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-	**Civil Case No. CIV-14-905-HE**
(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***.	**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and LCvR7.1(i), Plaintiffs file this Reply Brief in Support of their Motion for a Preliminary Injunction (Dkt. 23).

INTRODUCTION

Defendants argue that Plaintiffs' claims lack merit because Oklahoma already offers press sufficient access to executions—while at the same time defending the State's recent and alarming pattern of curtailing access without oversight or restraint. But the case law leads to the opposite conclusion: The fact that Oklahoma has consistently ensured the presence of media at executions since its statehood supports a constitutional right of access, which in turn ensures that such access is protected. The State recently took steps to make Oklahoma's execution process anything but transparent. It slashed the number of media witnesses; enacted a new Protocol formalizing a policy of closing the

viewing shade when executions go awry; and for the first time in its history, permitted in written regulations the *ad hoc* removal of media witnesses. A preliminary injunction will ensure that the State lives up to its statutory promises that media witnesses are an integral part of the execution process. Its newly-issued execution Protocol does not.

In arguing that public oversight of its actions constitutes an acute harm, the State has offered three inapposite anecdotes regarding backlash against outside contractors paid to provide execution resources. Defendants do not suggest that these revelations stemmed from execution *witnesses*—let alone those in Oklahoma. The bald assertion that the death penalty proves controversial for participating businesses falls short of the compelling, fact-based evidence required to justify excluding press from a government proceeding.

I. Plaintiffs Meet the Standards for Issuance of a Preliminary Injunction.

In their Motion for a Preliminary Injunction (Dkt. 23), Plaintiffs requested limited relief consisting of: 1) full visual and audio access 2) to the entire execution procedure 3) for the historical number of twelve media witnesses and 4) an injunction against any part of the revised Protocol inconsistent with that access. Contrary to Defendants' claims in their Response to Plaintiffs' Motion (Dkt. 35) ("Defs.' Br."), Plaintiffs have *not* requested that the State be preliminarily ordered to record video or audio of any execution. Defs.' Br. at 4. Yet, Defendants rely on the specter of this non-existent request to argue that the injunction is akin to the mandatory "live televising of an event." *Id.* To the contrary, the request is limited to asking this Court to enjoin the State from *reducing* the standard number of witnesses, *closing* the execution shade, or *terminating* audio feeds—retaining the same witness complement, curtain, and microphone in place for prior executions.

It is true that Plaintiffs' Motion also argues for an extension of access to initial IV insertion procedures. Yet all this change requires is for the State to lift the execution shade minutes earlier than it otherwise would. However, should this Court agree with Defendants that this is a "disfavored" injunction due to its alteration of the status quo, Plaintiffs still meet the test for the issuance of preliminary relief on all of their claims. *See ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999) (non-relaxed standard for injunctions). As Plaintiffs argued in their opening brief (Dkt. 24) ("Pls.' Br."), they meet either standard, as they demonstrate both a likelihood of success and irreparable harm.

Finally, Defendants do not acknowledge the increased tendency toward injunctive relief when First Amendment rights are at stake, given the near-automatic assumptions of irreparable harm and public interest. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Cmty. Commc'ns. Co. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 (10th Cir. 1981).

II. Plaintiffs Do Not Seek "Special Access;" They Seek to Vindicate Their Constitutional Rights.

Defendants have stated that the Oklahoma DOC has never provided the access that Plaintiffs seek to observe IV insertion procedures, and that this automatically defeats any right of access claim. Defs.' Br. at 6. But that conclusion is incorrect; otherwise, no right of access challenge—necessarily seeking access that has been foreclosed—would ever succeed. Yet, courts routinely apply access claims to proceedings previously shrouded in secrecy, so long as the history and/or logic prongs support this result. *See, e.g., Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 367 n.1 (M.D. Pa. 2012) (granting access to full execution proceeding); *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 n.2, 1027 (9th Cir.

2008) (granting access to plea colloquy transcripts); *United States v. Simone*, 14 F.3d 833, 838–40 (3d Cir. 1994) (finding right of access to post-trial hearings); *In re The N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (recognizing right of access to pretrial documents); *In re The Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984) (granting access to pretrial proceeding with no historical counterpart); *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (granting access to pretrial hearings even though "at common law, the public apparently had no right to attend pretrial criminal proceedings"). What Defendants characterize as "special access" is the very question before this Court: Are Plaintiffs entitled to access executions? If so, the burden is on the State to provide specific evidence that certain portions of that proceeding—undeniably among them the insertion of IV lines into the body of the condemned—create an acute harm if exposed to scrutiny.[1] As discussed below, the State has offered no such evidence. *See infra* at III.

Furthermore, the State argues that the press seeks "special access" because the general public is not allowed to witness every execution. But the test for whether the public has a right of access to government proceedings is not whether that access is the same or different between groups of observers, but rather, whether both experience and logic

[1] Defendants also suggest a laches-like defense to Plaintiffs' request to view IV procedures, noting that "If this restriction is truly an irreparable harm, it is one that has gone unchallenged…." Defs.' Br. at 6 n.1. While this may be true, it is not of doctrinal significance. As noted above, access claims are frequently granted after exclusion. Furthermore, the significance of these procedures, to Plaintiffs and the public, has increased dramatically after revelations that the State's phlebotomist was unable to find a viable IV insertion point. Okla. Dep't of Pub. Safety, Investigative Report 16 (Sept. 4, 2014) attached as Ex. 2 to Pls.' Mot. for Prelim. Inj. (Dkt. 34-2). As such, the IV insertion procedures are without a doubt of current and acute public importance and media interest.

demonstrate that the government must grant that access to members of the public at all. Oklahoma has had an unbroken history of requiring witnesses at each state execution since the procedures were moved from fully public spectacles at the turn of the nineteenth century, ensuring a consistent public presence for the purpose of government accountability. *See* Senat Decl. ¶¶ 22–28. Here, where space is significantly limited by design, the press serves as a vital proxy for the public's oversight of the death penalty. That oversight is of imminent constitutional import pursuant to the Eighth Amendment's bar on cruel and unusual punishment, which must be monitored against society's continually "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Without the presence of press witnesses, the public will have no way of knowing what goes on behind the closed doors of an execution room, where it entrusts the government with carrying out the most dire of punishments for criminal acts. Placing a curtain between the press and the execution chamber is the same as closing the doors to the execution room itself. The press serve as surrogates for the public[2] in relaying how quickly the executioners are getting the job done, how much pain the condemned seems to be experiencing, how the State is responding to problems during the execution process,

[2] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) ("By reporting about the government, the media are 'surrogates for the public.'"); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–91 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press…."); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 Stan. L. Rev. 927, 949 (1992) ("[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.").

among other issues. These questions cannot be dismissed as "special" journalistic curiosities; the Supreme Court has *mandated* the public know the answers to them in order to ensure our representative government is truly doing the public's bidding. *See id.*

III. The Irreparable Harm to Plaintiffs' First Amendment Rights Outweighs the "Harm" of Public Oversight over Oklahoma's Execution Process.

Defendants rest much of their opposition to injunctive relief on the theory that prohibiting oversight of initial IV procedures is necessary to protect the identities of "those escorting the offender…and those preparing the IV lines." Defs.' Br. at 7. In turn, this protection is required to prevent "a chilling effect on those that might participate in executions." *Id*. at 8. First, it is important to note that Defendants' claims of such harm do not apply to the majority of Plaintiffs' injunctive request: Namely, to retain twelve witnesses and enjoin the State from withholding audio and video access after the IV has been inserted. Furthermore, courts have considered identical claims of harm regarding initial IV-related procedures, and rejected them as conclusory. *See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 884 (2002). This Court should do the same.

Defendants express concern about identification of DOC employees: those who escort the offender or insert IV lines. Defendants provide no evidence that members of Oklahoma's execution team—or any State correctional staff—have been "chilled" by identification or public controversy. Instead, Defendants cite three events where outside contractors engaged in general commerce have received pushback for engaging in business contracts with the State to deliver execution-related services. *See* Defs.' Br. at 8-9; Exs. 1–3. Two of these instances did not occur in Oklahoma. *See* Exs. 1, 3. Most

critically, no incident cited by the Defendants relates in any way to disclosure *by witnesses* to an execution. It is not at all clear that access to witness the entire execution procedure creates a risk of identification of state officials on the execution team.

The State makes several conclusory claims about potentially less intrusive means of protecting the identification of executioners. In its response, the State claims that requiring medical professionals to wear surgical masks and turn away from the witness viewing window would not sufficiently hide their identities. Defs.' Br. at 7. Furthermore, the State declares, any mask or covering would necessarily be a "distraction or encumbrance" as an individual places an IV or institutes a cut-down procedure. *Id.* at 8. Defendants provide no evidence whatsoever of testing out these techniques or consulting with execution team members about their utility. The Supreme Court has established that proceedings to which the public has a right of access "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-Enter. Co. v. Superior Court,* 478 U.S. 1, 13–14 (1986) ["*Press-Enterprise II*"] (citing *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 502 (1984)). The court in *Woodford* recognized the "commonsense understanding that an individual wearing a surgical cap, mask and gloves—which, when worn together, cover the forehead, nose, cheeks, mouth and hands—cannot be identified with any meaningful degree of specificity." *Woodford,* 299 F.3d at 884–85; *see also Wetzel,* 906 F. Supp. 2d at 373 ("Defendants have not articulated a reason why the lethal injection team cannot take affirmative steps beyond wearing surgical garb to conceal their identifying characteristics."). Defendants present no

evidence as to why this Court would not reach the same conclusion. The *Woodford* court also found that surgical attire would not impede execution staff in performing their duties, including insertion of an intravenous line or in the event of a struggle with the condemned. *See Woodford,* 299 F.3d at 885. The State's claims of harm are unsupported, conclusory, and dismissive of the press' right to report on these critical initial procedures.

Finally, Defendants claim that the reduction of media witnesses is required by "[l]ogistical concerns." Defs.' Br. at 7. Yet the State has not provided specific evidence to support this claim. The State provides a Declaration stating that recent renovations to the execution chamber required changes to the old "witness area [which] accommodated twenty-five chairs and the new design now allows for nineteen." Crow Decl. in Supp. of Defs.' Br. (Dkt. 34-5), ¶ 5. That is a reduction of six witness chairs. The State has not explained how this reduction of **six** witnesses requires the State to provide **seven** fewer chairs to members of the press. Further, even if the State had limited its reduction to impact the media by 100% (that is, by six chairs), it must demonstrate that such limitations are essential and narrowly-tailored. *See Press-Enterprise II*, 478 U.S. at 13–14. The State has not justified why *all* of the remaining chairs must be reserved for other attendees, even if the other chairs are not actually occupied during an execution.

The State has offered a vague assertion that other witnesses are required to attend executions, and that "[m]edia are invited, to the extent that space is available." Defs.' Br. at 9. That is an inaccurate statement of state law, which provides that "reporters from recognized members of the news media *will* be admitted." Okla. Stat. Ann. tit. 22, § 1015(B) (emphasis added). The statute does not, in fact, say that media access may be

limited by available space; on the contrary, the statute specifically notes that seating may be limited as space allows for government officials, *Id*. at (C) (permitting access by closed-circuit television); and for members of the victims' families, *Id.* at (D) (same), but does not include the same language with regard to media. While the juggling of interested witnesses in a limited space is undoubtedly a difficult task, the State displayed no nuance or regard for the rights of the press when it summarily removed over half of their seats.

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.' Mot. to Dismiss (Dkt. 32) at 13, Ex. 3. By history and tradition, this number has been set at twelve. Senat Decl. ¶¶ 25–26. Yet Defendants chose to reduce the witness seating area without regard to this history. And its administrative decisions about when and to whom access is granted during executions are of constitutional moment. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) ("[T]hough 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."). The right of access requires the State to do more to accommodate the need for oversight of its death penalty.

On the other hand, the harm to Plaintiffs in coverage of any individual execution is concrete and irremediable. Each execution is an event of public significance, and the loss of an ability to report on any individual execution does grave harm to the public record. Without Plaintiffs' reporting on the Lockett execution, for example, the public would only have been informed of the State's rosier version of the Lockett execution. *See* Wells

Decl. ¶ 26. The State's assertion that "Plaintiffs' access would be no more limited than it has ever been," does not match with the reality that it has cut off visual and auditory access to the press in an unprecedented manner. Defs.' Br. at 6. Logistical concerns cannot serve as pretexts for limitations that violate the First Amendment. Permitting the State to lower the execution blind when another execution goes wrong ensures that the public will never hear about the gruesome details of a botched execution—by design. Further, the initial IV procedures have a renewed newsworthy salience in light of Lockett's autopsy results, which indicate that the flaws in his execution process stemmed from a botched IV insertion. *See* Fretland Decl. ¶ 23–24. Without access to a full and objective account of events free of government obstruction, public discussion of policy is severely curtailed. This "unquestionably constitutes irreparable injury." *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).

CONCLUSION

For the reasons detailed above, this Court should grant Plaintiffs' Motion for a Preliminary Injunction directing Defendants not to curtail Plaintiffs' ability to fully witness execution proceedings during the pendency of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2014, I did serve the above Motion for Preliminary Injunction through the Court's ECF filing system pursuant to Fed. R. Civ. Proc. 5(b)(2)(E) to the following counsel for all Defendants:

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