CASE NO. CIV-14-905-HE

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

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(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.

MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Lee Rowland*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2606

Brady Henderson, OBA #21212
Ryan Kiesel, OBA #21254
ACLU of Oklahoma Foundation
3000 Paseo Drive
Oklahoma City, OK 73103
(405) 524-8511

Counsel for Plaintiffs
Admitted *Pro Hac Vice

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Plaintiffs *The Oklahoma Observer*, Arnold Hamilton, *Guardian US,* and Katie Fretland offer the following consolidated memorandum in opposition to Defendants' Motion to Dismiss and in favor of Plaintiffs' Motion for a Preliminary Injunction.

INTRODUCTION

On April 29, 2014, when Oklahoma executed Clayton Lockett, only government officials witnessed his prolonged death. State employees began the lethal injection by repeatedly inserting intravenous lines into his body. Per state protocol, the press was prohibited from witnessing these actions. After the state began administering intravenous lethal drugs, and while Lockett was supposed to be unconscious, he began displaying obvious distress: twitching and mumbling. In response, Defendants closed the shade on the single execution chamber window that provided witnesses with a view of Lockett. Fourteen minutes later, the execution was "called off," and ten minutes later Lockett died, unseen by anyone but state officials for the final twenty-four minutes of his life.

The State's policies ensured that no independent witness saw Lockett's death, or the insertion of IV lines that deliver lethal chemicals—whose improper insertion causes the majority of botched lethal injections, and likely precipitated Lockett's own prolonged death. In its new Execution Protocol, the State has explicitly redoubled its commitment to closing the viewing shade at will. This policy is tantamount to a censorship regime that permits the press to witness the execution process, *but only those portions that the state wants the public to see.* An uncensored right of access ensures public accountability for

critical government acts; that benefit is unachievable with only a piecemeal view of the government's actions. Yet the State's execution protocol cloaks in total secrecy those portions of an execution most critical for public oversight.

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 historically have been open to the public and play a critical role in ensuring the positive functions of government. As other federal courts have held, executions unquestionably qualify as such proceedings. Once the right of access attaches to a particular proceeding, the government bears the burden of minimizing and justifying any restrictions on the ability to witness it.

The death penalty historically has been carried out under public scrutiny in the United States, and that scrutiny has continually informed our evolving Eighth Amendment traditions. Oklahoma, too, has long required that the press be permitted to witness execution procedures, including lethal injections. The ability of the press to witness the facts and circumstances of each execution, and to report on the same, promotes the proper functioning of the death penalty and increases public confidence in the integrity of the justice system. This right applies to government proceedings warts and all—the right of access means little if the State can withdraw it when press coverage may prove critical. Furthermore, selective withdrawal is at odds with Oklahoma's tradition of transparency and undermines the public legitimacy of the State's actions.

Because Plaintiffs have standing to bring, and are likely to prevail on, their First Amendment claims, Defendants' Motion must be denied. Furthermore, because Defendants' policies cause irreparable harm to Plaintiffs, preliminary relief is warranted.

STATEMENT OF FACTS

Plaintiffs are media organizations and journalists who report on the death penalty and the lethal injection process. Plaintiff Katie Fretland is a freelance journalist who has published articles describing her eyewitness accounts of two Oklahoma executions, including Clayton Lockett's. Fretland Decl. ¶¶ 1–2. Fretland was among the local and national journalists who gathered to observe the scheduled execution of Lockett from the witness chamber on April 29. *Id.* ¶1. She reported on the event for Plaintiffs *The Oklahoma Observer* and *Guardian US*. *Id.* When the viewing shade was raised, Plaintiff Fretland saw that Lockett was on a gurney inside the chamber. *Id.* ¶ 13. After raising the shade, the State began administering intravenous drugs to Lockett. *Id.* ¶ 15. Fretland then observed Lockett writhing, groaning, and uttering words following the administration of drugs, and until the viewing shade was again shut. *Id.* ¶¶ 17–18. Because it was lowered, Fretland was prevented from observing Lockett's death. *Id.* ¶¶ 18–20. Fretland later learned from the State that it took over 40 minutes for Lockett to die. *Id.* ¶ 21.

By the State of Oklahoma's sole account, at 5:22 p.m. on April 29, 2014, Clayton Lockett, the first of two inmates scheduled for execution that evening, was strapped to a gurney and prepared for injection. Letter from Robert Patton, Dir. of the Okla. Dep't of Corr., to Mary Fallin, Governor of Okla. 2 (May 1, 2014) ["DOC Timeline"], attached as Ex. 1. The State's phlebotomist was unable to find a viable IV insertion point, so a doctor

entered the chamber. Okla. Dep't of Pub. Safety, Investigative Report 16 (Sept. 4, 2014) ["DPS Report"], attached as Ex. 2. Together, they punctured Lockett in his arms, legs, feet, and neck over 15 times. DOC Timeline; Office of the Med. Exam'r, Sw. Inst. of Forensic Scis., Autopsy Report 2 (Aug. 28, 2014) ["Autopsy Report"], attached as Ex. 3. They settled on an IV line to Lockett's groin, which they covered with a sheet. DOC Timeline at 2. At 6:23 p.m., the shade between the execution chamber and the witness room was raised. *Id.*

Twelve reporters were present to witness the remainder of the execution proceeding. At 6:33 p.m., Lockett was declared unconscious, and staff began to administer lethal drugs. *Id.* At 6:36 p.m., Lockett began struggling and attempting to lift his upper body off of the gurney. Fretland Decl. ¶ 17. He was groaning, and uttered a phrase that included the word "man." *Id.* He appeared to be in pain. *Id.* The doctor then walked over to Lockett, lifted the sheet, and spoke to Defendant Trammell. DPS Report at 18. Media witnesses were able to see the doctor as he entered the chamber. Fretland Decl. ¶ 18. At 6:42 p.m., officials lowered the viewing shade at Defendant Trammell's direction, preventing Fretland from witnessing the rest of the execution. DOC Timeline.

According to the DOC, behind the drawn shade, the phlebotomist and doctor checked the IV and reported to Defendant Patton that a vein had collapsed and the drugs had either absorbed into the tissue, leaked out, or both. *Id*. The doctor confirmed to the director than an insufficient dosage of drugs had been administered, that no other vein was available, and that there were not enough drugs remaining to cause death. *Id.* At 6:56 p.m., Defendant Patton called off the execution. *Id.* At 7:06 p.m.—twenty-four minutes

after the shade was drawn and ten minutes after the execution was called off—a doctor pronounced Lockett dead in the execution chamber. *Id.* Defendant Patton subsequently announced his death to reporters at the prison's media center. Fretland Decl. ¶ 21.

Following Lockett's botched execution, Defendant Patton, Director of the Oklahoma DOC, sent a letter to Governor Fallin requesting an external investigation of Lockett's execution, stating he "believe[d] the report will be perceived as more credible if conducted by an external entity." DOC Timeline. On April 30, Fallin directed DPS to conduct a review of events leading up to and during Lockett's execution. Exec. Order No. 2014-11, attached as Ex. 4. The order required that the Southwestern Institute of Forensics Science (SWIFS) in Dallas, Texas perform an autopsy. *Id.* Among its recommendations, DPS advised the DOC to conduct a pre-execution briefing with all witnesses including an explanation that witnesses will not be allowed to view all aspects of the execution. DPS Report at 29. The SWIFS autopsy stated Lockett's cause of death as "judicially ordered execution." Autopsy Report at 11.

On September 30, 2014, the DOC adopted a revised set of procedures for planning and carrying out executions. *See* Okla. Dep't of Corr., Execution Procedures (Sept. 30, 2014) ["Revised Protocol"], attached as Ex. 5. The procedures limit the number of media witnesses allowed to view executions to five persons, *id.* at 13; the previous protocol allowed up to twelve media witnesses, Okla. Dep't of Corr., Procedures for the Execution of Offenders Sentenced to Death 10 (Apr. 14, 2014), attached as Ex. 6. The new protocol mandates that after the condemned speaks his last words—assuming he is permitted to do so—the microphone to the execution room will be turned off. Revised Protocol at 28. The

execution team will place a microphone on the condemned's shirt so that only they may hear any utterances or noises he may make throughout the procedure. *Id.* at Attach. D 6. The new rules state that if the condemned remains conscious five minutes after injection of lethal chemicals, "[t]he director may order the curtains to the witness viewing room be closed, and if necessary, for witnesses to be removed from the facility." Id. at Attach. D 8–9. The Revised Protocol states that the Director of DOC may deviate from the procedures at any time. *Id.* at 2.

LEGAL ARGUMENT

I. Governing Standards for the Issuance of a Preliminary Injunction

In this Circuit, a plaintiff is entitled to preliminary injunctive relief if: "(1) the movant will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood the movant ultimately will prevail on the merits; (3) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and 4) the injunction would not be contrary to the public interest." *ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999) (citation omitted).

As fully detailed below, Plaintiffs are likely to prevail on the merits of their claims. *See Koerpel v. Heckler*, 797 F.2d 858, 866 (10th Cir. 1986).[1] Courts routinely grant preliminary injunctions when First Amendment rights are at stake. *See id.* at 867; *Cmty. Commc'ns, Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 (10th Cir. 1981).

[1] In *Koerpel*, the court explained that where a plaintiff has satisfied the other factors of the injunction test—which the instant Plaintiffs amply satisfy—it applies a relaxed standard for determining likelihood of success on the merits. Under this modified test, it is "enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Koerpel*, 797 F.2d at 866 (citation omitted).

Furthermore, as this case deals with matters of free speech, once Plaintiffs have demonstrated a likelihood of success, irreparable harm is presumed. *Cmty. Commc'ns, Inc.*, 660 F.2d at 1376*; Elrod v. Burns*, 427 U.S. 347, 373 (1976). For similar reasons, Plaintiffs amply satisfy the remaining prongs because their ability to report on the State's execution procedure implicates the public's rights as well. The balance of harms weighs in favor of Plaintiffs' right to observe judicial executions; further, an injunction would vindicate the public's right to receive core information about their government.

II. Plaintiffs have standing to bring claims for injunctive and declaratory relief, and this Court has standing to hear them.

Plaintiffs clearly satisfy the three requirements for standing in federal court: First, Plaintiffs have suffered, and continue to suffer, injury in fact—an invasion of a legally protected interest that is "concrete and particularized," "actual or imminent." *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996) (citation omitted). As discussed in their Complaint, Plaintiffs were denied access to "unedited" information about the botched Lockett execution. The State maintains a policy preventing anyone from witnessing the IV insertion portion of the lethal injection proceeding; this is not contested. Defs.' Br. at 1. Further, the State has reiterated its intent to selectively close the viewing shade. Revised Protocol at Attach. D 8–9. Plaintiffs seek *only* injunctive and declaratory relief to prevent the loss of their constitutional rights, which is certain to recur under Defendants' execution protocols. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod*, 427 U.S. at

373. The harm to Plaintiffs, and Defendants' policies causing it, are therefore fully fit for judicial review.

Second, there can be no dispute that Plaintiffs' injuries are directly traceable to the Defendants' actions or failures to act. When deprivation of a public right is alleged, "considerations personal to particular individuals may be quite relevant to the standing inquiry." *United States v. McVeigh*, 106 F.3d 325, 336 n.10 (10th Cir. 1997). Plaintiffs were deprived of *their own* firsthand, on-the-ground reporting, and were forced to rely on official accounts of Lockett's final moments, which are inconsistent with Plaintiff Fretland's own observations. Fretland Decl. ¶¶ 20–21. The harm sustained by Plaintiffs makes them "proper proponents" of an access claim. *McVeigh*, 106 F.3d at 336 n.10 (quoting *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)). Third, ongoing and future deprivations of Plaintiffs' rights will be redressed when this Court grants relief. *See, e.g.*, *United States v. McVeigh*, 918 F. Supp. 1452, 1467 (W.D. Okla. 1996) (directing that procedures be established for consideration of *prospective* right of access requests).

Defendants argue that Plaintiffs' challenge of the State's *ad hoc* shade closure relies on "indeterminate intent" too attenuated to provide standing, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Defs.' Br. at 3–4. This is incorrect for two reasons. First, the Supreme Court has applied *Lujan* to find standing when the "threatened enforcement of a law creates an Article III injury," such as harm to First Amendment rights. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). Second, Plaintiffs' intent is not indeterminate. Fretland will submit her name to witness the next execution; Plaintiffs will report on it, and reasonably fear that their access will be

"edited" during the next execution. Fretland Decl. ¶ 29; Hamilton ¶ 20. Defendants have formalized a policy of closing the shade at will. Revised Protocol at Attach. D, 8–9. When First Amendment rights are at stake, a specific intent to engage in protected conduct, combined with existing policy, provides justiciability. *See Driehaus,* 134 S. Ct. at 2343; *Hain v. Mullin*, 327 F.3d 1177, 1180 (10th Cir. 2003); *Leigh v. Salazar*, 677 F.3d 892, 896–97 (9th Cir. 2012) (right to access specific government event justiciable even where next event was not scheduled).

Most importantly, the *ad hoc*, time-sensitive nature of such closure *increases*, not decreases, the justiciability of this case: it is the platonic ideal of "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). Executions are far too short in duration for Plaintiffs to litigate their right of access when it is terminated in the middle of an execution proceeding. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 6 (1986) ["*Press-Enterprise II*"]. From the timeline of the Lockett execution, it is clear that a deprivation of access "could not, or probably would not, be able to be adjudicated while fully 'live.'" *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (internal quotation marks omitted). The Court therefore has jurisdiction to settle this continuing controversy. *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 832 F.2d 1180, 1187 (10th Cir. 1987) (right of access claims subject to mootness exception when derived from standing government policy authorizing lack of access); *Grant v. Meyer*, 828 F.2d 1446, 1449 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988) (exception proper when Plaintiffs have "reasonable expectation" of being subjected to

repeat loss of rights). Here, the next loss of Plaintiffs' First Amendment rights is even less speculative. An execution is scheduled for November 13, 2014; Plaintiffs are *certain* to lose their right to witness IV procedures at that time. They will also lose their right to witness the condemned's death should that execution go awry; there is no other possible venue for redressing that injury.

For the same reasons listed above, the Eleventh Amendment is not a bar to Plaintiffs' claims, which are purely prospective. As Defendants acknowledge, immunity bars only retrospective relief, Defs.' Br. at 5, and Plaintiffs have requested none. Instead, they seek redress for the "continuing violations of federal law and to protect federal interests." *Id.; see also Smith v. Plati*, 258 F.3d 1167, 1171 n.1 (10th Cir. 2001) (Eleventh Amendment does not bar suits for prospective relief to remedy constitutional violations).

III. Plaintiffs are likely to prevail on their First Amendment Claims.

a. Execution proceedings are subject to the right of access.

The Supreme Court has recognized the public's First Amendment right to access the full spectrum of criminal justice proceedings. *Press-Enterprise II*, 478 U.S. at 8. In assessing when a constitutional right of access applies to specific proceedings, courts employ a "history and logic" analysis. This two-part "*Press-Enterprise* test," analyzes both "whether the place and process have historically been open to the press and general public" (the "history" prong), and "whether public access plays a significant positive role in the functioning of the particular process in question" (the "logic" prong). *Id.* The Tenth Circuit has adopted this test and frequently cites other Circuits in defining its contours. *See, e.g., United States v. Gonzales*, 150 F.3d 1246, 1257 (10th Cir. 1998) (citing Second

and Eleventh Circuits in assessing history); *U.S. v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) (citing Second, D.C., Sixth, Eighth, and Ninth Circuit precedent in assessing logic).

In Oklahoma, the State considers the execution process the application of the judgment phase of the criminal justice system, rather than part of the incarceration process. Proceedings of the justice system are presumptively subject to the right of access. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 573 (1980). Title 22 of Oklahoma's state law, entitled "Criminal Procedure," governs executions in Oklahoma along with other criminal justice proceedings. *See* Okla. Stat. Ann. tit. 22, § 524 (preliminary hearings), § 592 (*voir dire*), §§ 831–61 (trial), § 1015 (executions). State law requires the warden to invite to each execution "the district attorney of the county in which the crime occurred or a designee [and] the judge who presided at the trial issuing the sentence of death…to witness the execution." Okla. Stat. Ann. tit. 22, § 1015. The mandated invitation of the prosecutor and judge from the condemned's criminal trial indicates the execution of a *court* judgment. *See* Autopsy Report at 11 (concluding Lockett's cause of death was "judicially ordered execution"). Oklahoma's executions are therefore criminal justice proceedings entitled to a right of access.

But even if this Court should find that executions are not judicial proceedings, it should join other federal courts in holding that the right of access attaches to this most important government act. "Courts have applied the *Press–Enterprise II* framework to evaluate attempts to access a wide range of civil and administrative government activities." *Salazar*, 677 F.3d at 899–900 (collecting cases); *Phila. Inquirer v. Wetzel*, 906

F. Supp. 2d 362, 367 n.1 (M.D.Pa. 2012) (collecting Third Circuit cases); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 573 (D. Utah 1985) ("The right of access to judicial proceedings has been extended beyond criminal trials….The press have a first amendment right of access to presidential press conferences."), *appeal dismissed on mootness grounds,* 832 F.2d 1180 (10th Cir. 1987).[2]

Application of the right of access to executions is a matter of first impression in this Circuit. Defendants argue that access should be governed solely by precedent relating to prisons, where generally the press has no right of access beyond the public, citing: *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). Defs.' Br. at 7–11. But this is the incorrect framework for assessing the right of access. The movement of executions into prisons is recent in our historical tradition, and the State cannot "take this safeguard [access] away from the public by placing its actions beyond public scrutiny" by relocating them in prisons. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

[2] *See United States v. Miami Univ.*, 294 F.3d 797, 821 (6th Cir. 2002) (access university's student disciplinary records); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (state environmental agency records); *In re September 11 Litig.*, 723 F.Supp.2d 526, 530–31 (S.D.N.Y. 2010) (settlement records); *In re Guantanamo Bay Detainee Litig.*, 630 F.Supp.2d 1, 10 (D.D.C. 2009) (habeas corpus proceedings); *ACLU v. Holder*, 652 F.Supp.2d 654, 662 (E.D. Va. 2009) (sealed qui tam complaints); *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 249 F.Supp.2d 911, 915 (S.D. Ohio 2003) (resumes of superintendent candidates); *Newspapers, Inc. v. Roberts*, 839 A.2d 185, 191 (Pa. 2003) (legislator phone records); *Mayhew v. Wilder*, 46 S.W.3d 760, 776–77 (Tenn. Ct. App. 2001) (meetings of state legislature); *Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1046, 1048 (N.Y. 1990) (dentist's professional disciplinary hearing).

Most importantly, Oklahoma has consistently provided the press with access to executions held on prison grounds. This is at odds with Defendants' claim that Plaintiffs seek "unprecedented privileges," Defs.' Br. at 1; instead they simply seek to ensure the access already provided by the State is not subject to Defendants' *ad hoc* censorship. Plaintiffs' claims are starkly different from those in *Houchins* and *Procunier* where the press sought unrestricted access to penal institutions and prisoners:

> Plaintiffs' request to view the entire execution, and not the limited portion currently allowed by the DOC, can be read as an extension of current procedures permitting their viewing of the execution. It is therefore quite different from the relief sought in *Houchins*, where plaintiffs sought "unregulated access" and impromptu tours of the prison.

Wetzel, 906 F. Supp. 2d at 370 (citation omitted). This Circuit has held that even where a state may fully ban access to certain government acts, once it offers that access, it cannot be limited on unlawful grounds. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) ("though the Colorado Legislature theoretically has the power to deny access entirely, the First Amendment can be implicated by the line drawing in Colorado's access-to-records statute"). Oklahoma has *made* the decision to offer access to the press, and by extension, the public. The question is whether the State may provide access *only* to portions of the proceeding that show no improper government activity. It may not.

b. Oklahoma executions have historically been open to representatives of the public.

Oklahoma's law provides access for witnesses to an execution, including "reporters from recognized members of the news media." Okla. Stat. Ann. tit. 22, § 1015. As Defendants acknowledge, Oklahoma has by statute authorized the presence of

journalists at executions since at least 1951, and citizen representatives since the beginning of the Twentieth Century. Defs.' Br. at 13. But Defendants wrongly conclude that the presence of public representatives contrasts with public access.

"Experience" does not require a tradition of unrestricted access to the general public; rather, it entails consideration of the experience of openness within a proper context. The Ninth Circuit found persuasive wardens' tradition of inviting members of the news media to witness executions—a tradition that instituted the press as a "constant presence" since executions had been moved into the state's prisons. *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875–76 (2002) (citations and internal quotation marks omitted). In Oklahoma, the presence of either representative citizens or journalists is a longstanding and unbroken statutory right. As Professor Sarat notes, executions in America were traditionally open and public until a movement toward eliminating the fully-public "spectacle of a violent death" began in the Nineteenth Century. Sarat Decl. ¶¶ 8–9. Prof. Senat notes that Oklahoma was consistent with this trend—but ensured that representatives of the public were a *consistently* required presence at capital punishment from the State's origins as Oklahoma Territory. *See* Senat Decl. ¶¶ 22–28. (detailing unbroken territorial tradition of including reputable citizens and press coverage of executions since the late Nineteenth Century).

Journalists function as surrogates for the public, and vindicate the public's right to receive unbiased, non-government sources of oversight and information. *See, e.g., Lyles v. State*, 330 P.2d 734, 742–43 (Okla. Crim. App. 1958) ("in support of extending the privileges of freedom of the press to televisors of court proceedings is the necessity of

educating and informing our people concerning the proper functioning of the courts"); *McVeigh*, 106 F.3d at 336 ("Indeed, '[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed.'") (citing *Press–Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984)). The State's consistent inclusion of media witnesses has ensured public oversight and government accountability for its death penalty; it also establishes a tradition, and a right, of access.

c. Transparency plays a critical role in ensuring the proper administration of the death penalty.

In addition to looking to a state's history to determine when the constitutional right of access applies to a government proceeding, courts analyze "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8 (citation omitted). This Circuit has identified six structural interests that the Supreme Court uses to assess this "logic" test. *Gonzales*, 150 F.3d at 1258 n.18; *McVeigh*, 106 F.3d at 336 (10th Cir. 1997). These interests are identical to the six factors that the Third Circuit applied in determining that press access to executions in their entirety contributes to the proper functioning of the death penalty. *Wetzel*, 906 F. Supp. 2d at 368, 371. The interests include: "informing the public discussion of government affairs, assuring the public perception of fairness, promoting the community-therapeutic effect of criminal justice proceedings, providing a public check on corrupt practices, intimidating potential perjurers, and generally enhancing the

performance of all involved in the process." *McVeigh*, 106 F.3d at 336; *see also Gonzales*, 150 F.3d at 1258 n.18.

As detailed in their Declarations, Plaintiffs seek to observe and hear executions in their entirety in order to provide full, impartial, firsthand eyewitness accounts of how the State is carrying out lethal injection procedures. *See* Fretland Decl. ¶¶ 12–14; Hamilton Decl. ¶¶ 5, 11–12; Wells Decl. ¶¶ 9, 14, 16. The Oklahoma Observer, in particular, views itself as "the public's watchdog" and works to provide information on "how tax dollars are spent and what policies are being carried out in the public's name." Hamilton Decl. ¶ 5. Without Plaintiffs' reporting, the public would only been informed of the State's version of events—which has been inconsistent with eyewitness reports in the past. *See* Wells Decl. ¶ 26. The right of access is premised on the understanding that one of its major purposes "was to protect the free discussion of governmental affairs." *Globe Newspaper Co.*, 457 U.S. at 604. Without access to a full and objective account of events—free from government obstruction—public discussion of policy is severely curtailed. Had Plaintiff Fretland witnessed Lockett's execution from start to finish, she would have relayed to the public "a more thorough report." Fretland Decl. ¶ 23.

One of the most important functions of the media with respect to the death penalty it is to provide a public check on bad practices. Journalists produce primary sources upon which researchers and policy makers rely to catalog and update capital punishment methods. *See* Radelet Decl. ¶¶ 9, 12; *see also* Sarat Decl. ¶ 7. Through his capital punishment research, Professor Austin Sarat has studied newspaper coverage of botched executions from 1890 to 2010. Sarat Decl. ¶ 7. His research has concluded that

"[j]ournalistic accounts of botched executions have played a central role in the incremental modernization of killing methods through American history—from hanging to electrocution, from the gas chamber to lethal injection—due to the resulting pressure on policy makers charged with enforcing the penalty humanely." *Id.* ¶ 10; *see also Press-Enterprise II*, 478 U.S. at 9 (concluding that openness enhances both actual fairness of criminal trials and an appearance of fairness "essential" to public confidence).

Unlike the State, news outlets have no interest in making executions seem more humane. Fretland Decl. ¶ 26l; *see also Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) ("media has less incentive to upset a verdict than" an involved party). The press provides a critically important account that can point out discrepancies with the State's record. Hamilton Decl. ¶¶ 14, 17. Professor Senat attests that the courts of Oklahoma are committed to keeping their doors "open to the press and its prying eyes and purifying pen." Senat Decl. ¶¶ 19, 28 (citing *Lyles*, 330 P.2d at 740). Judicial executions, the most severe punishment a State can impose, must be exposed to media scrutiny in order to bring to light any inconsistencies in the State's version of events.[3]

Finally, unfettered media access helps assure the public that the State's procedures are just. Without transparency, an unexpected outcome like Lockett's botched execution leads to an understanding that the system has failed at best, and at worst, has been corrupted. *See Richmond Newspapers, Inc.*, 448 U.S. at 571; Wells Decl. ¶ 27. Media

[3] There have been many cases in which authorities have given accounts that contradict eyewitness reports. Examples include the execution of Joseph Wood, in which Arizona officials reported that everything went according to protocol, but reporters noted that Wood took "660 gulps of air" and took almost two hours to die. *See* Wells Decl. ¶ 26.

reports detailing executions from the moment an imprisoned person enters a lethal injection chamber to after he has been announced dead gives the public confidence that the procedures are being carried out properly, and the State has nothing to hide.[4] The right of access is not only enjoyed by the public, but is shared by the accused. *Press-Enterprise II*, 478 U.S. at 7.[5] Media presence thus assures that the process will comply with constitutional standards. The same concerns that drove the Court to recognize the public's right of access to criminal trial proceedings require granting the public, by way of the press, an unhindered view of how the condemned is restrained, prepared for death, and treated during emergencies. *See Woodford*, 299 F.3d at 877. In fact, the Constitution creates an imperative for public access to execution procedures by way of the Eighth Amendment, which applies distinctly in the execution phase of a criminal proceeding.

Plaintiffs amply satisfy each of the six factors of the *Press-Enterprise* logic test. Allowing the press to report on the entire method of execution promotes more informed discussion of capital punishment and the public perception of justice. Exposing the process to public scrutiny thereby improves the administration of the death penalty.

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[4] Oklahoma has long recognized the nexus between open governance and the public's perception of fairness. Indeed, Defendant Patton himself recognizes the importance of public oversight. He personally called on the governor to conduct an external investigation of Lockett's execution, stating, "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." DOC Timeline. This is in keeping with other traditions of openness, such as the State's Open Meeting Act, enacted "not simply to prevent or punish deliberate violations, but to restore sadly sagging public confidence in government." Senat Decl. ¶ 12.

[5] Professor Senat's research demonstrates that in Oklahoma, "a public trial is not only a right of the accused, but also a *public* right." Senat Decl. ¶ 3.

d. The critical importance of death penalty oversight is sufficient to establish a right of access, even absent a historical tradition.

Even if the Court should find that Oklahoma's statutory grant of media access does not support a clear historical tradition of execution access, the uniquely heightened public importance in this particular proceeding is dispositive. As Justice Brennan explained, history is relevant because the right of access "has special force" when it carries the "favorable judgment of experience," but what is "crucial" in deciding where an access right exists "is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers, Inc.*, 448 U.S. at 589 (Brennan, J., concurring); *see also Press Enterprise II*, 478 U.S. at 10 n.3, (noting that right of access was applied to pretrial proceedings by state courts when the proceedings had "no historical counterpart," but the "importance of the…proceeding" was clear); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) ("lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access").[6]

[6] This view that the logic prong alone may be sufficient to support a right of access is shared by several Circuits. *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 n.2, 1027 (9th Cir. 2008) (if logic favors disclosure, "it is necessarily dispositive" even without historical experience); *Detroit Free Press*, 303 F.3d at 701 (brief historical tradition is "sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted"*); United States v. Simone*, 14 F.3d 833, 838–40 (3d Cir. 1994) (finding right of access to post-trial hearings because "logic counsels" that openness will "have a positive effect" and the "'experience' prong . . . provides little guidance"); *In re The N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (same, with no discussion of historic practices); *In re Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984) (finding "significant benefit to be gained" from access to pretrial proceeding with no long historical counterpart); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (right of access applies to pretrial hearings even though, "at common law, the public apparently had no right to attend pretrial criminal proceedings").

The Eighth Amendment's ban on cruel and unusual punishment provides a compelling constitutional logic for the right of access. The Supreme Court has recognized that the Amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This progressive standard requires both the public and the courts to have accurate information about the methods of execution and related outcomes. Full access to the process and experience of execution in Oklahoma allows for a more thorough evaluation of how and whether the State's procedure aligns with the Eighth Amendment.

Indeed, in her Declaration, Plaintiff Fretland states that if she had had full access to Lockett's execution, she would have reported on whether or not he seemed calm, how the team strapped him to the gurney, and whether he looked or sounded to be in pain. Fretland Decl. ¶ 24. The public has a right to know these details in order to determine whether they comport with modern sensibilities, and ultimately, whether current execution methods will continue. *See* Wells Decl. ¶ 9.

Whether a prisoner dies painlessly is a matter of great legal and political significance, and the only way to know if a person dies humanely is to have independent witnesses to the entire execution. *Id.* ¶¶ 10, 23. Professor Sarat demonstrates in his Declaration that journalistic reporting of executions has enabled policy makers to ensure that the death penalty keeps pace with public opinion. Sarat Decl. ¶¶ 11–18. The constitutional mandate to prevent cruel and unusual punishment requires public oversight of the death penalty. Just as the Sixth Amendment supports public scrutiny of trials, the Eighth Amendment provides a compelling need for a right of access to executions.

e. Plaintiffs have a right to witness the entire lethal injection proceeding.

Once a proceeding is found to be entitled to a presumption of access, "the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13–14 (internal citation omitted); *see also Globe Newspaper Co.*, 457 U.S. at 606–07. The burden lies with the government to demonstrate "that 'disclosure will work a clearly defined and serious injury,'" *In re Cendant Corp.*, 260 F.3d 183, 194 (3d. Cir. 2001) (citation omitted), and "only the most compelling reasons can justify non-disclosure." *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (quoting *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005)).

As the courts in *Woodford* and *Wetzel* properly held, vindicating the right of access to executions requires uninterrupted access "from the moment the condemned is escorted into the execution chamber." *Woodford*, 299 F.3d at 870–71; *see also Wetzel*, 906 F. Supp. 2d at 368–71 ("public perception of fairness and transparency concerning the death penalty…can only be achieved by permitting full public view of the execution," which must be "without auditory or visual obstruction"). Importantly, the State has the burden of specifically justifying any withdrawal of access as the least secretive method necessary to accomplish state interests. *See Press-Enterprise II*, 478 U.S. at 13–14. Such justification cannot be "conclusory," and the State must consider any alternatives that would accomplish its goals without sacrificing access. *Id.* at 15.

Defendants appear to claim the need for operational secrecy as justification for closing the blinds, both initially and after an execution is botched and requires additional

medical oversight. Defs.' Br. at 1 (seeking to avoid "intense scrutiny [of DOC employees] during the stressful and delicate stages of executions"). The State's stated interest in protecting the privacy of the execution team, Defs.' Br. at 4, can and must be addressed in narrowly curtailed ways that do not impinge on the constitutional right to witness an execution. Here, we know that Plaintiff Fretland and other members of the press *did* see a member of the execution team and no identification or other harm resulted; any such claim of harm is therefore conclusory. *See Woodford*, 299 F.3d at 881 (other opportunities for witnesses to see the execution team constituted "loopholes that undermine[d]…credibility of defendants' concerns for anonymity"). Nor has the State explained why, for example, having the team face away from the window or wear surgical masks common to the medical profession, are inadequate alternatives. As to auditory access, it beggars belief that there is *any* state interest in blocking audio of the entire execution proceeding. Plaintiff Fretland's reports of overhearing Lockett's moaning and speaking were integral to public reporting of Lockett's death.

Furthermore, scrutiny of DOC employees' actions is a benefit, not impediment, to the proper administration of the death penalty. *See Press-Enterprise II*, 478 U.S. at 8–9 (openness enhances government performance). Defendant's claim that scrutiny of the initial IV insertion procedure would impact employees' ability to perform their duties is unpersuasive. Indeed, in the *absence* of such scrutiny, Lockett's IV insertion procedure was performed improperly and caused his prolonged death. Nor is this unique; Prof. Radelet concludes, in "a majority [] of botched lethal injections, the error stems from the failure to properly insert the IV at the beginning of the procedure." Radelet Decl. ¶ 14.

Given the right of access' animating principle—that oversight *improves*, not hinders, government performance—IV procedures will benefit acutely from increased scrutiny.

IV. Plaintiff will suffer irreparable harm absent an injunction.

Plaintiffs' reports of the Lockett execution were irreparably damaged by Defendants' closure of the viewing shade, depriving the public record of firsthand accounts of the botched proceeding. This harm, moreover, will be imminently repeated if Plaintiffs do not receive the relief they seek, as Defendants maintain the right *both* to exclude Plaintiffs from witnessing initial IV procedures, *and* to close the viewing shade as they see fit. See Revised Protocol at Attach. D, 8–9. This "unquestionably constitutes irreparable harm," *Elrod*, 427 U.S. at 373 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)); *see also ACLU v. Johnson*, 194 F.3d at 1163 (curtailment of protected speech is sufficient showing of irreparable injury).

An injunction restraining Defendants from censoring botched executions in the future cannot correct the damage done to Plaintiffs' reporting or the public record. But by guaranteeing First Amendment access to the entirety of an execution, including the critical moments of injection and termination, this Court will prevent further irreparable harm to Plaintiffs' rights and to the public record of Oklahoma's execution process.

V. The balance of harms favors Plaintiffs.

The balance of harms weighs in favor of the Plaintiffs' and public's need for oversight of judicial executions, which even Defendants have acknowledged is in the public interest. *See* Defs.' Br. at 14. The risk to the State—that the public will be fully informed about the details of its administration of capital punishment— is not even a

legitimate state interest. It is virtually meaningless next to the harm that Plaintiffs, and the public, risk if the State is permitted to shroud executions in secrecy. As detailed above, the State has not yet offered any specific, non-conclusory reasons for barring access to the full execution proceeding. But the harm to Plaintiffs' constitutional rights is, by black letter law, irreparable and severe.

VI. An injunction serves the public interest.

Courts have recognized the significant public interest value in upholding First Amendment principles. *See Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1076 (10th Cir. 2001) ("Because we have held that Utah's challenged statutes also unconstitutionally limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest."); *Elam Constr., Inc. v. Reg'l Transp. Dist.,* 129 F.3d 1343, 1347 (10th Cir.1997) ("The public interest also favors plaintiffs' assertion of their First Amendment rights."). The public interest is served when media witnesses are not be subject to censorship by the State, or its executioners. Courts have thus decided that the press's access to execution proceedings in their entirety is protected by the Constitution.

An injunction preventing withdrawal of the right of access will ensure the damage done to Plaintiffs and, by extension, the system of public oversight, does not recur.

CONCLUSION

For the reasons detailed above, this Court should deny Defendants' Motion to Dismiss, and enter a preliminary injunction directing them not to curtail Plaintiffs' ability to fully witness execution proceedings.

Respectfully submitted,

___/s/__*Lee Rowland*_____
Lee Rowland*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2606

___/s/___*Brady Henderson*_____
Brady Henderson, OBA #21212
Ryan Kiesel, OBA #21254
ACLU of Oklahoma Foundation
3000 Paseo Drive
Oklahoma City, OK 73103
(405) 524-8511

Counsel for Plaintiffs
*Admitted *Pro Hac Vice*