

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1.) The Oklahoma Observer, (2.) Arnold Hamilton, (3.) Guardian US, (4.) Katie Fretland,

Plaintiffs,

-v-

(1.) Robert Patton in his capacity as Director, Oklahoma Department of Corrections; (2.) Anita Trammell, in her capacity as Warden of the Oklahoma State Penitentiary,

Defendants.

Civil Case No. CIV-14-905-HE

FIRST AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

Plaintiffs The Oklahoma Observer, Arnold Hamilton, Guardian US, and Katie Fretland, by and through their attorneys, allege and state as follows:

PRELIMINARY STATEMENT

“To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the...[‘]procedures,’ which are invasive, possibly painful and may give rise to serious complications. This information is best gathered first-hand or from the media, which serves as the public’s surrogate.”

Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002)

(citation omitted).

1. The First Amendment to the United States Constitution guarantees the public and press an affirmative right of access to certain government

proceedings. This right of access applies to government proceedings that have been open to the public historically and that play a critical role in ensuring the positive functions of government.

2. Historically, the death penalty has been carried out under public scrutiny in the United States. Oklahoma, too, has long guaranteed by statute and practice that the press and public may witness execution procedures, including lethal injection.
3. Meaningful access to, and oversight of, execution proceedings is critical to the public's and the courts' ability to assess the propriety and lawfulness of the death penalty.
4. The ability of the press to witness the particular facts and circumstances of each execution, and to report on the same, promotes the proper functioning of the State's death penalty system and increases public confidence in the integrity of the justice system.
5. Without full access to execution proceedings in their entirety, the press is unable to provide the public with thorough and objective reporting on the manner in which Oklahoma is carrying out the death penalty.
6. The public is deprived of the right to receive information about, and discuss the propriety of, the execution method if it is denied access to critical details of the State's execution proceedings.

7. At Oklahoma's most recent execution, the assembled press and other witnesses were prevented from exercising their right of access to the State's lethal injection proceeding.
8. First, the assembled press was denied the opportunity to observe Clayton Lockett entering the execution chamber and his intravenous lines being prepared and inserted. The State's phlebotomist and physician punctured Lockett's arms, legs, feet, and neck over 15 times before settling on an IV line to his groin area.
9. As a result of Lockett's botched execution, the Oklahoma Department of Corrections issued a revised execution protocol on September 30, 2014. The new protocol now requires special licensing or certification in order to place a central femoral line, the method used in Lockett's execution.
10. Furthermore, after lifting the viewing shade that provides the witnesses with visual access to the execution chamber and the administration of intravenous drugs, the State again lowered this same shade in the middle of the execution proceeding, prematurely terminating press access. The state's revised execution protocol now makes closure of the viewing shade after lethal injection complications standard policy.
11. For almost 20 minutes while Clayton Lockett was dying, the assembled press and other witnesses were deprived of the right to observe the proceedings. The press was also deprived of the opportunity to verify the nature and source of sounds emanating from the execution chamber, which

indicated pain and suffering. The revised protocol now mandates that audio transmission from the execution chamber to the witness room be turned off just before the director orders the administration of chemicals to begin. Only the execution team will be able to hear noises and utterances from the chamber.

12. Because of the State's use of the viewing shade during initial and later stages of Lockett's execution, the press and public received only government-edited access to an important government proceeding. As a result, the press, and by extension the public, were deprived of the First Amendment right of access to observe the initiation and termination of the execution proceeding.
13. Oklahoma's revised protocol formalizes Oklahoma's non-transparent policy by explicitly allowing Defendant Patton and his successors to close the curtains to the witness viewing room during lethal injection procedures.
14. The new protocol states, twice, that the director of the Department of Corrections ("DOC") may block the media from viewing the execution if the condemned remains conscious just five minutes after lethal drugs have been injected into his body. In addition, the director may order pre-approved media witnesses to be removed from the facility. There are no standards or specified state interests that limit or define this authority, other than the fact that there have been complications with the lethal injection. The revised protocol also reduces the number of journalists who may witness an

execution. The previous set of procedures allowed 12 members of the media to be present. The new protocol, at most, only allows five persons from the press to be there.

15. The DOC director is explicitly permitted to deviate from this new protocol at his choosing, at any time.
16. While a formal execution proceeding is underway, the press has a right to witness the State's administration of the death penalty. According to the execution protocol in effect during the Lockett execution, if the State terminates an execution, then its duty reverts to one of sustaining life and providing medical care to the condemned. In stark contrast to the previous protocol, the newly-revised protocol makes no mention of the State's duty to apply mandatory life-saving care to the condemned if the execution is terminated (or "called off").
17. During the Lockett execution, the State of Oklahoma provided no public notice that it was calling off the formal execution proceeding before terminating press access. Upon information or belief, the State provided no life-saving care to Lockett after the administration of lethal drugs. The state's new protocol greatly increases the likelihood that the press will be excluded from execution proceedings in the event of another emergency, preventing public oversight and accountability over botched lethal injections.

18. Because of the State's closure of the viewing shade before Lockett's death, moreover, the press and public received only truncated access to the execution proceeding. The press was unable to observe Lockett's final moments or eventual death. As a result, the public was deprived of objective accounts as to whether, at the time of his death, the State was still attempting to execute Lockett, or in the alternative, attempting to provide medical care after calling off his execution. *Compare* Press Release, Gov. Mary Fallin, *In Death Penalty Debate, Remember the Victims*, Bartsville Examiner Enterprise (May 7, 2014), *available at* <http://examiner-enterprise.com/opinion/columnists/death-penalty-debate-remember-victims> (stating that the State of Oklahoma conducted a "lawful execution"), *with* Letter from Robert Patton, Dir. of Okla. Dep't of Corr., to Mary Fallin, Gov. of Okla., at 3 (May 1, 2014), *available at* <http://www.theguardian.com/world/interactive/2014/may/01/oklahoma-execution-clayton-lockett-timeline-document> (stating that Director Patton called off the execution at 6:56 p.m., and that the doctor pronounced Lockett deceased at 7:06 p.m.).
19. Plaintiffs therefore seek permanent injunctive and declaratory relief under the First Amendment to the United States Constitution and Article 2 § 22 of the Oklahoma Constitution. Plaintiffs ask that the Court prohibit the State of Oklahoma from denying them meaningful, uninterrupted, and unedited access to the entire execution procedure.

JURISDICTION AND VENUE

20. This case arises under the United States Constitution and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and § 1343(a)(3). This action is brought pursuant to 42 U.S.C. § 1983.
21. This Court has jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a).
22. This Court has the authority to grant declaratory relief pursuant to 28 U.S.C. § 2201(a), § 2202, and Federal Rule of Civil Procedure 65.
23. Venue is proper in this Court under 28 U.S.C. § 1391(b). All Defendants are sued in their official capacity, and their official places of business are all located within the State of Oklahoma. The event giving rise to this Complaint is an unconstitutional state policy, practice, or custom.

PARTIES

24. Plaintiff The Oklahoma Observer is a domestic, for-profit publication owned by Oklahoma-based AHB Enterprises LLC. The Oklahoma Observer was established on October 9, 1969, to provide critical oversight of public figures and officials, and a means for Oklahomans to reach informed opinions about issues of common concern. The distribution of reports and editorials published in The Oklahoma Observer is supported by the Oklahoma Observer Democracy Foundation, a foundation designated as a

501(c)3 non-profit on July 17, 2014, to provide free access to content available to subscribers of the print edition, via the okobserver.net website.

25. Plaintiff Arnold Hamilton is Editor of The Oklahoma Observer and Co-owner with Beverly Hamilton of its holding company, AHB Enterprises LLC. Plaintiff Arnold Hamilton became Editor of The Oklahoma Observer in September 2006. Plaintiff Hamilton previously served as the longtime Oklahoma Bureau chief for The Dallas Morning News, and covered government and politics for the San Jose Mercury News, the Dallas Times Herald, the Tulsa Tribune, and the Oklahoma Journal. In his capacity as Editor, Plaintiff Hamilton requires and relies on eyewitness reporting by journalists in planning the coverage of The Oklahoma Observer.
26. Plaintiffs The Oklahoma Observer and Hamilton regularly provide reporting on death penalty issues within the State. Plaintiffs The Oklahoma Observer and Hamilton consider State execution proceedings within the publication's mission of fostering public oversight and informed public debate over issues of common concern.
27. Plaintiff Guardian US is a national digital news service organized in New York, where it is based, as Guardian News and Media LLC. Plaintiff Guardian US was established in 2011 to cover U.S. and international news for an American audience as the U.S. online presence of the London-based newspaper the Guardian, one of Britain's oldest and most respected news outlets. Plaintiff Guardian US produces news articles, opinion, live-blogs,

and interactive and multimedia content that currently reach over 20 million online U.S. readers each month. Plaintiff Guardian US was awarded the Pulitzer Prize for Public Service in 2014. Plaintiff Guardian US has reported extensively on the death penalty in general, and lethal injection proceedings in particular.

28. Plaintiff Katie Fretland is a freelance journalist who covers issues surrounding crime, criminal justice, and the death penalty for news organizations including Plaintiffs The Oklahoma Observer and Guardian US. Using records she requested under the Freedom of Information Act, Plaintiff Fretland wrote an investigative report about lethal injection in Oklahoma published by both The Colorado Independent and The Oklahoma Observer in March of 2014, which detailed Oklahoma's purchasing of lethal injection drugs with petty cash funds and the State's injection of leftover drugs into dead inmates for disposal purposes. Plaintiff Fretland has published articles describing her eyewitness accounts of two Oklahoma executions, including Clayton Lockett's execution on April 29, 2014. She has appeared on MSNBC, New York Public Radio, and Al Jazeera America.
29. Plaintiff Fretland was among the local and national journalists who gathered to observe the scheduled execution of Clayton Lockett from the witness chamber on April 29. Plaintiff Fretland was selected as a witness to the botched Lockett execution, and reported on the event for Plaintiffs The Oklahoma Observer and Guardian US.

30. The Oklahoma Department of Corrections runs a lottery to select reporters to observe the proceeding from the witness chamber; pursuant to the previous execution protocol, up to 12 press witnesses were selected to attend the proceeding on behalf of their news organizations. Plaintiff Fretland entered the lottery to observe the scheduled Lockett execution, was selected to witness the proceeding, and observed the lethal injection proceeding from the witness chamber to the extent permitted by the State.
31. When the viewing shade providing access to the execution chamber was raised, Plaintiff Fretland saw that Lockett was already on a gurney inside the chamber. The intravenous (“IV”) lines that deliver the drugs to the condemned had already been placed. After raising the shade, the State began administering intravenous drugs to Lockett. Plaintiff Fretland then observed Lockett writhing, groaning, and uttering words following the administration of drugs, and until the viewing shade was again lowered. After the shade was lowered, Plaintiff Fretland was prevented from observing Lockett’s death. Plaintiff Fretland stated publicly that she later learned from the State that it took more than 40 minutes for Lockett to die.
32. Defendants’ actions and failures to act prevented Plaintiff Fretland from witnessing and reporting on either the IV insertion procedure or the circumstances of Lockett’s actual death in her reporting for The Oklahoma Observer and Guardian US. The new execution protocol formally allows the state to lower the shade should there be complications in upcoming

executions, specifically if the condemned is not deemed unconscious within five minutes of the administration of lethal chemicals. In Lockett's case, the physician did not announce him to be unconscious until ten minutes after chemicals entered his system. Plaintiffs therefore reasonably believe it to be more likely that they will be prevented from accessing future executions, and specifically those that are "botched," as a result of the revised protocol.

33. Beyond lowering the shade, the revised protocol also allows the director of the DOC to remove media witnesses from the facility at his discretion.
34. And, the new protocol requires the execution team to turn off the audio feed to the execution chamber after the condemned is permitted to speak his last words. The procedures in effect during the Lockett execution had no such requirement. Now, only the State will have audio access to how the condemned is reacting to the chemicals entering his body, through a microphone that will be attached to his shirt.
35. Defendants' actions and failures to act prevented Plaintiffs The Oklahoma Observer, Hamilton, and Guardian US from providing their readers with an independent eyewitness account of the initiation and termination of execution procedures. Having an eyewitness attend an entire execution – from start to finish – is crucial to the ability of The Oklahoma Observer and Guardian US to report accurately on and provide readers with a full and complete description of the lethal injection process as carried out in Oklahoma.

36. Plaintiff Fretland will again submit to the lottery process for observing the next execution in Oklahoma, currently scheduled for November 13, 2014, and witness the proceeding firsthand if selected. She will report on the execution from the grounds of the State Penitentiary based on firsthand accounts, whether or not she is chosen to be one of the witnesses to the execution. Plaintiff Fretland has made arrangements with Plaintiffs The Observer and the Guardian to publish her reporting on the event.
37. Plaintiffs The Oklahoma Observer, Hamilton, and Guardian US will publish news stories about the next-scheduled execution in Oklahoma, and have arranged for Plaintiff Fretland to attend the execution, enter the witness lottery, and provide on-the-ground reporting on their behalf.
38. Defendant Robert Patton is Director of the Department of Corrections (“DOC”). Acting under color of state law, Defendant Patton holds executive authority over the administration of the State death penalty.
39. Defendant Anita Trammell is the Warden of the Oklahoma State Penitentiary (“OSP”), the facility in which Oklahoma executes its condemned. Defendant Trammell, acting under color of state law, controls execution procedures in Oklahoma.

FACTS

The Right of Access

40. The public and press have a First Amendment right of access to observe certain government proceedings. This right of access turns on two

complementary considerations: (1) the “experience” test, which examines whether “place and process have been open to the press and general public;” and (2) the “logic” test, which evaluates whether “public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

41. Even a brief historical tradition may be sufficient to establish a First Amendment right of access to a government proceeding, if the beneficial effects of public access are overwhelming.
42. Oklahoma has a long history of providing robust public and media access to government proceedings. The State’s democratic functions benefit from this public accountability and oversight, which provides an outlet for community concern and bolsters public opinion that justice has been served.
43. In particular, this First Amendment right of access attaches to all stages of the criminal justice process, including pre-trial proceedings, trials, and public executions.
44. Executions comprise an integral part of Oklahoma’s criminal justice process. Title 22 of Oklahoma’s state law – entitled “Criminal Procedure” – governs the breadth of criminal justice proceedings, including preliminary hearings, *voir dire*, trials, and executions. *See Okla. Stat. Ann. tit. 22, § 524* (preliminary hearings), *§ 592 (voir dire)*, *§§ 831–61 (trial)*, *§ 1015* (executions).

45. State law and protocols issued by the DOC provide for members of the press and public to observe the execution proceeding. By statute, Okla. Stat. Ann. tit. 22, §§ 1014, 1015, and 1016 set forth the statutory framework that governs Oklahoma's death penalty. Okla. Stat. Ann. tit. 22, § 1015 sets forth the location of, and public witnesses to, the execution of a death sentence. These procedures require that the State Penitentiary, where sentences of death are carried out, be designated "by the court by which judgment is to be rendered." *Id.*

46. Okla. Stat. Ann. tit. 22, § 1015 also requires the warden to invite:

the district attorney of the county in which the crime occurred or a designee, the judge who presided at the trial issuing the sentence of death, the chief of police of the municipality in which the crime occurred, if applicable, and lead law enforcement officials of any state, county or local law enforcement agency who investigated the crime or testified in any court or clemency proceeding related to the crime, including but not limited to the sheriff of the county wherein the conviction was had, to witness the execution.

The statute also provides for attendance by family members of the condemned and family members of the victims.

47. Accordingly, executions are the final stage of the criminal justice process in Oklahoma, as indicated by the legislature's inclusion of the proceedings in Title 22 and its continuity with previous stages of the criminal justice process.

Public and Media Access to Execution Proceedings in Oklahoma

48. Oklahoma law has traditionally required the admittance of media and public witnesses at executions. The State of Oklahoma statutorily recognizes that members of the news media have a right to witness executions, along with a limited number of public citizens. Okla. Stat. Ann. tit. 22, § 1015(B) provides that “reporters from recognized members of the news media will be admitted [to executions] upon proper identification, application, and approval of the warden.”
49. This statute has required media access to witness the execution proceeding since at least 1951, when the statute admitted “newspaper men.” 1992 Okla. Sess. Law Serv. Ch. 106 (H.B. 2268) (West).
50. Both the State’s previous and current execution protocols require that witnesses, including members of the press, be granted access to observe the execution proceeding. *See* Procedures for the Execution of Offenders Sentenced to Death, OP-040301 (effective Apr. 14, 2014) [hereinafter, “Previous Protocol”] (App’x A); *see also* Execution of Offenders Sentenced to Death, OP-040301 (effective Sept. 30, 2014) [hereinafter, “Revised Protocol”] (App’x B). Specifically, the Previous Protocol provides that “[t]welve media representatives will be allowed as witnesses in the execution area,” including a newspaper of general record and the Associated Press wire service. Previous Protocol V.C.1. The Revised Protocol states that “five members of the news media may be selected to witness the execution.” Revised Protocol VI.D.2; VII.F.2.c.

51. Unlike the Previous Protocol, the Revised Protocol does not detail the selection process and designated areas for media witnesses. The Previous Protocol provides that designated media witnesses are not subject to the warden's approval. *See* Previous Protocol V.C; *see also id.* VIII.B.6 (allocating separate waiting rooms for observers subject to warden approval – victim and offender witnesses – and for witnesses not subject to the warden's discretion).
52. Additionally, both the State's Previous and Revised Protocols require as a condition of access to the witness chamber that media witnesses promise to "fully brief" other reporters whose names are not drawn for access to the proceeding. Previous Protocol V.C.3.c; Revised Protocol VII.F.2.f., VII.I.3., Attachment E. Specifically, the Previous Protocol mandates a reporters pool under which interested "[o]ther media representatives" not specifically designated access under the protocol "will be requested to place [their] name and media representation into a container" from which a DOC employee will draw names to fill the twelve reserved press seats. Previous Protocol V.C.2-3.a. These "representatives selected [through the draw] will sign a statement agreeing to fully brief the remaining media representatives covering the execution before filing their stories." Previous Protocol V.C. 3.C. "After completion of the execution, the designated twelve media representatives will then be escorted back to the Media Center where they will brief the remaining representatives." Previous Protocol V.C.7; *see also*

Revised Protocol VII.F.2.f. (“News media witnesses shall return to the Media Room after the execution to answer questions of all other media representatives concerning their observations during the execution.”). Thus, Oklahoma protocol not only permits but *requires* press debriefing and dissemination of information about the execution, as witnessed firsthand, as a condition of media access.

53. The State’s Revised Protocol does not explicitly state when an execution formally begins.
54. In contrast, the State’s Previous Protocol defines the beginning of the execution proceeding as the moment when the condemned is “moved to the Execution Room” and before the “person recruited by the warden for IV insertion will insert the appropriate intravenous catheter(s)” into the vein. Previous Protocol IX.C.1-.2. The State’s Previous Protocol also defines the completion of the execution as the time in which “the offender is pronounced dead by the attending physician,” Previous Protocol IX.C.6; or, in the event of a stay during the actual administration of the lethal drug or drugs, when “all proceedings...cease immediately” at which time “the shades will be lowered and medical personnel will take action immediately to render emergency measures,” Previous Protocol IX.C.7;¹ *see also id.* C.10

¹ In the April 14, 2014 version of the Procedures for the Execution of Offenders Sentenced to Death, there are two consecutive subsections under Protocol IX labeled as point “C.” In effect, this error creates two Protocols referenced as IX.C.7. This Complaint refers to the second referenced Protocol.

(“Upon pronouncement of death, all persons will leave the execution areas except those responsible for the removal of the body.”).

55. The State’s Revised Protocol has separated the phases of execution instead of treating the process as seamless. *See* Revised Protocol VII.F-I. Troublingly, the State has also granted the DOC director the ability to limit media access at any point in a manner that is conditional, temporary, and *ad hoc*. The Revised Protocol allows Defendant Patton and his successors to “order the curtains to the witness viewing room be closed, and if necessary, for witnesses to be removed from the facility.” Revised Protocol Attachment D G.5., H.7.
56. Upon information or belief, the State of Oklahoma has not previously used the lethal injection observation chamber’s shades to block, restrict, or revoke access to the assembled witnesses to an execution after the execution proceeding has begun, and before the execution proceeding is concluded.
57. Upon information or belief, members of the press have been admitted to, and have reported on, every execution in Oklahoma since the State recommenced executions after the 1976 Supreme Court decisions upholding death penalty schemes once again as constitutional. News articles have routinely included eyewitness reports from witnesses and media in attendance at the State’s lethal injection proceedings. *See, e.g.,* Ann Weaver, *Killer, 74, Becomes Oldest to be Executed in State*, *The Oklahoman*, June 2, 2006, *available at* <http://newsok.com/killer-74-becomes-oldest-to-be>

executed-in-state/article/1860863 (describing media witness account of the execution of John Boltz); Kathrin Chavez & Don Mecoy, *Convicted Killer Parks Executed*, *The Oklahoman*, March 10, 1992, available at <http://newsok.com/convicted-killer-parks-executed/article/2387603>

(describing media witness account of the execution of Robyn Parks); Ken Raymond, *Lethal Injection Made Its Debut in Oklahoma 20 Years Ago*, *The Oklahoman*, Sept. 7, 2010, available at <http://newsok.com/lethal-injection-made-its-debut-in-oklahoma-20-years-ago/article/3492556> (recounting Oklahoma media witness reports of Oklahoma's first execution by lethal injection of Charles Troy Coleman in 1990).

58. Recent press reports on Oklahoma's execution methods have been critical in informing the public about the State of Oklahoma's administration of lethal injection. See, e.g., Justin Juozapavicius, *Man Convicted in 1998 Stabbing Death Executed*, Associated Press, Jan. 23, 2014, available at <http://news.msn.com/crime-justice/oklahoma-executes-man-convicted-in-1998-stabbing> (describing media account of the lethal injection of Kenneth Hogan); Graham Lee Brewer, *Condemned Man's Last Words Lead to Questions About Lethal Injection 'Cocktail' in Oklahoma, US*, *The Oklahoman*, Feb. 9, 2014, available at <http://newsok.com/condemned-mans-last-words-lead-to-questions-about-lethal-injection-cocktail-in-oklahoma-u.s./article/3932043> (describing media account of the lethal injection execution of Michael Lee Wilson); Katie Fretland, *Oklahoma Execution:*

Clayton Lockett Writhes on Gurney in Botched Procedure, Guardian, Apr. 30, 2014, *available* at <http://www.theguardian.com/world/2014/apr/30/oklahoma-execution-botched-clayton-lockett> (describing reporter's eyewitness account of Clayton Lockett's execution by lethal injection).

59. Oklahoma's tradition of press access to executions is subject to First Amendment protections.

The Importance of Access to Executions in Oklahoma

60. The effectiveness of the State's democratic functions is served by allowing public oversight and accountability.
61. The death penalty represents the most powerful exercise of government authority – the intentional ending of a human life. The need for public oversight is as critical at the execution stage of the justice process as it is in earlier stages, including *voir dire* and trial.
62. The Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishment, has been interpreted by the U.S. Supreme Court as turning on “evolving standards of decency that mark the progress of a maturing society.” *Glass v. Louisiana*, 471 U.S. 1080, 1083 (1985); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). This standard has been applied in particular to the use of the death penalty, which has evolved through a series of different methods. Many changes to execution procedures have occurred

as a direct result of evidence that prior methods were inhumane or caused unnecessary pain.

63. Changes to execution methods have resulted from public debate, media reporting, and courts' reliance on objective reports of the facts and circumstances of past executions.
64. As such, public and press access to the objective facts and procedure of each execution is critical in aiding the public and the courts in their evaluation of whether execution proceedings violate current standards of decency.
65. By witnessing and reporting on the entire execution process, members of the news media, as representatives and surrogates of the public, provide assurance that established procedures and protocols are being followed and that deviations will be publicized.
66. As independent witnesses to government proceedings, members of the news media provide public scrutiny, which enhances the quality and safeguards the integrity of the death penalty process. Reporting by press not associated with the condemned, the victim, or the State of Oklahoma is critical to assuring the public that they have thorough and objective facts about the execution process. Unbiased reporting is therefore necessary to the perceived and actual legitimacy of the execution process.
67. Defendant Robert Patton, Director of the Oklahoma DOC, recommended that the Governor pursue an independent investigation of the circumstances of the botched Lockett execution, noting: "While I have complete

confidence in the abilities and integrity of my Inspector General and his staff, I believe the report will be perceived as more credible if conducted by an external entity.” Letter from Robert Patton, Dir. of the Okla. Dep’t of Corr., to Mary Fallin, Gov. of Okla. (May 1, 2014) [“Timeline of Botched Procedure”], *available* *at* <http://www.theguardian.com/world/interactive/2014/may/01/oklahoma-execution-clayton-lockett-timeline-document>.

68. To determine whether executions are fairly and humanely administered, the public must have thorough and reliable information about the procedures and protocols used by the State, including the insertion of intravenous (“IV”) lines and the determination of death. This information is best gathered firsthand and reported by eyewitnesses disinterested in the parties to the proceeding.
69. Public and press access to witness the entirety of Oklahoma’s execution procedure is overwhelmingly beneficial to the State’s democratic function and is subject to First Amendment protection.

The Failed Execution of Clayton Lockett

70. The State of Oklahoma had scheduled the execution of two condemned men on the evening of April 29, 2014: Clayton Lockett at 6 p.m. and Charles Warner at 8 p.m.
71. At 5:19 p.m., according to the State’s sole account, Defendant Trammell and her restraint team escorted Clayton Lockett to the execution chamber.

Lockett was then placed and restrained on the execution table. Lethal doses of drugs were prepared for injection. The phlebotomist then entered the chamber to place an IV into Lockett's body. Unable to find a viable insertion point in Lockett's arms, legs, feet, or neck, the phlebotomist inserted the IV into Lockett's groin area. Lockett's groin was then covered with a small gown or sheet.

72. Upon information or belief, the State of Oklahoma has the capability to videotape the entire execution process, including the IV insertion, and has installed a camera capable of video and audio recording in the execution chamber.
73. Upon information or belief, this camera was not turned on during the botched Lockett execution.
74. The placement of the IV is an integral part of the lethal injection procedure. *See, e.g.*, Protocol IX.B.1 (prescribing selection of a licensed health care specialist certified in IV insertion). The placement of the IV line is necessary to ensure that all intravenous drugs can be administered according to protocol.
75. The placement of an IV line involves technical skill that requires training. *See id.* (selection of a licensed health care specialist certified in IV insertion); B.2 (selection of persons to administer lethal chemical agents); and B.4 (execution review and training). The proper placement of the IV line is essential to ensuring that drugs are administered directly into the

veins of the condemned in required dosages, so as not to cause unnecessary pain.

76. There was no public access, and therefore no objective press account, of the hour-long period during which Lockett was in the execution chamber between 5:19 p.m. and 6:23 p.m. Upon information or belief, during this time the execution team, and specifically the phlebotomist, repeatedly attempted to insert an IV line into Lockett's body.
77. The media, and by extension, the Oklahoma public, had no public access to witness or document whether the IV insertion procedure was performed according to protocol, whether the individual or individuals who inserted the IV appeared to be acting with the proper training, whether the condemned experienced pain during that process, and whether any other events occurred during the execution proceeding between 5:19 p.m. and 6:23 p.m.
78. At 6:23 p.m., the shade between the execution chamber and the witness viewing area was opened, initiating media access. Twelve reporters were present to witness the remainder of the execution proceeding. Immediately after providing media access, prison employees began to administer the drug Midazolam to the condemned. At 6:33 p.m., the doctor declared Lockett unconscious, and staff began to administer the lethal drugs.
79. At 6:36, Lockett's head rolled to the side, and he mumbled something unintelligible. A minute later, Lockett seemed to be struggling to get up and mumbled another unintelligible statement.

80. At 6:38 p.m., Lockett was grimacing, groaning, and lifting his head and shoulders entirely up from the gurney. He uttered a phrase that included the word “man.” He appeared to be in pain.
81. The doctor then walked over to Lockett, lifted up the sheet, and spoke to Defendant Trammell. Between 6:39 and 6:42 p.m., Trammell then announced that employees would “lower the blinds temporarily.”
82. At 6:42 p.m., the shade was lowered, preventing the media from witnessing the remainder of the execution. Reporters in the witness viewing area could not observe what was happening behind the shade. Prison employees then left the room, leaving behind the journalists and several of Lockett’s attorneys.
83. According to the DOC, behind the drawn shade, the phlebotomist and doctor checked the IV and reported to Defendant Patton that a blood vein had collapsed and the drugs had either absorbed into the tissue, leaked out, or both.
84. According to the DOC’s report, the doctor confirmed to the director that an insufficient dosage of drugs had been administered to cause death, that no other vein was available, and that there were not enough drugs remaining to cause death. The doctor also told Defendants Trammell and Patton that Lockett had a faint heartbeat and was unconscious. Journalists were not permitted to witness either this exchange or Lockett’s reaction to the collapsed vein or drug leakage into his body tissue.

85. Upon information or belief, the manner of IV selection and insertion contributed to the consciousness, pain, and unexpected responses of Lockett.
86. At 6:56 p.m., a full 14 minutes after the shade was lowered, Defendant Patton called off the execution, according to the State's timeline. At some point, he returned to the witness viewing area and announced that the execution had been formally called off and the second execution scheduled for that night had been stayed. After Defendant Patton's announcement, witnesses were told to leave the viewing area.
87. At 7:06 p.m. – 24 minutes after the shade was drawn and 10 minutes after the execution was called off – a doctor pronounced Lockett dead in the execution chamber. Defendant Patton subsequently announced Lockett's death to reporters in a statement at the prison's media center.
88. The day after Lockett's botched execution, Governor Mary Fallin issued Executive Order 2014-11, directing the Southwestern Institute of Forensic Science (SWIFS) in Dallas, Texas perform an autopsy. Exec. Order No. 2014-11, *available at* <https://www.sos.ok.gov/documents/executive/942.pdf>.
89. The autopsy found that Lockett's body had been punctured over 15 times in his arms, legs, feet, and neck. Office of the Med. Exam'r, Sw. Inst. of Forensic Scis., Autopsy Report 2 (Aug. 28, 2014) ["Autopsy Report"] (App'x C).
90. The autopsy listed the official cause of death as "judicially ordered execution." Autopsy Report at 11.

91. The State's Revised Protocol now requires a person specifically seeking to place a central femoral venous line (an IV to the groin area) to be currently certified or licensed to do so. Revised Protocol VII.F.5.i.

The State's Burdens on the Plaintiffs' Right of Access

92. As a result of action and inaction by the State of Oklahoma, and pursuant to the State's Revised Protocol, all Plaintiffs have been, and will continue to be, deprived of their First Amendment right to witness an Oklahoma execution.
93. For the majority of the Lockett lethal injection proceeding, the State of Oklahoma used a physical shade to prohibit Plaintiff Fretland and other witnesses present from accessing, witnessing, verifying, or reporting on the sights and sounds of the proceeding.
94. The Oklahoma Observer, Editor Hamilton, and Guardian US, who had made arrangements to edit and publish the eyewitness reporting of Plaintiff Fretland, were likewise prevented from publishing full and independent accounts of the botched lethal injection of Clayton Lockett.
95. In order to meaningfully observe an execution, a press witness must be able to see and hear the proceeding from the moment the condemned enters the execution chamber through, to and including, the time he is declared dead – or, alternatively, up to and including the time that he exits the chamber alive if an execution is called off.

96. By preventing witnesses from gaining access to the lethal injection proceeding until after the condemned has been fully prepared for the provision of lethal drugs, Defendants obstructed Plaintiffs' access to the execution and prohibited them from meaningfully reporting on the entire execution. Specifically, the press could not report the extent to which initial IV preparation and placement procedures for Lockett went according to protocol, the apparent behavior and training of the relevant staff members, or the degree of pain or suffering experienced during the IV insertion process.
97. For the first hour of the lethal injection procedure, from 5:19 p.m. through at least 6:23 p.m., media representatives were not permitted any visual or auditory access to the execution chamber. During this time, state employees prepared Lockett for execution, finding and inserting IV lines and connecting his body to the intravenous lines that supply the lethal injection drugs. The media's only accounts of this critical period therefore come from the State of Oklahoma itself including those of Plaintiffs. *See* Letter from Robert Patton, Dir. of the Okla. Dep't of Corr., to Mary Fallin, Gov. of Okla. (May 1, 2014), *available at* <http://www.theguardian.com/world/interactive/2014/may/01/oklahoma-execution-clayton-lockett-timeline-document> (embedding PDF of letter from Robert Patton, Director of the Oklahoma DOC, as a news story without other reported content); Richard L. Fricker, *It Doesn't Pass the*

Smell Test, The Oklahoma Observer (May 15, 2014), available at <http://www.okobserver.net/2014/05/15/it-doesnt-pass-the-smell-test/> (noting that “Lockett lay on the death gurney for an hour before the actual execution procedure began”).

98. Both the State’s Previous and Revised Protocols make plain that these IV procedures are integral to the execution process, and require training and skill. Furthermore, a substantial number of lethal injections are “botched” as a result of error or unexpected response during the IV insertion process. Information about the initial IV procedures is essential to the press’ right to witness the execution and the public’s right to assess the propriety of the lethal injection proceeding.
99. By prematurely closing the viewing shade after the lethal injection resulted in drug leakage and Lockett’s unexpected consciousness, Defendants further obstructed Plaintiffs’ access to the execution and prohibited them from meaningfully reporting on the entire execution. Specifically, the State foreclosed access at the most critical juncture of the execution proceeding – when it became apparent that the lethal injection proceeding diverged from the standard protocol. Immediately after the gathered witnesses were presented with visual and auditory evidence that the execution had been botched, the State revoked the access of members of the press, and by extension, the public. At the moment when public oversight was most important, the State instead unlawfully shrouded its execution proceedings

in secrecy. Troublingly, the State's Revised Protocol mandates that shortly before chemicals are administered, the State must turn off the microphone that grants audio access from the execution chamber to the witness room. Only the executioners will be able to hear the condemned should he make any sounds or utterances. This severely curtails the public's ability to properly monitor the proceedings and hold the government accountable for any misdeeds.

100. Plaintiffs were forced to rely on official reports from the State for critical details of the execution proceeding. Accordingly, they were unable to give firsthand, objective accounts as to whether established procedures were followed or whether, and to what extent, Lockett experienced pain and suffering as a result. Rather than provide independent accounts of Lockett's death, Plaintiffs were forced instead to inform readers on the limitations of their ability to access the event. The closure of the viewing shade, in fact, became a focal point of Plaintiff Fretland's reporting and Plaintiffs' coverage of the attempted Lockett execution. *See* Katie Fretland, *Clayton Lockett Writhed and Groaned. After 43 Minutes, He Was Declared Dead*, *Guardian* US, Apr. 30, 2014, *available at* <http://www.theguardian.com/world/2014/apr/30/clayton-lockett-oklahoma-execution-witness> ("Then, in a gesture that seemed to echo Oklahoma's fierce commitment to secrecy in the way it carries out lethal injections, the curtains were drawn over the execution chamber, obscuring the gruesome

spectacle from public view. Officials picked up prison phones and left the room.”); Richard Fricker, *Oklahoma’s Execution De-botchery*, *The Oklahoma Observer* (April 30, 2014), *available at* <http://www.okobserver.net/2014/04/30/oklahomas-execution-de-botch-ery/> (“Shortly thereafter, the screen was closed and reporters were ushered out of the room. Nothing more was heard from the State until DOC Director Patton announced he had used his own authority to halt the execution.”).

101. By keeping the viewing shade closed during initial IV selection and insertion procedures, Defendants obstructed, and will continue to obstruct, the Plaintiffs’ access to the full execution procedure and prohibit them from meaningfully reporting on the entire execution.
102. Closing the viewing shade and revoking all visual access to the execution proceeding is neither necessary to nor justified by protecting the right to privacy.
103. Closing the viewing shade and revoking all visual access to the execution proceeding is neither necessary to nor justified by the State’s desire to hide the identity of the staff involved in administering the death penalty.
104. Turning off the microphone before the administration of drugs is neither necessary to nor justified by protecting the condemned’s privacy.
105. Limiting the number of press witnesses to only five persons is neither necessary to nor justified by the State’s interests in protecting privacy and confidentiality.

106. Exclusion of the press at the discretion of the DOC director is neither necessary to nor justified by the State's interests in protecting privacy and confidentiality.
107. Oklahoma has no tradition of providing access *only* to "non-cruel" or "usual" portions of an execution proceeding. If Defendants are permitted to continue preventing witnesses from observing any part of the execution, from the time it begins until death, the public will have no way of evaluating the State's administration of the death penalty or ensuring that those proceedings meet evolving standards of decency.
108. The new protocol's explicit grant of permission to the DOC director to lower the shade five minutes after chemicals are administered conflicts with the First Amendment right of the public and the press to observe government proceedings, including executions. The Revised Protocol is particularly unlawful because it specifically authorizes the withdrawal of public access if and when an execution goes awry.
109. Charles Warner is currently scheduled to be executed in Oklahoma by lethal injection on November 13, 2014.
110. Richard Glossip is currently scheduled to be executed in Oklahoma by lethal injection on November 20, 2014.
111. John Grant is currently scheduled to be executed in Oklahoma by lethal injection on December 4, 2014.

112. Plaintiffs The Oklahoma Observer, Hamilton, Guardian US, and Fretland all intend to continue reporting on the death penalty and to deliver eyewitness reporting from the scene of the next execution to occur in Oklahoma. Plaintiff Fretland will again enter the witness lottery for the next scheduled execution, and has made arrangements with Plaintiffs The Observer and the Guardian to publish her reporting on the event. Without an Order from this Court, all Plaintiffs risk having their right to access Oklahoma's execution proceedings curtailed, withheld, or revoked in violation of the First Amendment to the U.S. Constitution.

CLAIMS

Count I

Violation of the First Amendment to the U.S. Constitution

113. Plaintiffs repeat and re-allege each allegation contained in Paragraphs 1 through 99 of this Complaint.
114. The First Amendment, made applicable to the states by the Fourteenth Amendment, guarantees designated members of the public and the press a qualified right of access to government proceedings, including executions.
115. Defendants deprived Plaintiffs of their First Amendment rights by preventing Plaintiffs from aurally and visually observing the full execution proceeding, and by extension deprived the Oklahoma public of informed and accurate media coverage of that critical event.

116. Defendants will deprive Plaintiffs, and others similarly situated, of their First Amendment rights in future executions if the State of Oklahoma is not required to allow witnesses to meaningfully observe the entire procedure from the moment the condemned enters the execution chamber until the time the condemned is declared dead.

Count II

Violation of Article 2, Section 22 of the Oklahoma Constitution

117. Plaintiffs repeat and re-allege each allegation contained in Paragraphs 1 through 103 of this Complaint.
118. Article 2 § 22 of the Oklahoma Constitution guarantees designated members of the public and the press a qualified right of access to government proceedings.
119. Article 2 § 22 of the Oklahoma Constitution prevents the State from taking action to abridge the liberty of the press.
120. Defendants deprived Plaintiffs of their First Amendment rights by preventing Plaintiffs from aurally and visually observing the full execution proceeding, and by extension deprived the Oklahoman public to informed and accurate media coverage.
121. Defendants will deprive Plaintiffs, and others similarly situated, of their rights in future executions if the State of Oklahoma is not required allow witnesses to meaningfully observe the entire proceeding from the moment

the condemned enters the execution chamber until the time the condemned is declared dead.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that Plaintiffs have a right protected by the First Amendment to the United States Constitution and Article 2 § 22 of the Oklahoma Constitution to witness and hear the entire execution process;
2. Declare that Defendants' Revised Protocol allowing the DOC director to prevent witnesses to an execution from viewing and hearing the entire execution process violates the First Amendment to the United States Constitution and Article 2 § 22 of the Oklahoma Constitution;
3. Declare that Defendants' Revised Protocol reducing the number of press witnesses from twelve to five violates Oklahoma's established common law right of access to the execution process;
4. Declare that a lethal injection proceeding, for purposes of the right of visual and auditory access, includes the entire time from when the condemned enters the execution chamber until the time the condemned leaves the execution chamber, dead or alive;
5. Preliminarily and permanently enjoin Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction from curtailing, censoring, limiting, or hindering the ability of lawful witnesses

and media representatives to witness and listen to the entire execution process;

6. Preliminarily and permanently enter a mandatory injunction requiring the State to amend its Revised Protocol to prohibit the withdrawal of visual or auditory access to the execution proceeding during the entire execution process, from the time from when the condemned enters the execution chamber until the time the condemned is declared dead, or the State calls off the execution;
7. Preliminarily and permanently enter a mandatory injunction requiring the State to amend its Revised Protocol to allow twelve media witnesses, consistent with Oklahoma's history and tradition.
8. Preliminarily and permanently enter a mandatory injunction requiring the State to record and keep a video and audio recording of the entire execution proceeding, from when the condemned is led into the execution chamber until the condemned exits the chamber, dead or alive;
9. Award Plaintiffs reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988; and
10. Grant Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

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