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.

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

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DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendants Robert Patton and Anita Trammell, pursuant to Fed. R. Civ. P. 12(b)(6), respectfully submit their Motion to Dismiss Plaintiffs' Complaint and Brief in Support. This Court should dismiss Plaintiffs' Complaint because Plaintiffs lack standing, Defendants have Eleventh Amendment immunity and Plaintiffs fail to state a claim upon which relief may be granted.

INTRODUCTION

Plaintiffs are media entities and individuals that seek to expand their access to executions in Oklahoma by claiming a First Amendment right to that access. Plaintiffs seek declaratory and injunctive relief in order to gain unprecedented privileges to witness preparation of the condemned for execution, encompassing the strapping of the condemned to the gurney and the insertion of IVs in the condemned. Plaintiffs seek to expose employees of the Oklahoma Department of Corrections ("ODOC") to intense scrutiny during the stressful and delicate stages of executions. Defendants request that this Court recognize that Plaintiffs have neither standing in part, nor a claim on the whole, and ask that this Court dismiss Plaintiffs' Complaint.

SUMMARY OF THE CASE

Plaintiff Oklahoma Observer is an Oklahoma news outlet which contends that it regularly reports on death penalty issues and relies on eye witness accounts of the death penalty in its reporting. Plaintiff Arnold Hamilton is the editor of the Oklahoma Observer. The Guardian US is a national digital news service which claims that it has reported on the death penalty. Plaintiff Katie Fretland is a journalist that contracts with

the Oklahoma Observer and the Guardian U.S. to report on death penalty matters in the State of Oklahoma. [Doc. 1 at 7-8]. Plaintiff Fretland was among media individuals selected by lottery to witness to the execution of Clayton Lockett in April of 2014. *Id*. at 8. After Plaintiff Fretland and other media members were escorted into the viewing room, the shade was raised and Plaintiff Fretland witnessed Inmate Lockett on the gurney, with IVs already inserted. *Id.* When complications arose, the shades were again lowered, blocking witnesses' view. *Id*. Plaintiff Fretland claims that she intends to enter the lottery again to witness future executions in the State of Oklahoma. *Id*. at 9. The remaining Plaintiffs allege that they cannot fully report on the death penalty proceedings unless they have access of all activity in the death chamber from the moment the condemned enters until he leaves.

STANDARD FOR DISMISSAL UNDER FED. R. CIV. P. 12(B)(6)

A plaintiff must give a "short and plain statement of the claim showing that the pleader is entitled to relief" under Fed. R. Civ. P. 8(a)(2). This statement does not need to be a detailed list of factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, to survive a motion to dismiss, the plaintiff cannot merely give broad "labels and conclusions, and a formulaic recitation of the elements of a cause of action. . . ." but instead must plead a set of facts that at least makes the claims plausible, and raises the "right of relief above the speculative level." *Id*. While a court must accept allegations in a complaint as true, this principal does not apply to legal conclusions, conclusory statements, or recitals of the elements of a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts will only give the presumption of truth to factual

allegations, and will look to those allegations to determine whether the plaintiff has stated a plausible claim. *Kan. Penn. Gaming, L.L.C. v. Collins*, 656 F.3d 1210, 1219 (10th Cir. 2011).

PROPOSITION I: PLAINTIFFS LACK STANDING TO CHALLENGE THE POSSIBILITY OF BLINDS BEING LOWERED DURING EXECUTIONS

If a party lacks constitutional standing, federal courts lack jurisdiction. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009). To establish standing, a plaintiff must show an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1984). The injury must be "concrete and particularized" and "actual or imminent," rather than "conjectural or hypothetical." *Id*.

In *Lujan*, the Supreme Court addressed injury in fact where an environmental group sued the Department of the Interior for not applying certain requirements of the Endangered Species Act to specific foreign projects that federal agencies were funding. *Id*. at 557-59. The environmental group complained that the projects would lead to greater levels of extinction of endangered species in the area. *Id*. at 562. The group stated that two of their members had previously visited the area, observed certain endangered species, and intended to return again. *Id*. at 563.

The Supreme Court held that this indeterminate intent to return to the area was not enough to show an actual or imminent injury. *Id*. at 564. The Court quoted an earlier Supreme Court case, stating that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief…if unaccompanied by any continuing, adverse effects." *Id*. (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983))

(further citation omitted). Because the claimed injury was not actual or imminent, the Supreme Court concluded that the group failed to show injury. *Id*. at 567.

Plaintiffs are in a similar predicament regarding standing. They cannot show injury in fact for at least part of their claims. To provide a clear analysis of Plaintiffs' lack of standing, Defendants present Plaintiffs' claims as two distinct issues. First, Plaintiffs complain that they will not see the beginning stages of the execution procedure, which they define as starting the moment the inmate enters the chamber. Second, Plaintiffs complain that ODOC officials may draw the curtains prior to the completion of the execution.

The second complaint is too attenuated for Plaintiffs to demonstrate that injury is actual, imminent or threatened. As opposed to the complaint regarding the procedures at the beginning of the executions, which have been common practice for ODOC in recent executions, the lowering of the blinds prior to the inmate's death is a rare occurrence. In fact, Plaintiffs claim that they do not know of any previous instance where the shades have been lowered before the end of an execution. Of the numerous executions that ODOC has carried out, Plaintiffs are unable to point to any other instance where ODOC has blocked access to the press. [Doc. 1 at 15]. In the case of the Lockett execution, the warden ordered the blinds lowered in response to problem which ODOC has never before encountered. Due to the need for the paramedic and others to enter the room and assist, the blinds were lowered to protect those individuals' identities. This was consistent with state law, which requires the identities of execution team members to be confidential. OKLA. STAT. tit. 22 §1015. There is no indication from Plaintiff that the problem

encountered will ever reoccur. Therefore, Plaintiffs' speculation that ODOC will lower the shades again is neither actual nor imminent, and is unsupported by any pattern of behavior, other than one isolated instance. One isolated instance of past action does not establish an actual or imminent injury. Plaintiffs have not presented an injury in fact, and, therefore, lack standing to challenge the *possibility* that shades may be lowered prior to the completion of an execution.

Plaintiffs' complaints regarding what portions of the execution they may or may not see are too attenuated and amorphous to grant them legal standing in this case. Therefore, this Court should dismiss the allegations in Plaintiffs' Complaint regarding the lowering of the blinds prior to the death of the condemned.

PROPOSITION II: DEFENDANTS HAVE ELEVENTH AMENDMENT IMMUNITY

For essentially the same reason that Plaintiffs lack standing on the lowering of the blinds, Defendants also have Eleventh Amendment immunity regarding that issue. In order to sue a state official for prospective injunctive relief, the plaintiff must allege an ongoing violation of federal law. *Ex Parte Young*, 209 U.S. 123 (1908). The Defendants maintain their immunity when Plaintiffs are seeking relief which is retrospective, that is, relief for a past violation. *Elephant Butte Irr. Dist. of New Mexico v. Department of Interior*, 160 F.3d 602, 607–08 (10th Cir.1998). Remedies are considered prospective when designed to end continuing violations of federal law and to protect the federal interests. *Green v. Mansour*, 474 U.S. 64, 68 (1985). Relief is considered retrospective when it is designed to compensate individuals for past violations or to directly encourage

compliance with federal law through deterrence. *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986).

In the case at bar, Plaintiffs attempt to deter state officials from ever lowering the blinds before the condemned is pronounced dead, or at least until a death sentence is called off or postponed. Plaintiffs ask for this relief based on one incident which occurred in the last century. Plaintiffs have not demonstrated that there is any threat of an ongoing violation and using a § 1983 claim as a deterrent to future events is improper. This Court must dismiss Plaintiffs' claims in regards to the lowering of the blinds prior to the death of the condemned.

PROPOSITION III: THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS TO EXECUTIONS

1. The Press Generally does not have a First Amendment Right of Access to Prisons

Plaintiffs' position that they possess a special First Amendment entitlement to observe execution procedures is widely unsupported by case law. As a general rule, the news media, "have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell v. Procunier*, 417 U.S. 817, 834 (1974). The Constitution in no way requires that the government reveal information or procedures to the press that are not also available to the public. *Id.* The Supreme Court has never found any, "First Amendment guarantee of a right of access to all sources of information within government control." *Houchin v. KQED, Inc.*, 438 U.S. 1, 9 (1978). In fact, with regards to executions specifically, the Supreme Court has actually indicated that state

officials could *exclude* media representatives, "because [t]hese are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions…." *Holden v. Minnesota*, 137 U.S. 483, 491 (1890). While *Holden* was mainly concerned with *ex post facto* issues, the bedrock principal is consistent with later precedent: the press only possesses First Amendment access rights to the same extent as the general public. The press does not enjoy the type of special access it seeks in this case.

The Oklahoma Legislature has not opened executions to the general public. Instead, the Legislature has limited execution witnesses to specific, discreet groups. OKLA. STAT. tit. 22, § 1015. In addition, the Legislature has given the warden discretion regarding the approval of certain witnesses, such as members of the news media and individuals that serve supporting or professional roles to immediate family members. *Id.* These limitations show that executions are not open to the public; therefore, the press does not have a First Amendment right of access to prisons. Rather, the press has state-granted, qualified permission to be present at the executions. While Plaintiffs may not agree with the extent of their state-granted access, that disagreement does not implicate the protections of the First Amendment. Thus, Plaintiffs' allegations of a right of access are unsupported, and should be rejected by this Court.

2. *Richmond Newspapers* and *Press-Enterprise Co.* do not Provide the Proper Test for this Issue

The Plaintiffs' Complaint relies heavily on the "experience and logic" test set out in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980), *Globe Newspaper v. Superior*

Court, 457 U.S. 596 (1982), and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). However, these cases are inapplicable to the situation at bar.

In *Richmond Newspapers*, a news media outlet brought suit against the State of Virginia after a trial court judge excluded the press and public from a murder trial. 448 U.S. 555, 559-63 (1980). The Supreme Court examined the long, consistent history of open trials, and concluded that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id*. at 573. The Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment…." *Id*. at 580.

The Court buttressed its reasoning for finding an implied guarantee of access to criminal trials in *Globe Newspaper Co.*, stating that the, "right of access to criminal trials plays a significant role in the functioning of the judicial process and the government as a whole." 457 U.S. 596, 606 (1982). Finally, in *Press-Enterprise Co.*, the Supreme Court congealed those interests into the "experience and logic" test. 478 U.S. 1, 8 (1986). The Supreme Court considered whether the public's access to criminal trials extended to preliminary hearings. *Id*. at 4-6. The Court stated that, "[i]n cases dealing with the claim of a First Amendment right of access to *criminal proceedings*," the Court would apply the considerations of experience and logic. *Id*. at 8. The Court concluded that the public should be allowed access to criminal judicial proceedings if those proceedings are held in places that have, "historically been open to the press and general public" and "public access plays a significant positive role in the functioning of the particular process in question." *Id*. at 8-9.

The Tenth Circuit has not addressed the issue of media access to executions, but has addressed the utility of the "evidence and logic" test in situations outside of criminal trial proceedings. *Smith v. Plati*, 258 F.3d 1167, 1178 n.10 (10th Cir. 2001); *United States v. McVeigh*, 119 F.3d 806, 811-12 (10th Cir. 1997); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994). In fact, when a media individual argued that the "experience and logic" test applied to his attempts to obtain public information regarding a university's athletic programs, the Tenth Circuit reiterated that because the individual's claims, "do not involve a claim of denied coverage of a criminal in particular, or any trial proceeding in general, we do not find those cases particularly relevant." *Smith*, at 1178 n. 10. Therefore, the case law in the Tenth Circuit has restricted the "experience and logic" test to apply only in the context of criminal trial proceedings, or *possibly* trial proceedings in general.

The "experience and logic" test is not the proper test regarding public access to executions. The Supreme Court has never expanded that test outside of the bounds of criminal trial proceedings. Further, the Tenth Circuit has also never expanded the test outside of criminal trial proceedings, and has found the test not "particularly relevant" to access claims that do not involve trial proceedings. Plaintiffs are asking this Court to expand the reach of this test to cover other government functions, based only on a non-binding decision from the Ninth Circuit.

The Ninth Circuit case that Plaintiffs rely on is an outlier in First Amendment jurisprudence and this Court should decline to follow that decision's logic, as has at least one other court. *See*: *Arkansas Times, Inc. v. Norris*, 36 Media L. Rep, 2008 WL 110853,

*3 (ED Ark. 2008). (Exhibit 1). The Ninth Circuit's logic leads to consequences that stand contrary to Supreme Court precedent. In *California First Amendment Coalition v. Woodford*, the Ninth Circuit found that there is a First Amendment right, based on the experience and logic test, to view an execution. 299 F.3d 868, 874-75 (9th Cir. 2002). The Ninth Circuit did not analyze how executions fit into the framework of the criminal proceedings, but merely decided that such proceedings extended to the execution of prisoners. *Id*.

The Ninth Circuit emphasized that the Supreme Court never flatly held that there was no First Amendment right to access prisons, only that the press' rights were co-extensive with the public's right. *Id*. However, this ignores the fact that the public's right is lawfully constricted by prison regulations. The Supreme Court has also never held that the press or public have a First Amendment right or access that trumps the regulations of the prison officials. *Houchins v. KQED, Inc.* 438 U.S. 1, 9 (1978) (neither the press nor the public have a right to enter prisons and take moving or still pictures of inmates); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 845-48 (1974) (visitation restrictions did not violate the First Amendment); *Pell v. Procunier*, 417 U.S. 817, 825-26 (1974) (visitation restrictions did not violate the First Amendment).

Further, the Ninth Circuit's expansion of the concept of "criminal proceedings" to include executions leads to results contrary to the Supreme Court's precedent. If the punishment of an offender was equivalent to the trial of the accused, it raises the possibility that all prison sentences would be open to the general public and press. The Supreme Court, without any mention of the "experience and logic" test, has already

repeatedly held that the press has no First Amendment right of access to prisons besides the general right given to the public. The Supreme Court has also never held that the public has a right that trumps prison regulations. Therefore, to open up the possibility of a First Amendment right to specifically observe prison sentences, as part of the broadly defined "criminal proceeding," is in conflict with Supreme Court precedent.

The "experience and logic" test is inapplicable to executions of sentences in general, and to executions of the death sentence in particular. The Supreme Court has never applied the "experience and logic" test outside of the context of criminal trial proceedings or preliminary proceedings. The Tenth Circuit has specifically stated that the "experience and logic" test is irrelevant outside the context of trial proceedings. The Ninth Circuit's tangential expansion of the "experience and logic" test will lead to new rights that fly in the face of Supreme Court precedent. This Court should reject the premise that the "experience and logic" test applies in this instance, and instead rely on the guiding principles that the Supreme Court has *actually* established for access to prisons and prison operations.

3. Even if the "Experience and Logic" Test Applies, Plaintiffs cannot Establish a Right of Access Under that Test

a. Executions are not historically open to the press and general public

Plaintiffs allege in conclusory fashion that public executions have been historically open to the public. This conclusion, however, requires limited and insufficient definitions of both "historical" and "public."

While Plaintiffs opine that history confirms the openness of executions, the reality is that there is no consistent historical precedent. When analyzing the "experience" factor, the Supreme Court has used operative phrases such as "near uniform practice," "constant," and "unbroken, uncontradicted history." *Press-Enterprise Co.*, at 11; *Richmond Newspapers*, at 566, 573. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in *In re Oliver* [citation omitted], the presumption was so solidly grounded that the Court was 'unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.'" *Globe Newspaper Co.*, 457 US at 605. The Plaintiffs' definition of "historical tradition" regarding executions cannot claim the same consistent pedigree like those in the above cited Supreme Court cases. Instead, the history of public executions is irregular and inconsistent, and cannot provide a logical "traditional experience."

While many executions early in history, including in the United States, were open to the public, this fact has not remained constant. In fact, the Ninth Circuit admitted that in 1937, California ended its practice of "town square" executions, and turned the executions into "private" events. *Cal. First. Amendment Coal.* at 875. The Washington Supreme Court has held that the public has no state constitutional right to attend executions. *Halquist v. Dept. of Corr.*, 783 P.2d 1065 (Wash. 1989). Arkansas declared its executions to be private, rather than public. ARK. CODE ANN. § 16-90-502.

Oklahoma, since statehood, has never allowed public execution. Section 2279 of Criminal Procedure Code of 1908 states that executions must take place "within the walls or yards of a jail…or some convenient *private* place in the county." (Emphasis added) (Exhibit 2). In fact, media representatives were not actually allowed to witness executions until 1951. 1951 Okla. Sess. Law. Ch. 17 § 1. (Exhibit 3). Section 2280 of the Criminal Procedure Code of 1908 only provided for twelve reputable citizens to witness the execution. (Ex. 2). Oklahoma does not have a history of public executions. Instead, the State has consistently directed that executions be private, and only limited individuals were allowed to witness those executions. This is a stark contrast to **criminal trials**, which historically had a completely open policy. *Richmond Newspapers*, at 564-75.

Thus, contrary to Plaintiffs' assertions, executions are not historically open events on equal footing as proceedings in criminal trials. Rather, the history surrounding public executions has been mercurial, with recent history trending towards the private nature of executions.

Plaintiffs further muddle the definition of the "public." Plaintiffs seem to claim that by opening executions up to a limited, restricted subset of individuals, the State has somehow made executions a public event. The fact that individuals are allowed to attend executions does not make it open to the public, any more than allowing guests at any private event would make the event public. "Private" does not mean devoid of witnesses, it means limited to certain witnesses. Webster's defines private as, "intended for or restricted to the use of a particular person, group or class." http://www.merriam-

webster.com/dictionary/private (accessed September 5, 2014). While a criminal trial is generally open to any and all comers (public), executions are open only to those specifically allowed by law (private). Therefore, Plaintiffs' access claims would fail on the experience prong of the "experience and logic" test. *See*: *Arkansas Times, Inc. v. Norris*, 36 Media L. Rep, 2008 WL 110853, *3 (ED Ark. 2008).

b. Public access to executions does not play a particularly positive role in the actual functioning of the process

The Ninth Circuit actually described crowds that gathered for public executions in old England as "large and disorderly." *Cal. First Amendment*, at 875. It is common sense that the ignited passions and tempers of the public, witnessing the executions of the worst of criminals, typically leads not to a rational discussion of the death penalty among cooler heads, but rather a scenario of contention and disorder, especially when considering the fractious nature of the death penalty debate. The State of Oklahoma has recognized this reality, and has sought to strike an appropriate and effective balance between the importance of public debate and discussion, and the interests of preserving the dignity and security of executions. By limiting access, the State has prevented the disorderly mobs of the past while still affording the public the opportunity to understand and debate the nature and method of executions.

Plaintiffs claim that they cannot provide the public with thorough or objective reporting absent the extensive access they seek. [Doc. 1 at 2]. Regardless of the merit of this allegation, it fails to create a logical nexus between the media's access to executions and their rights under the First Amendment. The Supreme Court has held that "the right

to speak and publish does not carry with it the unrestrained right to gather information…For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). The D.C. Circuit has stated that the First Amendment does not, "create any per se right of access to government property or activities simply because such access might lead to more thorough or better reporting. *JB Pictures, Inc. v. Dept. of Defense*, 86 F.3d 236, 238 (D.C. Cir. 1996).

Plaintiffs' aspiration of thorough reporting does not create a First Amendment right to access executions. Even if this Court accepted Plaintiffs' premise that keeping the viewing window of an execution chamber open for the duration of the entire process is a good or desirable idea, "[w]e must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment." *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978). Access to executions is not constitutionally commanded by the First Amendment.

Plaintiffs' predictions of better reporting are merely claims of what they consider good or desirable. They do not show that public access, in general, provides a particularly positive role in the actual functioning of the process. While the Plaintiffs appear to attempt to separate their interest from the interest of the general public, the Supreme Court clearly forecloses any such separation.

Further, Plaintiffs' broad claims that courts rely on objective reports on executions is a severed misrepresentation of case law. While some courts may rely on eyewitness testimony, most courts do not credit eyewitness testimony of past executions as firm evidence that a protocol violates the Eighth Amendment. *See Jackson v. Danberg*, 656 F.3d 157, 163, 163 n.6 (3rd Cir. 2011) (eyewitness testimony is equivocal, and not affirmative evidence that drugs fail to render inmate unconscious); *DeYoung v. Owens*, 646 F.3d 1319, 1325-27, 1327 n.5 (11th Cir. 2011) (rejecting evidence of previous executions as evidence of suffering); *Chavez v. Palmer*, 14-CV-110-J-39JBT, 2014 WL 521067 at *13-14 (M.D. Fla. Feb. 10, 2014) (eyewitness testimony is insufficient to establish suffering); *Sawyer v. Whitley*, 772 F.Supp. 297, 305, 306-08 (E.D. La. 1991) (not discussing the lay eyewitness accounts); *Malicoat v. State*, 137 P.3d 1234, 1238 (Ok. Crim. App. 2006) (there was no way for the court to determine that the anecdotal eyewitness evidence was accurate or signified anything with regard to the inmate's consciousness. The court refused to speculate as to whether mistakes were made in past executions); *but see Cal. First. Amendment Coalition v. Woodford*, 96-CV-1291-VRW, 2000 WL 33173913 at *9 (N.D. Cal. July 26, 2000); *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994); *Jones v. Butterworth*, 695 So.2d 679, 680-82 (Fla. 1997).

Contrary to Plaintiffs' claims that their reporting serves as the bulwark to preserve the integrity of the Eighth Amendment, case law reveals that courts view such eyewitness testimony as speculative, equivocal, and generally unhelpful with regards to whether an inmate suffers from the execution. The general lack of utility of the salacious details of an execution shows that press presence does not play a particularly positive role worthy

of a First Amendment right of special access. Because press or public access to executions does not play any particularly positive role, Plaintiffs' claims fail the "logic" prong of the "experience and logic" test as well.

CONCLUSION

Plaintiffs fail to state a claim upon which relief can be granted. Other than the Ninth Circuit, no court has held that the press, or public, has a First Amendment right to view executions. Therefore, Plaintiffs' First Amendment claims regarding the viewing of executions are baseless, and should be dismissed. Further, Plaintiffs' suggested use of the "experience and logic" test is not applicable with reference to executions. Finally, even if this Court applied the "experience and logic" test, Plaintiffs' claims still fail, as executions have not been traditionally open in Oklahoma, nor does the presence of the press play a particularly positive role in the actual functioning of the process. These failings preclude Plaintiffs' requested relief, including the request for audio and video recordings of executions. Because Plaintiffs have failed to state a First Amendment claim, this Court should dismiss their Complaint.

Respectfully submitted,

/s/M. Daniel Weitman

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September 2014 I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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