ staves were to be “painted and numbered; and to be delivered to the several Constables and Marshals correspondent with their respective numbers.” *Id.*

day New York Police Department.<sup>111</sup> Under the Act, all members of the force carried a “suitable emblem or device, by which they [could], when necessary, make themselves known.”<sup>112</sup>

That early practice of insisting that law enforcement be identified has carried through to the present. Today, most states and police departments require officers to wear badges or other identifying symbols while on duty.<sup>113</sup> Not only do these symbols serve as verification of an officer’s identity and authority, they also serve an important accountability function, enabling citizens to hold officers and agencies liable when “enforcement” infringes upon an individual’s constitutional rights.<sup>114</sup> The Department of Justice has strongly encouraged such identifying symbols as recently as 2014: “Officers wearing name plates while in uniform is a basic component of transparency and accountability,” the Department wrote to the Ferguson, Missouri police department.<sup>115</sup> “The failure to wear name plates contributes to mistrust and undermines accountability” and conveys a message that officers “may seek to act with impunity.”<sup>116</sup>

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111. George J. Lankevich, *American Metropolis: New York City: A Short History* 84–85 (2002).

112. *Laws of the State of New York*, ch. 315 § 9 (1844).

113. See, e.g., *Mass. Gen. Laws*, ch. 41, § 98C (1970) (stating that, in Massachusetts, officers are not required to wear a badge, tag, or label identifying them by name, but if they are not identified by name, they are required to wear a badge, tag, or label identifying them by number); *D.C. Code* § 5-331.09 (2005) (“[A]ll uniformed officers assigned to police First Amendment assemblies are equipped with . . . enhanced identification and may be identified even if wearing riot gear.”).

114. Section 1983 creates a private right of action for persons whose constitutional liberties are violated by government actors acting under color of law. 42 U.S.C. § 1983 (2018). Though plaintiffs can initially file § 1983 actions against pseudonymous defendants, the success of their claims depends on their ability to later identify, usually through discovery, their assailants. Carol R. Andrews, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 *U. Pitt. L. Rev.* 883, 895–907 (1996) (discussing the procedures for naming a pseudonymous defendant and later acquiring that defendant’s identity). Often, defendants will take advantage of the time-consuming nature of discovery to run the statute of limitations on the plaintiff’s claim(s), ultimately depriving them of the opportunity to amend their complaint to include the identity of the responsible agents. *Id.*; see also Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 *Calif. L. Rev.* 1549, 1552–53 nn.15–22 (2001) (discussing how pseudonymous defendants evade statutes of limitations). From there, plaintiffs are left to the mercy of the judge’s interpretation of Federal Rule of Civil Procedure 15, which, more often than not, denies plaintiff relief. For more information on how pseudonymous government defendants have used Federal Rule of Civil Procedure 15 to defeat plaintiffs’ § 1983 claims, see Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 *Cardozo L. Rev.* 793 (2003). The perils of retrieving timely discovery are greatly increased where, as here, both the agent’s identity and agency are unknown.

115. Letter from Christy E. Lopez, Deputy Chief, Special Litig. Section, C.R. Div., U.S. Dep’t of Just., to Thomas Jackson, Police Chief, City of Ferguson (Sept. 23, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/11/04/ferguson\\_ltr\\_nameplates\\_9-23-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/11/04/ferguson_ltr_nameplates_9-23-14.pdf) [<https://perma.cc/QM46-Q24H>].

116. *Id.*

In sum, the experience of the public's ability to identify law enforcement agencies through badges, insignia, and other symbols is nearly as storied as the public's access to criminal trials. That experience, taken together with the positive role that access plays, supports a finding that a right of access attaches to this kind of government information.

B. *Sound Public Policy Supports Access to Police-Identifying Information*

Acknowledging the public's right of access to information about law enforcement undoubtedly enhances the quality of the government's policing practices. In the first instance, public access acts as a check on the actions of law enforcement by ensuring that proceedings are conducted fairly.<sup>117</sup> As the Court reasoned in *Press-Enterprise I*, “[t]he value of openness lies in the fact that people not actually [present] can have confidence that standards of fairness are being observed.”<sup>118</sup> Conversely, when the government acts under a cloak of anonymity—as is the case when unidentified forces police the citizenry—the public can have little confidence in their ability to hold the responsible parties accountable when rights are violated.<sup>119</sup>

Additionally, because law enforcement represents one of the most visible demonstrations of government authority, public access to information about these forces offers citizens the opportunity to debate and critique the government, thereby “serv[ing] to insure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”<sup>120</sup> Indeed, “a major purpose of [the First] Amendment was to protect [such] free discussion of governmental affairs.”<sup>121</sup> In this way, public access serves a vital accountability function.<sup>122</sup>

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117. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (noting that public access assures that proceedings are conducted fairly, including discouraging misconduct of participants and decisions based on secret bias or partiality).

118. *Press-Enterprise I*, 464 U.S. 501, 508 (1984).

119. *First Amend. Coal. v. Jud. Inquiry & Rev. Bd.*, 784 F.2d 467, 486 (3d Cir. 1986) (Adams, J., concurring in part and dissenting in part) (“Legitimacy rests in large part on public understanding.”); see also *Gravel v. United States*, 408 U.S. 606, 640–41 (1972) (Douglas, J., dissenting) (“When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system.” (internal quotation marks omitted) (quoting Sam J. Ervin, Jr., *Secrecy in a Free Society*, Nation, Nov. 8, 1971, at 456)).

120. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982).

121. *Id.* at 604 (internal quotation marks omitted) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

122. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 705 (6th Cir. 2002). In finding that the plaintiffs were likely to succeed on the merits of their First Amendment right of access claim in *Index Newspapers LLC v. United States Marshals Service*, the Ninth Circuit noted the positive role that access plays in holding the government accountable through the recording of police behavior in public: “Indeed, the public became aware of the circumstances surrounding George Floyd’s death because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer kneeling on Floyd’s neck until he died.” *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020). Protecting

Finally, extending the right of access to police identification, although not squarely addressed by the existing case law, finds support in our American experience. In light of increasing concerns about policing nationally—and about the overpolicing and discriminatory treatment of minority communities, specifically<sup>123</sup>—increased access to government information in this realm can serve an “important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.”<sup>124</sup> As the Sixth Circuit observed in granting the right to access administrative proceedings, it is important for the public, “particularly individuals who feel that they are being targeted by the government,” to know that, even during times of heightened emotions, the government is adhering to proper procedures and respecting individuals’ rights.<sup>125</sup>

Given the history of white supremacy, racialized policing, and vigilante violence,<sup>126</sup> minoritized communities may harbor justifiable skepticism of strangers purporting to be law enforcement. The custom of dressing up in military paraphernalia and weaponry by paramilitary groups and vigilantes<sup>127</sup> means that many citizens might be hesitant to be-

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the right to record officers’ behavior is of little worth, however, if those officers can hide their identity.

A note on recent scholarship concerning the “right to record” police: The right of access to police identification proposed here is both conceptually similar to and practically complementary to existing proposals championing “the right to record.” Both rights stem from the ability of the citizen to know what its government is doing and to hold the government accountable when its actions are misaligned with the citizen’s interests. For more detailed discussion on the constitutional bases (and practical motivations) of the right to record, see generally Jared Mullen, *Information Gathering or Speech Creation: How to Think About a First Amendment Right to Record*, 28 Wm. & Mary Bill Rts. J. 803 (2020) (discussing the right to record police); Tyler Finn, Note, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 Colum. L. Rev. 445 (2019) (same); Nicholas J. Jacques, Note, *Information Gathering in the Era of Mobile Technology: Towards a Liberal Right to Record*, 102 Cornell L. Rev. 783 (2017) (same).

123. For a fuller discussion on racial biases in policing, see, e.g., Robert A. Brown, *Policing in American History*, 16 Du Bois Rev. 189, 189–193 (2020) (examining the historical evolution of policing in America and arguing that policing reforms have not eliminated detrimental experiences for many Black Americans); Nat’l Acads. of Scis., Eng’g & Med., *Proactive Policing: Effects on Crime and Communities* 251–302 (2018) (tracing the history of racial biases and disparities in policing and recommending solutions).

124. *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

125. *Detroit Free Press*, 303 F.3d at 704.

126. Olivia B. Waxman, *The Proud Boys Are Part of America’s Long History of Vigilante Violence. Here’s What to Know About the Group’s Origins*, Time (Oct. 1, 2020), <https://time.com/5894743/trump-proud-boys-history/> (on file with *Columbia Law Review*) (last updated Oct. 2, 2020) (documenting the history of paramilitary white power movements since the 1980s).

127. Richard Winton, *Man With Assault Rifle Impersonating National Guard Arrested at Downtown Protest*, L.A. Times (June 2, 2020), <https://www.latimes.com/california/story/2020-06-02/man-with-assault-rifle-impersonating-national-guard-arrested-downtown-la-protest> (on file with the *Columbia Law Review*).

lieve that someone donning what appears to be a law enforcement uniform actually possesses the authority to issue lawful orders.<sup>128</sup> As a result, there is an increased likelihood of resistance and escalation. In such situations, requiring that law enforcement be identified would not only be the best practical fix but could also be lifesaving for all those involved.

Having demonstrated how both the “experience” and “logic” prongs of the *Press-Enterprise* test weigh in favor of a right of access to this kind of government information, courts will then need to decide whether the government has demonstrated an overriding interest in continuing the practice of deploying unidentified police forces.

C. *The Government’s Blanket Nonidentification Policy Fails Strict Scrutiny*

To overcome the public’s right of access, the government must satisfy strict scrutiny.<sup>129</sup> That is, the government must show that withholding information is (1) “necessitated by a compelling governmental interest” and is (2) “narrowly tailored to serve that interest.”<sup>130</sup> Additionally, *Press-Enterprise II* requires that the asserted interest “be articulated along with findings specific enough that a reviewing court can determine whether the [government’s action] was proper[.]”<sup>131</sup> In the context of withholding police identification, the government does not satisfy strict scrutiny.

When it deployed unidentified agents to respond to the protests in the summer of 2020, the government argued that it did so to prevent “doxxing” of law enforcement officers.<sup>132</sup> According to an unclassified intelligence document from DHS, officers’ personal information (including

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128. The recent tragedy of Kyle Rittenhouse evidences the point. Rittenhouse, a seventeen-year-old from Kenosha, Wisconsin, took it upon himself to police a protest in that city after a white police officer shot Jacob Blake Jr., a Black man, several times in the back. Dressed in an army-green shirt and carrying a military-style, semiautomatic long gun (which, by law, he was too young to possess), Rittenhouse was permitted to walk down the streets of Kenosha, even *after* having shot and killed two people. Mary Mitchell, Opinion, Don’t Make 17-Year-Old Kenosha Shooter a Hero, *Chi. Sun Times* (Aug. 28, 2020), <https://chicago.suntimes.com/opinion/2020/8/28/21406302/kenosha-kyle-rittenhouse-no-hero-jacob-blake> [<https://perma.cc/2EM8-Q75C>].

129. See *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 304 (2d Cir. 2012); *Detroit Free Press*, 303 F.3d at 705–10 (6th Cir. 2002); *Kamasinski v. Jud. Rev. Council*, 44 F.3d 106, 108–09 (2d Cir. 1994) (noting how “strict scrutiny is the correct standard” in considering whether content-based confidentiality portions of a statute violated the First Amendment); *Press-Enterprise II*, 478 U.S. 1, 9–10 (1986) (holding that, when publicity might undermine the right of accused to a fair trial, the trial court must determine whether the right of the accused overrides the qualified First Amendment right of public access). But see *Courthouse News Serv. v. Planet*, 947 F.3d 581, 596 (9th Cir. 2020) (“Thus, in *Leigh v. Salazar* . . . we explained that the *Press-Enterprise II* ‘balancing test’ is ‘rigorous,’ but not strict, scrutiny.” (quoting *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012))).

130. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606–07 (1982).

131. *Press-Enterprise II*, 478 U.S. at 9–10 (internal quotation marks omitted) (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

132. Sergio Olmos, Mike Baker & Zolan Kanno-Youngs, Federal Agents Unleash Militarized Crackdown on Portland, *N.Y. Times* (July 17, 2020), <https://www.nytimes.com/>

their names, home and email addresses, and phone numbers) was leaked online in the wake of the protests following George Floyd's murder.<sup>133</sup> As a result, federal agencies decided that officers would not wear identifying badges. To be sure, protecting the privacy of officers constitutes a compelling governmental interest.<sup>134</sup> The Sixth Circuit recognized as much in *Detroit Free Press*, when it acknowledged the legitimacy of the government's desire to keep private the identities of immigrant detainees.<sup>135</sup> If the assertions alleged in the memo are true and supported by empirical evidence, a court could plausibly find that the DHS memo constitutes a "specific finding" under the *Press-Enterprise II* standard.<sup>136</sup>

To prevail under strict scrutiny, though, the government's actions must also be "narrowly tailored." Deploying agents from various agencies under a blanket policy of nonidentification is not narrowly tailored.<sup>137</sup> The Court's analysis in *Globe Newspaper* is instructive here. There, the Court determined that even the state's compelling interest in shielding minor victims of alleged sex crimes "from further trauma and embarrassment" and "encourag[ing] . . . such victims to come forward and testify" was insufficient to justify a statute requiring an across-the-board, mandatory closure of a court when those minors testified.<sup>138</sup> Instead, the Supreme Court instructed the trial court to determine the necessity of closure on a "case-by-case basis."<sup>139</sup> Here, too, the government should engage in a case-by-case analysis of whether specific agents are at a heightened risk of being doxxed in order to overcome the public's First Amendment right.

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2020/07/17/us/portland-protests.html (on file with the *Columbia Law Review*) (last updated Sept. 1, 2020). Doxxing (also spelled "doxing") is the practice of publishing private or identifying information about someone on the internet, usually with malicious intent. Dox, Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/dox> [<https://perma.cc/ZG48-GEH7>] (last visited Apr. 23, 2021).

133. Michael Balsamo & Colleen Long, Police Officers' Personal Info Leaked Online, AP News (June 10, 2020), <https://apnews.com/article/23a5e9d316127994ae31ad4813db3f80> (on file with the *Columbia Law Review*).

134. *Ayala v. Speckard*, 131 F.3d 62, 72 (2d Cir.1997) (en banc) (allowing a court to exclude the public from proceedings during which undercover officers were to testify).

135. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 706 (6th Cir. 2002) ("Inasmuch as these agents' declarations establish that certain information revealed during removal proceedings could impede the ongoing anti-terrorism investigation, we defer to their judgment."); see also *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 304–05 (2d Cir. 2012) ("[W]e have recognized that 'a person's physical safety' as well as 'the privacy interests of individuals' . . . may 'warrant closure.'" (quoting *United States v. Doe*, 63 F.3d 121, 127 (2d Cir. 1995))).

136. However, lacking specific, empirical evidence, the government's fear of "doxxing" amounts to "speculation," which "fails to justify" their blanket policy of nonidentification. *Detroit Free Press*, 303 F.3d at 706.

137. Blanket policies will often be considered overly broad and therefore not narrowly tailored under the First Amendment. Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 416–17 (1998) ("[T]he Court . . . has suggested that 'overbreadth' and 'narrow tailoring' are different expressions for precisely the same constitutional defect.").

138. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607–10 (1982).

139. *Id.* at 608.

But even if the government could make such a showing, a blanket policy of nonidentification—like a blanket closure of courts for sex crimes—is the *most* restrictive method of preventing the risk of doxxing. As the Court has made clear, when the government takes the most restrictive means when less restrictive alternatives are available, its policy is not narrowly tailored and must fail under strict scrutiny analysis.<sup>140</sup> In this instance, many less restrictive alternatives exist, including permitting agents to wear ID numbers instead of nameplates or allowing them to wear solely the first or last name on their uniform. Though the agents' badges/agency insignia would still need to be displayed to comply with the First Amendment, each of these options substantially reduces the opportunity for doxxing, while continuing to allow officers to be identified as officers.<sup>141</sup>

For the foregoing reasons, the government is likely unable to overcome the qualified right of access and, therefore, should be constitutionally required to identify its agents.

#### CONCLUSION

In a representative democracy, the people are sovereign. The people institute government not to control them but to protect and provide for them.<sup>142</sup> But when the government “limit[s] the stock of information from which members of the public may draw,”<sup>143</sup> it becomes difficult for the people to evaluate their government. When the information that is being limited concerns the actions of the government's agents themselves, the ability of ordinary citizens to exercise their accountability mechanisms is stunted, and the people are effectively deprived of their sovereignty. Such is the case when the government deploys unidentified agents to police its citizens. Fortunately, the Constitution of the United States does not permit such a deprivation. The right of access implicit within the First Amendment requires that citizens know who their governors are, and courts should seek to enforce that right.

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140. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 870–79 (1997) (citing the availability of less restrictive means as evidence that the statute was not narrowly tailored); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351–53 (1995) (same).

141. Even if courts adopted the slightly lower standard of the Ninth Circuit (*rigorous* rather than *strict* scrutiny) the interests of the public should still prevail when viewed in light of the government's alternatives. *Courthouse News Serv. v. Planet*, 947 F.3d 581, 595–96 (9th Cir. 2020).

142. See *The Declaration of Independence* para. 2 (U.S. 1776).

143. *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 575–76 (1980) (internal quotation marks omitted) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).