

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

The Appeal, Inc.

Plaintiff,

v.

TYRONE OLIVER, Commissioner of the Georgia
Department of Corrections; SHAWN EMMONS,
Warden of the Georgia Diagnostic and
Classifications Prison, and CHRISTOPHER M.
CARR, Attorney General of the State of Georgia,

Defendants.

Case No. 24CV003010

PLAINTIFF'S EMERGENCY MOTION FOR INTERLOCUTORY INJUNCTION
AND TEMPORARY RESTRAINING ORDER
AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to O.C.G.A. §§ 9-11-65 and 9-5-1, Plaintiff The Appeal, Inc. files this emergency motion for an interlocutory injunction and temporary restraining order in order to prevent it and the public from suffering irreparable injury.

INTRODUCTION AND SUMMARY

There is perhaps no greater exercise of governmental power than the State taking the life of one of its own citizens. Yet in Georgia, this exercise—which the State intends to resume on March 20, 2024, after a four-year pause—is shrouded in unconstitutional secrecy. Defendants arbitrarily restrict witnesses from accessing key components of Georgia’s execution process, leaving critical gaps in the information that the media—and, in turn, the public—receive about a punishment that stands alone in its severity and in its controversy. These restrictions violate fundamental constitutional rights of Plaintiff and of the public and necessitate urgent action by this Court. Plaintiff asks the Court to grant an interlocutory injunction and temporary restraining order so that it and the public are accurately informed regarding what occurs during the scheduled March 20 execution and any subsequent execution, thereby helping to ensure that this exercise of tremendous governmental power is carried out within the confines of state and federal law.

Defendants’ obstruction violates Article I, Section 1, Paragraph V and Paragraph XI of the Georgia Constitution and the First Amendment of the United States Constitution, all of which guarantee a public right of access to the execution process. The United States Supreme Court has long held that the First Amendment guarantees a right of access to certain governmental proceedings based on the principle “that a major purpose of the First Amendment was to protect the free discussion of governmental affairs.” *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 604 (1982). Free speech, therefore, “carries with it some freedom to listen.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). Without access to information, free speech holds little meaning, leading to the logical conclusion that the First Amendment includes a “right to

‘receive information and ideas.’” *Id.* (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). In other words: “[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). And the Georgia Constitution, for its part, guarantees that “[n]o law shall be passed to curtail or restrain the freedom of speech or of the press” and that “every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.” Ga. Const. Art. 1, § 1, ¶ V. The Georgia Supreme Court has characterized this provision as “provid[ing] even broader protection of speech than the First Amendment.” *Statesboro Pub. Co. v. City of Sylwania*, 271 Ga. 92, 95 (1999).

The Georgia Constitution also guarantees an even more expansive right of public access to criminal proceedings than its federal counterpart. *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 578 (1982) (“Georgia law, as we perceive it, regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law.”); *see also State v. Miller*, 260 Ga. 669, 671 (1990) (noting that the “1983 Constitution of Georgia provides even broader protection” than does the already “broad umbrella” of the federal First Amendment). The robust speech protections guaranteed by the Georgia Constitution, together with the steadfast right of public access to criminal proceedings afforded by Georgia law, further establish the public’s right of open access to executions conducted in Georgia.

Defendants’ choice to flaunt these constitutional protections is one that necessitates this Court’s action, and urgently, as the State intends to carry out an execution on March 20, 2024. Given the looming constitutional harm to Plaintiff and the public and this Court’s broad discretion to prevent that harm by issuing interlocutory injunctive relief, Plaintiff respectfully urges this Court to do so.

REQUEST FOR EMERGENCY TREATMENT

Plaintiff requests expedited treatment of this motion under Superior Court Rule 6.7. After a more than four-year pause in executions, Defendants are now preparing to carry out an execution in less than two weeks. The State obtained an execution warrant for Mr. Willie Pye on February 29, 2024, and set his scheduled execution date for March 20, 2024. Urgent action is needed to prevent Defendants from unconstitutionally obstructing access to their planned March 20 execution of Mr. Pye. Plaintiff therefore respectfully requests that the Court give this motion expedited treatment and issue a rule nisi setting a hearing on the motion as soon as possible.

STATEMENT OF FACTS

I. Defendants Currently Restrict the Public Right of Access to Executions.

Defendants conduct executions pursuant to the Georgia Department of Correction's ("GDC") Lethal Injection Procedures (the "LI Procedures," attached to the Complaint as Exhibit 1), which impose various and arbitrary restrictions on media witnesses' access to executions. Compl. ¶¶ 16-48.

Defendants prohibit any witness access to the tasks performed in the two hours leading up to an execution, which include delivery of the lethal injection chemicals to the Chemical Room (marked as Room "D" on Diagram 1 below); the IV Team's check of the execution equipment and instruments; preparation of syringes by designated staff members; and a test of the heart monitor to be used on the condemned. Compl. ¶¶ 20, 21. Defendants permit only a single Media Monitor to visually observe the final preparatory steps taken before the lethal injection is administered, which are often the most critical components of the execution process. Defendants require the Media Monitor, when possible, to be from the county where the crime giving rise to the death sentence occurred, Compl. ¶ 26, which frequently results in a reporter who is inexperienced in observing and reporting on executions serving as the sole source of contemporaneous information about critical

steps in the execution process. Compl. ¶ 29. These steps include bringing the condemned prisoner to the Execution Chamber, securing the prisoner to the gurney, and establishing intravenous access to the prisoner (hereinafter referred to as “the Preparation of the Condemned”). It is during the establishment of—or attempt to establish—IV access that complications regularly arise in lethal injections. *See* Compl. ¶ 23 (In fact, it was after several failed efforts to complete this step that the State of Idaho called off a botched execution just two weeks ago.¹) The Media Monitor observes from the Witness Room (marked as Room “A” on Diagram 1 below) through a glass pane into the Execution Chamber (marked as Room “B”) where the Preparation of the Condemned is taking place. When Georgia executions were previously carried out by electrocution, all media witnesses—not just a single Media Monitor—were allowed to view the final preparatory steps of bringing the condemned prisoner into the room and strapping the prisoner to the electric chair. Compl. ¶ 28.

¹ *Botched execution of serial killer in Idaho puts focus on capital punishment secrecy laws*, The Associated Press (Mar. 4, 2024), https://www.idahostatejournal.com/news/national/botched-execution-of-serial-killer-in-idaho-puts-focus-on-capital-punishment-secrecy-laws/article_d644a4db-61f7-5f3e-9159-b05b5bd4c8f7.html; *see also* Juan A. Lozano, *Report: Executions continued decline but many ‘botched’*, The Associated Press (Dec. 16, 2022), <https://apnews.com/article/capital-punishment-18a24913cdf8ab8bae1cb03e329365e0> (“[S]even of the 20 execution attempts in the U.S. [in 2022] were visibly problematic or took an inordinate amount of time.”); *Alabama pausing executions after 3rd failed lethal injection*, The Associated Press (Nov. 21, 2022), <https://apnews.com/article/alabama-executions-kay-ivey-fd61fdbef131c192958758ae43a8c34a>.

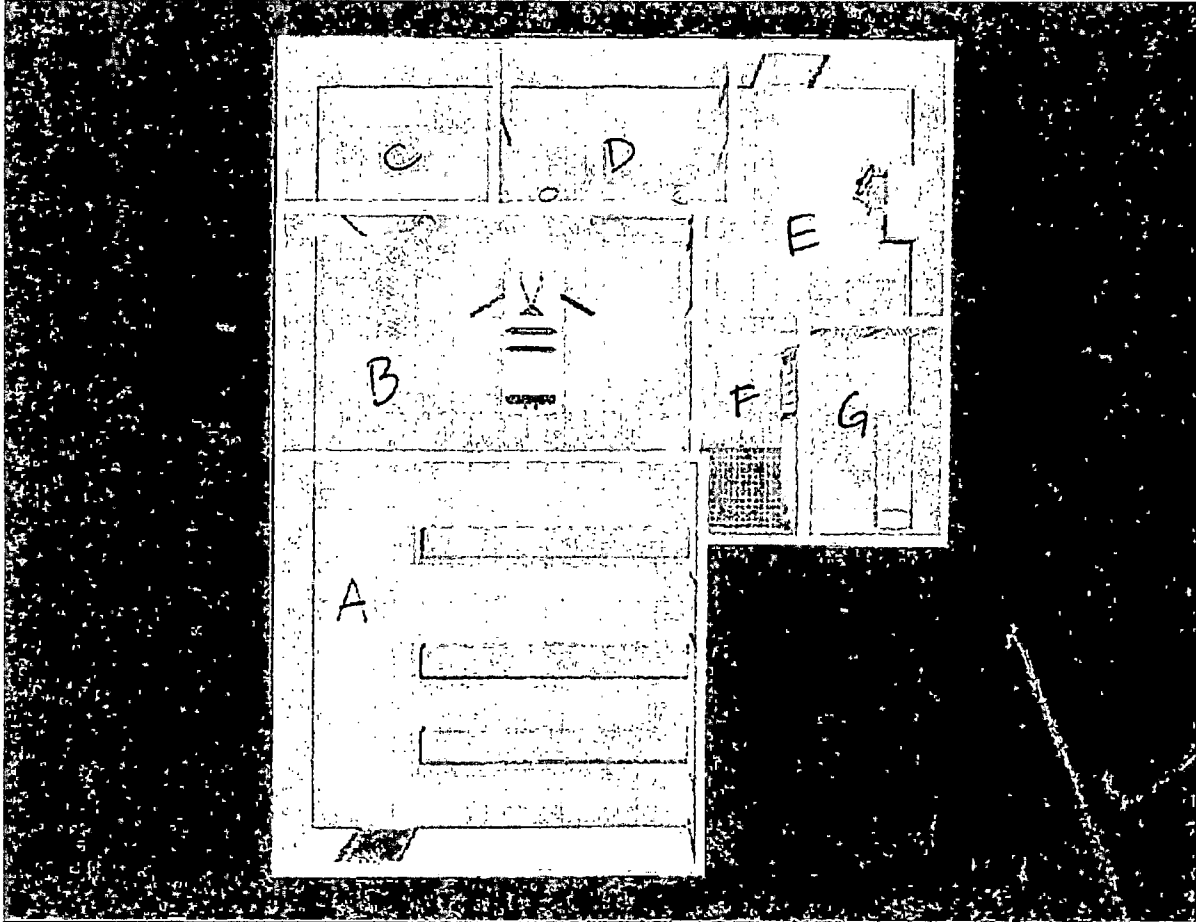


Diagram 1

Room A	The "Witness Room"
Room B	The "Execution Chamber"
Room C	Room adjoining Chemical Room and Execution Chamber
Room D	The "Chemical Room"
Room E	<i>[room adjoining Chemical Room and Execution Chamber, not subject of this complaint]</i>
Room F	<i>[room adjacent to Execution Chamber, not subject of this complaint]</i>
Room G	<i>[room adjacent to Execution Chamber, not subject of this complaint]</i>

Defendants further limit access to the Preparation of the Condemned by preventing the designated Media Monitor from having audio access to this part of the execution process.

Defendants turn the microphone off during the Preparation of the Condemned, preventing the Media Monitor from hearing what is being said while members of the execution team carry out these steps. Compl. ¶ 23.

After the Preparation of the Condemned is complete and intravenous access has been established, Defendants permit four additional media witnesses representing the Associated Press, the Georgia Association of Broadcasters, and the Georgia Press Association to enter the same Witness Room. Compl. ¶¶ 27, 31. Once the witnesses are in place, the microphone in the Execution Chamber is temporarily turned on to permit the Warden to read the Execution Order. The microphone is then turned back off. Compl. ¶ 29.

The administration of the lethal injection then proceeds from the Chemical Room, a room to which the media witnesses have no visual or audio access. Compl. ¶¶ 31, 33. First, the Injection Team in the Chemical Room injects a series of saline and compounded pentobarbital into intravenous ports. Compl. ¶ 32. These liquids travel through intravenous tubes that pass through the wall between the Chemical Room and the Execution Chamber and into the condemned prisoner's body. Compl. ¶ 32. Media witnesses have no visual or auditory access to the Chemical Room and what is happening inside of it, including, but not limited to, the timing of the injections, the number of injections, the quantity of drugs used in the injections, the order of injections, and any concerns or complications that arise during the injection process. Compl. ¶ 33.

Without access to the Chemical Room, media witnesses must rely on visual observation from their seats behind glass in the Execution Chamber to attempt to perceive when the lethal injection drugs begin flowing from the ports in the wall into the length of IV tubing and eventually into the prisoner, which is crucial information for determining how long the lethal injection takes to effectuate the prisoner's death. Compl. ¶ 34. Furthermore, relying on cues from the prisoner is difficult-to-impossible because the prisoner is covered with a sheet and strapped to the gurney with restraints on his arms, legs, and body, Compl. ¶ 36, and because the media witnesses are unable to hear any verbal utterances unless they are loud enough to breach the glass pane separating the Witness Room and the Execution Chamber. Compl. ¶ 37.

If a problem arises with the administration of the lethal injection drugs, the LI Procedures stipulate that the IV Nurse must alert the attending Physician, who in turn alerts the Warden, who then gives instructions to the Injection Team in the Chemical Room. Compl. ¶ 38. Media witnesses have no audio access to these communications because Defendants turn off the microphone in the Execution Chamber during this part of the execution process, and the witnesses have no access, visual or audio, to the Chemical Room, where the Injection Team is located. Compl. ¶ 39.

If the condemned prisoner is still exhibiting visible signs of life after the drugs have been administered and a sufficient time has passed, the Warden is supposed to instruct the Injection Team in the Chemical Room to administer additional pentobarbital. Media witnesses have no audio access to either the Execution Chamber or the Chemical Room for witnesses to hear these communications, nor is there visual access to the Chemical Room to see what, if any, additional chemicals are being injected. Compl. ¶ 40. If the condemned prisoner is still showing signs of life after additional lethal injection drugs are administered, several of the aforementioned steps must be repeated, with the same restrictions on media witness access. Compl. ¶ 42.

Once the condemned prisoner is confirmed dead, the microphone in the Execution Chamber is turned back on and the Warden announces the fact of death to the witnesses. The curtain is then closed over the window between the Execution Chamber and the Execution Witness Room. Compl. ¶ 43.

II. Georgia Has a Long History of Providing Full Public Access to Executions.

Georgia has a well-documented history of full access to State executions for both the public and the media. Compl. ¶¶ 48-59. Executions in Georgia have long been established as matters to which the public has a full right of access. *See* Compl. ¶¶ 49–60. Historically, it was common for thousands of people to attend State executions, *see id.*, and for access by the press to be unencumbered. Compl. ¶ 57. Reporters have historically recognized the important role of the press

in reporting on the entirety of Georgia executions: “Disagreeable though the task will be to us, we will be on hand to witness the execution, in order to give a full report of the same, which, though not pleasant reading to the refined, is yet necessary to the history of the age we live in.” Compl. ¶ 52.

Over time, Georgia has taken gradual steps to limit public and media access to State executions, culminating in the restricted access that Defendants implement today. Scholars who study the American death penalty have observed that governmental steps toward limiting public access to executions have been taken with the intention of limiting public scrutiny and thereby protecting the system of capital punishment.²

ARGUMENT AND CITATION TO AUTHORITY

Interlocutory relief is warranted because Defendants are set to enforce their unconstitutional restrictions to the public right of access during the upcoming execution scheduled for March 20, 2024, which is less than two weeks away. All factors weigh in favor of granting interlocutory relief, which is needed to ensure that Plaintiff’s and the public’s right of access to the execution process is not again violated.

I. Every Interlocutory Injunction Factor Weighs in Plaintiff’s Favor.

In determining whether to grant an interlocutory injunction, this Court has “broad discretion.” *SRB Inv. Servs., LLLP v. Branch Banking & Tr. Co.*, 289 Ga. 1, 5 (2011). This remedy is “a stop-gap measure to prevent irreparable injury or harm to those involved in the litigation.” *India-Am. Cultural Ass’n, Inc. v. iLink Pros., Inc.*, 296 Ga. 668, 670 (2015).

² See, e.g., Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 68 (2002) (“[E]ven though executions have become increasingly hidden from the public and therefore more politically acceptable, they have not become more humane, only more difficult to monitor.”); see also Nicholas Levi, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 Fed. Comm. L.J. 131 (2002); John D. Bessler, *Televised Executions and the Constitution: Recognizing A First Amendment Right of Access to State Executions*, 45 Fed. Comm. L.J. 355, 360 (1993).

In deciding whether to issue an interlocutory injunction, the Court should consider whether:

- (1) there is a substantial likelihood that Plaintiff will prevail on the merits of its claims at trial;
- (2) there is a substantial threat that Plaintiff will suffer irreparable injury if the injunction is not granted;
- (2) the threatened injury to Plaintiff outweighs the threatened harm that the injunction may do to the Defendants;
- (4) granting the requested interlocutory injunction will not disserve the public interest.

SRB Inv. Servs., 289 Ga. at 5.

These factors are a balancing test, and the movant need not prove each factor for the Court to grant an interlocutory injunction. *City of Waycross v. Pierce Cnty. Bd. of Comm'rs*, 300 Ga. 109, 111–12 (2016). Nevertheless, every factor weighs in favor of Plaintiff here: (1) It is likely that Plaintiff will ultimately prevail on the merits, because the public's right of access to executions is by now well-established and Defendants' restrictions on that right are arbitrary; (2) Plaintiff will suffer irreparable injury without preliminary relief, because it and the public will be arbitrarily denied access to critical aspects of the execution process on March 20 that cannot be granted retroactively; (3) any legitimate interests Defendants have in curtailing access are easily addressed through less-restrictive means, and any theoretical harm to Defendants is outweighed by the harm to Plaintiff and the public caused by ongoing lack of access; and (4) it is manifestly in the public's interest to have full and complete information about Georgia's execution process to ensure that the State carries out the solemn responsibility to which it has been entrusted humanely and within the bounds of the law. Interlocutory relief by this Court is therefore warranted and urgently needed.

A. Plaintiff Is Likely to Succeed on the Merits of Its Claims.

Plaintiff is likely to succeed on the merits of its State and federal constitutional claims because the public has a right of access to Georgia executions and Defendants' restrictions on that right are arbitrary and are not narrowly tailored to serve a compelling government interest.

1. Plaintiff and the public have a right of access to the entire execution process.

The question of whether a right of access to government proceedings exists turns on (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*); see *Owens v. State*, 295 Ga. 302 (2014) (applying the *Press-Enterprise II* test to a First Amendment challenge to Georgia’s Secrecy Act). In applying the first prong of the *Press-Enterprise II* test in a right-of-access challenge to record information about Georgia executions, the Eleventh Circuit has noted that “executions have historically been open events.” *Wellons v. Commissioner, Ga. Dept. of Corrections*, 754 F.3d 1260, 1266 (2014). Similarly, the Georgia Supreme Court has recognized that “there has been a tradition of allowing at least some public access to execution proceedings[.]” *Owens*, 295 Ga. At 316.³ Courts in multiple other jurisdictions have also concluded that the public has traditionally had access to the entire execution process. See *Philadelphia Inquirer v. Wetzel*, 906 F.Supp.2d 362, 366-72 (M.D. Pa. 2012) (“[H]istorical practice in Pennsylvania indicates that the public and press have traditionally enjoyed a right of access to executions.”); *First Amendment Coalition of Arizona Inc. v. Ryan*, 938 F.3d 1069, 1075 (9th Cir. 2019) (“[E]xecutions have historically been open to the press and the general

³ The Court in *Owens* went on to counterbalance the public’s right of access with the “longstanding tradition of concealing the identities of those who carry out executions.” *Owens*, 295 Ga. at 316. In this case, unlike in *Owens*, Plaintiff does not seek information tending to reveal the identities of those involved in the execution process and request access only to the proceedings occurring on the day of the execution itself. As such, the narrow limits on the public’s right of access articulated by the Georgia Supreme Court in *Owens* do not apply here.

public.”) (citing *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 875-76 (9th Cir. 2002)). As the facts alleged in the Complaint make clear, Compl. ¶¶ 49-60, a similar tradition of open access to executions exists in Georgia dating back over 150 years. As such, the first prong of the *Press-Enterprise II* test is satisfied.

As to the second prong, both the Eleventh Circuit and the Georgia Supreme Court have recognized that “public access to information certainly plays a positive role in the functioning of capital punishment.” *Wellons*, 754 F.3d at 1266; *accord Owens*, 295 Ga. at 316 (“We are mindful of Hill’s argument about enhancing the public debate on the death penalty in general and on the participation of specific persons and entities in executions in particular, and we recognize that disclosing the compounding pharmacy that produces lethal injection drugs might enhance the ability of Hill and the general public to more fully satisfy themselves that Georgia’s method of execution is humane.”).⁴ Their reasoning is in line with the reasoning of courts in other jurisdictions holding that “[i]ndependent public scrutiny—made possible by the public and media witnesses to an execution—plays a significant role in the proper functioning of capital punishment.” *Woodford*, 299 F.3d at 876 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *accord Wetzel*, 906 F.Supp.2d at 371 (finding that public access “to view the entire execution without visual or auditory obstruction contributes to the proper functioning of the execution process”); *see also Boos v. Barry*, 485 U.S. 312, 318 (1988) (“The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”) (citations and internal punctuation removed). Accordingly, the second prong of the *Press-Enterprise II* test is satisfied.

⁴ Again, the Court in *Owens* ultimately ruled against the plaintiff because it concluded that, “on balance,” the execution-participant confidentiality statute “plays a positive role in the functioning of the capital punishment process.” *Owens*, 295 Ga. at 316. Here, where the confidentiality of execution participants is not challenged, the only salient interest is that of the public in accessing the proceedings.

Furthermore, although the public right of access to executions is safeguarded by the federal First Amendment, the Georgia Constitution's broader language guarantees an even more expansive right of public access to criminal proceedings than its federal counterpart. *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 578 (1982) ("Georgia law, as we perceive it, regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law."); *see also State v. Miller*, 260 Ga. 669, 671 (1990) (noting that the "1983 Constitution of Georgia provides even broader protection" than does the already "broad umbrella" of the federal First Amendment). This right is grounded both in Article 1, Sec. 1, Para. V of the Georgia Constitution of 1983 and in Article 1, Sec. 1, Para. XI, which provides that criminal trials "shall" be public. An execution, although not a criminal hearing, is nevertheless the final proceeding of a criminal capital case. Indeed, it is among the gravest proceedings that any government can undertake on the public's behalf. The robust speech protections guaranteed by the Georgia Constitution, together with the steadfast right of public access to criminal proceedings afforded by Georgia law, further establish the public's right of open access to executions conducted in Georgia.

2. The restrictions that Defendants impose on the public right of access are arbitrary and unnecessary.

Because Plaintiff and the general public have a right of access to executions in Georgia, it follows that any restrictions Defendants impose on that access can stand only if they are "necessitated by a compelling governmental interest, and [are] narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 598 (1982). Far from being "narrowly tailored" to a "compelling governmental interest," the restrictions at issue in this case are arbitrary and serve only to withhold critical information about the execution process from Plaintiff and the public.

As an initial matter, Defendants currently limit the number of witnesses to five members of Georgia media organizations, with just a single one of those witnesses present for the process during

which medical personnel attempt to establish intravenous access to the condemned. Compl. ¶¶ 26-27. As a result, Plaintiff, which regularly reports on executions in Georgia and elsewhere, must rely on a limited subset of witnesses for contemporaneous accounts of the execution, as must any member of the public seeking to develop an informed opinion about Georgia’s execution process. Although Plaintiff does not challenge the limit on the overall number of witnesses present on the day of the execution, this factor in and of itself is more opaque than Georgia’s historic practice of permitting expansive public access to executions. Compl. ¶¶ 49-60.

The restrictions imposed on media witnesses that are at issue in this case stymie the flow of information still further. Defendants permit only a single media witness—typically the least experienced of those present when it comes to witnessing and reporting on executions, Compl. ¶ 29—to observe the execution team’s attempt to establish intravenous access, typically the most fraught period in any execution by lethal injection. The witness has only visual access through a glass window, and completely lacks any audio access because Defendants turn the microphone in the Execution Chamber off during this critical period. Auditory access exposes problems in a far more meaningful and complete way than the limited visual-only access of the current restrictions. Attempting to establish intravenous access is botched regularly in lethal injections across the country, *see* Compl. ¶ 24, and in multiple executions in Georgia over the past two decades:

- Georgia executed Jose High by lethal injection on November 6, 2001. Mr. High’s execution procedure went “off the page for 15 minutes” when execution officials struggled to properly insert an IV line into his arm.⁵
- Georgia executed John Hightower by lethal injection on June 27, 2007. Again, prison officials had trouble finding a vein in which to insert the IV, which unnecessarily prolonged the execution.⁶

⁵ Sandy Hodson, *Executions Are Carefully Scripted*, The Augusta Chronicle (Oct. 20, 2009), <https://www.augustachronicle.com/article/20091020/news/310209938>.

⁶ Harry R. Weber, *Killer Apologizes Before Execution*, Associated Press (Jul. 12, 2007), <https://coastalcourier.com/news/state-national/killer-apologizes-before-execution/>.

- Georgia executed Curtis Osborne by lethal injection on June 4, 2008. The procedure was delayed for two hours because prison officials could not identify a usable vein in which to insert the IV.⁷
- Georgia executed Brandon Astor Jones by lethal injection on February 3, 2016. During Mr. Jones’s execution, the lethal injection team had to insert the IV into his groin because they could not identify a vein to use in his arm.⁸

Just recently, on February 28, 2024, Idaho officials halted the execution of Thomas Creech when medical team members failed to establish intravenous access after multiple attempts.⁹ These examples illustrate how critical full access to the Preparation of the Condemned is to ensure that the public is aware of how the State carries out executions and when and how executions veer “off the page.”

Defendants’ restrictions on access to the Preparation of the Condemned are arbitrary. The Witness Room has the same capacity to accommodate the full contingent of witnesses during the Preparation of the Condemned as it does during the lethal injection itself—indeed, the Witness Room accommodated the full contingent of witnesses during preparation for execution by electrocution, the method employed by Georgia prior to execution by lethal injection. And there is no reason for the Execution Chamber microphone, which is already installed and fully functional, to be off during this period, except to withhold potentially relevant or illuminating utterances from the execution team or the condemned prisoner.

Defendants’ restrictions on access during the administration of the lethal injection are similarly arbitrary. The Execution Chamber microphone again remains off except for

⁷ The Associated Press, *Georgia Executes Man Who Killed 2 in 1990*, Access WDUN (June 4, 2008), <https://accesswdun.com/article/2008/6/210545>.

⁸ Rhonda Cook, *Georgia executes Brandon Astor Jones*, The Atlanta Journal-Constitution (Feb. 3, 2016), <https://www.ajc.com/news/local/georgia-executes-brandon-astor-jones/jDioe9hdPGv2oj7mhVehnM/>.

⁹ See Rebecca Boone, *Idaho halts execution by lethal injection after 8 failed attempts to insert IV line*, Associated Press (February 28, 2024), <https://apnews.com/article/idaho-execution-creech-murders-serial-killer-91a12d78e9301adde77e6076dbd01dbb>.

communications from the Warden ending the proceeding, restricting witnesses' ability to determine if the condemned prisoner is conscious or in pain during the execution process or to hear if any member of the execution team verbally identifies a problem or concern. Compl. ¶¶ 38-43. And many of the processes critical to carrying out the execution—including, critically, the administration of the lethal injection drugs by the Injection Team—occur in a room that is completely inaccessible, both by sight and sound, to the witnesses present. Compl. ¶ 34. Media witnesses are unable to observe when the lethal injection drugs begin flowing to the condemned prisoner, the quantity of drugs administered, the method by which the Injection Team administers the drugs, and, where applicable, how many additional injections are administered by the Injection Team. For the reasons discussed in greater detail in Section I(C), *infra*, any interests that the State could articulate in obstructing witness access cannot serve as a “compelling government interest” counterbalancing the public’s right of access to the execution process, and can be ameliorated by crafting the relief so as not to reveal the identity of anonymous participants to the execution process.

B. Plaintiff and the Public Will Suffer Irreparable Injury Without Interlocutory Relief.

In considering a request for interlocutory relief, the Georgia Supreme Court has held that irreparable harm is “the most important [factor], given that the main purpose of an interlocutory injunction is to preserve the status quo temporarily to allow the parties and the court time to try the case in an orderly manner.” *W. Sky Fin., LLC v. State ex rel. Olenz*, 300 Ga. 340, 354 (2016) (internal quotation marks omitted).

Violations of rights guaranteed by the Georgia Constitution “unquestionably constitute[] irreparable injury,” *Great Am. Dream, Inc. v. DeKalb Cnty.*, 290 Ga. 749, 752 (2012), and it is also well settled that “[t]he loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).¹⁰ Defendants’ obstruction of witness access to the complete execution process will cause constitutional harm to Plaintiff and the public, and for that reason alone must be enjoined.

If not remedied with interlocutory relief by this Court, Defendants will carry out an execution—perhaps the gravest task that citizens entrust to the State—under protocols that arbitrarily obstruct Plaintiff and the public from knowing the extent of what mistakes and errors may occur and their resultant pain to the person condemned to execution. Plaintiff depends on the media witnesses present at an execution to provide it with an account of what occurred and to, in turn, be able to accurately report to the public. But without adequate witness access to the entirety of the execution process, Plaintiff and the public will be without accurate and complete information regarding “the most awesome act that a State can perform,”¹¹ about which public debate abounds and which involves the state taking the life of a citizen.

C. The Irreparable Injury to Plaintiff Outweighs Any Harm to Defendants.

The Court may issue an interlocutory injunction if, “by balancing the equities of the parties, it would appear that the equities favor the party seeking the injunction. Thus, a demonstration of irreparable injury is not an absolute prerequisite to interlocutory injunctive relief.” *Parker v. Clary Lakes Recreation Ass’n*, 272 Ga. 44, 45 (2000) (internal citation omitted). In balancing the equities between the parties, the Court may consider the plaintiff’s likelihood of success on the merits, but

¹⁰ Insofar as Defendants’ now impose restrictions because of the speech exercised by witnesses following past executions, such a motivation is impermissible and constitutes irreparable injury. See *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983) (“[D]irect retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment.”); *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005) (“A plaintiff suffers adverse action if the defendant’s allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.”).

¹¹ *McCleskey v. Kemp*, 481 U.S. 279, 342 (1987).

the likelihood of ultimate success is not dispositive. *Garden Hills Civic Ass'n, Inc. v. Metro. Atlanta Rapid Transit Auth.*, 273 Ga. 280, 281 (2000).

Here, the balance of equities favors Plaintiff. Absent an injunction, Plaintiff will “be damaged and left without adequate remedy.” *Bernocchi v. Forcucci*, 279 Ga. 460, 461 (2005) (internal citations omitted). An execution is a time-limited event, and the right of access to the entire execution process cannot be exercised after the fact. Moreover, changing the witness access protocols to allow the public and Plaintiff constitutionally protected access to the entire execution process presents limited-to-no harm to Defendants. Expanded witness access requires relatively little action by Defendants and does not require making the identities of the executioner, source pharmacy, or other involved parties known to witnesses, Plaintiff, or the public. Precautions can be taken to ensure these identities are kept secret. What limited harm to Defendants might exist is far outweighed by the looming harm to Plaintiff and the public.

D. An Injunction Favors the Public Interest.

Not only will “granting the requested interlocutory injunction [] not disserve the public interest,” *SRB Inv. Servs.*, 289 Ga. at 5, it will affirmatively promote the public interest. The public interest is in being able to access critical information about how the State implements its death penalty, and in its constitutional rights being upheld.

The public interest weighs strongly in favor of granting an interlocutory injunction to prevent constitutional harm, *see, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019) (“[T]he public interest is served when constitutional rights are protected.”). “[I]njunctive protecting First Amendment freedoms are always in the public interest.” *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005). And “[n]either the government nor the public has any legitimate interest

in enforcing an unconstitutional [law].” *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020); *see also KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (same).

Furthermore, an interlocutory injunction in this case would support the fundamental need for transparency and information that State executions demand. “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers*, 448 U.S. at 572. Moreover, “public access . . . fosters an appearance of fairness, thereby heightening public respect for the judicial process.” *Globe Newspaper*, 457 U.S. at 606.

CONCLUSION & PRAYER FOR RELIEF

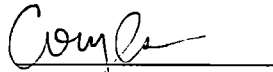
Plaintiff respectfully requests that the Court issue a rule nisi setting a hearing on the motion as soon as possible, to prevent Defendants’ unconstitutional restrictions from continuing to impose profound and irreparable harm.

Plaintiff further requests that, at the hearing, the Court issue a temporary restraining order to preserve the status quo until the Court has the opportunity to issue an interlocutory injunction. The Court may issue a TRO if “it appears from affidavits or verified complaint that immediate and irreparable injury, loss or damage will result before the adverse party can be heard in opposition.” *United Food & Com. Workers Union v. Amberjack Ltd.*, 253 Ga. 438, 438 (1984); O.C.G.A. § 9-11-65(b). For the reasons described above, Plaintiff will suffer immediate and irreparable injury if Defendants are allowed to carry out executions according to their current practices. As such, Plaintiff requests that Defendants; their officers, agents, servants, employees, representatives, and attorneys; and anyone acting on behalf of, in active participation with, or in concert with them, be prohibited from proceeding with executions until such time as the outlined ongoing violations of Plaintiff’s right of access to executions are remedied.

Finally, Plaintiff respectfully requests that the interlocutory injunction require Defendants to amend their procedures such that:

- 1) All five media witnesses have visual and auditory access to the steps outlined in Sections II(B)-(D) of the LI Procedures, including establishing intravenous access to the prisoner and preparation of pentobarbital and other injections in the Chemical Room.
- 2) All five media witnesses have visual and auditory access to the Execution Chamber throughout the steps outlined in Section II(E) of the LI Procedures.
- 3) All five media witnesses have visual access to the administration of injections in the Chemical Room (via closed-circuit camera or other remote means) and auditory access (via microphone or other remote means) to the Chemical Room throughout the steps outlined in Section II(E) of the LI Procedures.

Respectfully submitted, this 7th day of March, 2024.



Cory Isaacson
Georgia Bar No. 983797
Andres Lopez-Delgado
Georgia Bar No. 552876
Nneka Ewulonu
Georgia Bar No. 373718
**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
GEORGIA, INC.**
P.O. Box 570738 | Atlanta, Georgia 30357
Tel: (770) 415-5490 | cisaacson@acluga.org

/s/ Gerald R. Weber

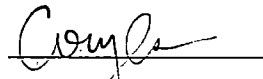
Gerald R. Weber
Law Offices of Gerry Weber, LLC
Georgia Bar No. 744878
P.O. Box 5391
Atlanta, Georgia 31107
Tel: (404) 522-0507
wgerryweber@gmail.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a true and correct copy of the within and foregoing to be filed with the Clerk of Court using the eFile Georgia system, which will serve a true and correct copy of the same upon all counsel of record.

Respectfully submitted, this 7th day of March, 2024.


Cory Isaacson

Counsel for Plaintiff