IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., et al., *Appellants,*

v.

COMMONWEALTH OF VIRGINIA, *Appellee.*

(And Two Companion Cases)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Pursuant to Rule 41.3 of the Rules of this Court, appellants Richmond Newspapers, Inc., *et al.*, file this brief in reply to the Brief On Behalf Of The Appellees Commonwealth of Virginia, *et al.*, filed with this Court on January 9, 1980. This reply brief is being filed more than three days before the case is called for hearing.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE MATTER IN CONTROVERSY BOTH BY APPEAL AND BY CERTIORARI.

Appellants seek review of the Virginia Supreme Court's judgments on appeal, 28 U.S.C. § 1257(2), because the closure order entered below was no mere lawless act but a quite literal application of a state statute which invites the state's trial courts, "in [their] discretion, [to] exclude from . . . trial" any and all observers, however orderly, on the theory that their "presence would impair the conduct of a fair trial." Va. Code § 19.2-266. Since the trial court and the state relied solely upon that statute to support the expulsion of all observers from the courtroom in this case,[1] the judgments below necessarily upheld that statute over appellants' First, Sixth, and Fourteenth Amendment challenges. The failure of appellants specifically to repeat appellees' mention of Va. Code §19.2-266 manifestly did not deprive the court below of the opportunity to consider the statute's validity in light of appellants' constitutional attack. Neither the decisions of this Court[2] nor those of the Supreme Court of Virginia[3] warrant a demand for further formality as an

[1] Appellees suggest in their brief before this Court that the courts below "may well have based [their] decisions upon the plenary authority of courts to protect an accused's right to a fair trial without regard to Va. Code § 19.2-266." Brief On Behalf Of The Appellees at 10-11. But that suggestion was never advanced below. And the suggestion would in any event have been insupportable, since the record in this case reveals absolutely no threat to fairness and no finding of such a threat. Finally, the suggestion would have been altogether incoherent, inasmuch as Va. Code §19.2-266 *by its own terms* makes "fair trial" the supposed justification for excluding persons from a courtroom throughout a criminal case. The question presented by appellants' attack upon that statute is the validity of stretching the "fair trial" talisman that far.

[2] *See* Brief of Appellants at 14-20.

[3] *See id.* at 16 n.10.

end in itself where, as here, the validity of Va. Code § 19.2-266 was so plainly "drawn in question . . . on the ground of its being repugnant to the Constitution," and the "decision [was] in favor of its validity." 28 U.S.C. § 1257(2).[4]

But even if an appeal does not lie, the propriety of review on certiorari, 28 U.S.C. §§ 1257(3), 2103, is beyond debate. *See* Brief of Appellants at 21-23. Conceding that appellants' First, Sixth, and Fourteenth Amendment "challenges to the plenary authority of trial courts to close a trial . . . . were made below," Brief On Behalf Of The Appellees at 14 n.6, appellees suggest only that such challenges were not "saved," *id.,* in the questions presented in appellants' Jurisdictional Statement. But that Jurisdictional Statement expressly challenged the constitutionality of Va. Code § 19.2-266 not only as written and construed but "as enforced" on this record, J.S. at 6, 21-26. Appellants stressed that, although the Virginia statute was drawn in question, "the questions posed would not be materially different were closure ordered pursuant to purely judge-made rules." *Id.* at 13 n.11.

Appellees' only other objection to review on certiorari depends upon the supposedly "novel" character of the rights appellants assert. Brief On Behalf Of The Appellees at 17-20. That objection is groundless.

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[4] In exercising its mandatory appellate jurisdiction not only (1) to review decisions in which the judgment below made no mention of the statute at issue, but also (2) to review decisions in which appellants below made no mention of the statute at issue, as well as (3) to review decisions in which neither the judgment nor appellants below made any mention of the statute at issue, *see* Brief of Appellants at 18-19, this Court has demonstrated that the *form* in which a state statute is challenged as repugnant to the Federal Constitution or is sustained against such a challenge is not the test of this Court's exercise of such jurisdiction. Section 1257(2) thus calls "not for some abracadabra." Flournoy v. Wiener, 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting). *See also* New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928).

II. THE RIGHT TO ATTEND AND OBSERVE CRIMINAL TRIALS CANNOT BE LEFT TO THE VAGARIES OF THE POLITICAL PROCESS.

Appellees seek to portray the rights asserted here as both novel and troublesome and thus inappropriate for anything beyond political cognizance and enforcement. *Id.* at 17-18, 22, 24, 30, 37, 39, 43. On the contrary, it is appellees' conception of the constitutional plan that problematically departs from tradition.

Appellees' reading of the Sixth Amendment is far narrower than this Court's—for every Member of this Court agreed in *Gannet Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979), that there is "an independent public interest in the enforcement of [the] Sixth Amendment" guarantee of a public trial. *Id.* at 2907; *id.* at 2913 (Burger, C.J., concurring); *id.* at 2914 (Powell, J., concurring); *id.* at 2930-33 (Blackmun, J., concurring in part and dissenting in part). And the proposition that excluded members of the public have standing to enforce such an interest under this Court's settled criteria, *see* Brief of Appellants at 45-46, remains unrefuted.[5] Nor have appellees addressed any of the reasons offered by appellants for concluding that the First, Ninth, and Fourteenth Amendments, in conjunction with the Sixth, have long secured a right to attend and observe criminal trials. *Id.* at 27-43, 51-59.

[5] Even if appellees were right in their assertion that the Sixth Amendment's public trial clause protects only persons accused of crime, it would be indisputable that the clause protects such persons not merely by giving each an option to insist upon publicity but also assuring all who stand accused of crime that the *system* in which they will be prosecuted and judged will be open to the routine public observation that alone can expose, and thus deter, patterns of bias or oppression—patterns which a system that could be closed by consent of its participants would be likely to breed. *See* Brief of Appellants at 56-57.

Appellees suggest, without so much as adverting to appellants' contrary arguments, *id.* at 47-49, that the political processes of the several states may be relied on to provide adequate protection for the fundamental right here at stake. Brief On Behalf Of The Appellees at 19-20, 36-39. But the appellees' own claim that the criminal trial in this very case was properly closed to the press and the public, *id.* at 39-42, speaks eloquently to the hollowness of that political suggestion. The laboratories of the fifty states, *see New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (1931)(Brandeis, J., joined by Stone, J., dissenting), ill-serve the Constitution when their processes are invoked to shroud with secrecy the most public of all proceedings. Whatever risks other nations might be willing to run, an open society's commitment to open trials cannot be regarded as merely another tentative experiment.

"[F]ree access to courts of justice," *Downes* v. *Bidwell,* 182 U.S. 244, 282-83(1901), is by no means a newly asserted right; it is, instead, among the "natural rights .... indispensable to a free government ...." *Id.* And appellants' insistence that this right be made secure rests upon no mere statistical sampling of some supposed contrary trend. *See* Brief On Behalf Of The Appellees at 14-15 & n.7. Whether the Nation's courts have deferred some trial closings out of disagreement with the Virginia Supreme Court or out of a desire to await this Court's decision in the instant case, the Constitution's measure cannot be taken on any such precarious scale. For we deal here not with innovative regulation in the social or economic arena, or in still-uncharted provinces of criminal administration, *cf. Apodaca* v. *Oregon,* 406 U.S. 404, 376 (1972)(Powell, J., concurring), but with a state's misguided invocation of a decision

of this Court to tamper with a tradition that is centuries old—a tradition that is demonstrably central to the public awareness and institutional accountability that define our form of government.

Respectfully submitted,

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