

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

ASSOCIATED PRESS, GANNETT CO.,
INC., NASHVILLE PUBLIC MEDIA,
INC., NASHVILLE PUBLIC RADIO,
SCRIPPS MEDIA, INC., SIX RIVERS
MEDIA, LLC, and TEGNA INC.,

Plaintiffs,

v.

KENNETH NELSEN, *in his official
capacity as Warden of Riverbend
Maximum Security Institution*, FRANK
STRADA, *in his official capacity as
Commissioner of the Tennessee
Department of Correction*,

Defendants.

CASE NO. 25-1513-III

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION**

INTRODUCTION

Whether you're for capital punishment or not, when the State exercises that very awesome power ... it's imperative that we have the media there to witness it, not just to promulgate and to spread the news that it's being done as a deterrent, but to also make sure that the State exercises that awesome power with the highest level of decorum and that it's carried out appropriately.

Statement of Sen. C. Coulter Gilbert on S.B. 2287, 98th Gen. Assemb. (Tenn. Mar. 9, 1994), at Tr. 4:21–5:4 (Compl. Ex. 12). The news media's rights of access to observe the "awesome power" of capital punishment are mandated by statute and the constitutions of both Tennessee and the United States. *Id.* Since 1994, the law of this state has provided that seven members of the press are "entitled to be present at

the carrying out of the death sentence” to stand in the shoes of the public as objective observers of the proceeding. 1994 Tenn. Pub. Acts, Ch. 675, § 1 (codified at Tenn. Code Ann. § 40-23-116(a)(6)). Additionally, the First Amendment protection of access to government proceedings guarantees the “right to view executions from the moment the condemned is escorted into the execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the process of putting the condemned inmate to death.” *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002).¹ Our Tennessee Constitution goes farther, providing an independent right of access to execution proceedings that is broader and stronger than the First Amendment right: Article I, Section 19 of the Tennessee Constitution (“Article I, Section 19”) explicitly states “[t]hat the printing presses shall be free to every person to examine the proceedings ... of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.”

The current Tennessee Department of Correction (“TDOC”) execution protocols infringe upon these statutory and constitutional rights of access. By limiting the press witnesses’ observation window of execution proceedings to ***a mere 10- to 15-minute period*** that excludes critically important portions of the proceedings, Defendants violate Tennessee state law, our state Constitution, and the First Amendment. The protocols violate the Press Coalition’s statutory and constitutional

¹ Pursuant to Local Rule 26.04, all cases that are not published decisions from Tennessee state courts are attached as **Compiled Exhibit 41**. The exhibit numbers assigned to attachments to this Memorandum are consecutive with the exhibits attached to Plaintiffs’ Complaint.

rights of access to attend and observe, for example, the entry and preparation of the condemned in the execution chamber, the physician's examination of the condemned after the administration of the lethal injection or electrical current, including the declaration of death, and the many preparatory steps that are inextricably intertwined with the execution, such as the preparation of the syringes. Each execution that Defendants carry out under these current protocols violates the press's—and the public's—right of access and the news media's duty to hold their government accountable.

Here, the Press Coalition asserts its statutory and constitutional rights of access to execution proceedings in Tennessee and seeks a temporary injunction that provides its members either direct observational or closed circuit audio and video access to the *entirety* of the proceeding, from the time the condemned enters the room until after the physician pronounces the condemned dead, and all initial steps in the proceeding, such as the preparation of syringes for use in lethal injections or sponges for use in electrocutions, that are inextricably intertwined with the execution of the condemned.

BACKGROUND

I. The operative Execution Protocols.

Under Tennessee law, lethal injection is “the method for carrying out” the death penalty, Tenn. Code Ann. § 40-23-114(a). However, if the offense for which the condemned was sentenced to death occurred before January 1, 1999, the condemned may choose to die by electrocution. *Id.* § 40-23-114(b). As a result, TDOC has issued

two different execution protocols, one for each method (collectively, the “Execution Protocols”). But under both protocols, witnesses, including press witnesses, are unable to observe critical components of the execution proceeding.

A. The Lethal Injection Protocol.

TDOC’s Lethal Injection Protocol, adopted January 8, 2025, “summarizes the most significant events, Department procedures, and personnel responsibilities for carrying out the Tennessee Supreme Court’s orders on executions by lethal injection.” Lethal Injection Protocol (Compl. Ex. 1) at 5.

The following chart illustrates the Lethal Injection Protocol. The *shaded* portions represent the small fraction of the proceeding to which the Press Coalition has access; *darker shading* indicates visual and audio access; *lighter shading* indicates only audio access; no shading indicates zero access.

8:00 a.m.	The Special Operations Team Leader prepares the four syringes to be used in the execution in the Lethal Injection Room.
	The Special Operations Team confirms that the camera used to monitor the IV site is operational.
	The syringes are labeled with an assigned number, chemical name, chemical amount, and a designated color.
	The preparations are documented on the “Chemical Preparation Time Sheet.”
	The Special Operations Team “prepares the IV lines for use by the IV Team.”
10:00 a.m.	The condemned is secured to a gurney.
	The condemned is moved to the execution chamber by the Restraint Team.
	The condemned is joined by other identified individuals, including his defense counsel witness and clergy.
	The IV Team attaches the electrocardiograph.
	The IV Team inserts both the primary IV catheter and a backup IV catheter, which will be “used to administer the LIC.”
	The Special Operations Team Leader checks the IV catheters.

	The Special Operations Team Leader “opens the IV line to start a flow of sterile saline solution in each line and administers at a slow rate to keep the lines open.”
	Media witnesses enter the witness room.
10:10 a.m.	<i>The blinds are opened.</i>
	<i>The Warden asks the condemned for last words, and the condemned delivers last words.</i>
	<i>The Warden gives the signal to proceed.</i>
	“The Special Operations Team Leader directs the assigned Special Operations Team Member to confirm the chemical name and order of syringes in the Primary Set A.”
	The Special Operations Team Leader administers 4 syringes.
	<i>The Special Operations Team Leader signals to the Warden that a 5-minute waiting period has begun.</i>
10:25 a.m.	<i>“[A]ll witness blinds are closed, the camera is disengaged, and the privacy curtains are closed.”</i>
	<i>The Physician enters the room to examine the condemned and determine if he is dead.</i>
	<i>The Physician then reports his findings to the Warden and pronounces the condemned dead.</i>
	The audio system is disengaged.
	The condemned’s body is removed from the execution room.

Id. at 17–22. It is unclear to media witnesses what action or sign constitutes either the Warden’s signal to proceed with the syringes or the Special Operations Team Leader’s “signal” that the drugs have been fully administered. Some media witnesses report a small ledge in the execution room where a “gloved hand” places what appears to be a rock during the proceeding, leading witnesses to speculate that this act constitutes either the signal that the administration of the drugs has begun or has concluded. *E.g.*, Loller Decl. ¶ 21; Cavendish Decl. ¶¶ 15, 26; Walters Decl. ¶ 20.

The Lethal Injection Protocol also makes clear that there is a closed-circuit camera recording footage of the condemned during these proceedings; in fact, the “Camera Operator” is part of the Special Operations Team. Lethal Injection Protocol

(Compl. Ex. 1) at 34. The Camera Operator’s primary duty is to “[o]perate the overhead camera that monitors the IV catheter during the lethal injection process.” *Id.* at 35.

B. The Electrocution Protocol

TDOC last issued an Electrocution Protocol in 2017. Electrocution Protocol (Compl. Ex. 2) at 5. Similar to the Lethal Injection Protocol, the Electrocution Protocol “contains a summary of the most significant events and departmental procedures to be followed in the process of carrying out the orders of the Court regarding the imposition of death by electrocution.” *Id.* at 1. It aligns closely with the Lethal Injection Protocol, with obvious differences; a container of sodium chloride solution is prepared to saturate natural sea sponges for use in the execution, *id.* at 38; the condemned is escorted from the holding cell and taken to the Execution Chamber by the Extraction Team, who also “prepare[] and secure[] the inmate in the chair” and place four saturated ankle sponges and secure them with straps, *id.* at 64. The blinds are then opened to the witness rooms, the Extraction Team places a saturated sponge on top of the condemned’s head, their head is secured, and a shroud is placed over their head. *Id.* A salt brine solution is added to the ankle sponges. *Id.* After the electrodes are checked and the primary and secondary disconnect boxes are deemed ready, “[t]he Warden gives the signal to proceed and the Executioner activates the electrical console.” *Id.* If the first electrocution was unsuccessful, the process is repeated. *Id.* at 68.

C. The Post-Execution Press Conference.

State law provides that “[t]hose news media members allowed to attend any execution of a sentence of death shall make available coverage of the execution to other news media members not selected to attend.” Tenn. Code Ann. § 40-23-116(a)(6). TDOC regulations accordingly provide: “Immediately after the execution of the death sentence is complete, all News Media Agency Representatives shall make themselves available for a news conference of other news media representatives and shall remain at the news conference until it is completed.” Tenn. Comp. R. & Regs. 0420-03-04-.05(1). This conference is an important part of each media witness’s duty to act as a surrogate for the public and the taxpayers in observing (and reporting on) the execution proceedings.

II. The Press Coalition members report on law enforcement and the criminal justice system, including executions in Tennessee.

The Press Coalition members are organizations that gather and report news in Tennessee. Each employs professional journalists who are assigned to cover government and criminal justice issues, including execution proceedings. Nine journalists, all employed by members of the Press Coalition, have submitted declarations in support of Plaintiffs’ motion detailing their experiences covering executions in Tennessee.

III. Defendants’ enforcement and implementation of the Execution Protocols has prevented and will continue to prevent the Press Coalition from observing critical portions of execution proceedings in Tennessee.

On May 22, 2025, the State of Tennessee executed Oscar Franklin Smith, by lethal injection—its first execution following a 5-year hiatus. Media Advisory, Tenn.

Dep't of Corr. (May 22, 2025), <https://www.tn.gov/correction/news/2025/5/22/media-advisory.html> (attached hereto as **Exhibit 42**). Reporters for AP, Gannett's *Tennessean*, the Banner, Six Rivers, and Nashville Public Radio's WPLN attended and covered Smith's execution.² Less than three months later, on August 5, 2025, the State executed Byron Black by lethal injection. Media Advisory, Tenn. Dep't of Corr. (Aug. 5, 2025), <https://www.tn.gov/correction/news/2025/8/5/media-advisory.html> (attached hereto as **Exhibit 43**). Reporters for AP, the *Tennessean*, the Banner, Scripps's WTVF, and WPLN attended and covered Black's execution.³ Defendants' Execution Protocols deprived the press of access to crucial stages of those proceedings.

There is a striking contrast between news media witnesses' accounts of the parts of execution proceedings they are able to see and TDOC's official statements. Media witness Catherine Sweeney from WPLN could hear muffled talking from Mr. Black's spiritual advisor telling him to "just focus on your breath," which made her think that he may have been experiencing some pain. Sweeney Decl. ¶ 11. When the curtain to the execution chamber finally opened, Black was already strapped down on the gurney with the IV inserted in his arm and sheets covering his arm. *Id.* ¶¶ 14–15. His hands were bandaged with "heavy kinesiology tape" and he "was

² Selection of Official Media Witnesses, Tenn. Dep't of Corr. (May 6, 2025), (Compl. Ex. 21); *see also* Cavendish Decl. ¶ 5; Loller Decl. ¶ 10; Walters Decl. ¶ 6; Fiscus Decl. ¶ 4; Sweeney Decl. ¶ 6.

³ Selection of Official Media Witnesses, Tenn. Dep't of Corr. (July 15, 2025) (Compl. Ex. 26); *see also* Cavendish Decl. ¶ 21; Sweeney Decl. ¶ 6.

squirming, and he looked distressed.” *Id.* ¶¶ 16–17. Sweeney heard Black say: “It hurts so bad.” *Id.* ¶ 18. Sweeney and the other media witnesses could not observe whether his reactions were caused by drug administration, because Defendants’ protocol barred them from witnessing when the drugs were actually delivered, *id.* ¶¶ 17–18; *cf.* Cavendish Decl. ¶¶ 25–26, even though there is a live camera feed to the IV site. Lethal Injection Protocol (Compl. Ex. 1) at 35. She could only infer the start of the drug administration. Sweeney Decl. ¶¶ 17–18.

Sweeney later learned that Black’s legal team asserted that the medical team had issues inserting the IV into his vein. *Id.* ¶ 25. Sweeney “had to rely on the account of his legal team rather than [her] own observations” in her reporting on Black’s execution. *Id.* Similarly, the Banner’s reporting on Black’s execution recounted that Black’s attorney had alleged that “medical personnel had trouble finding the veins in both of his arms, leading to a puddle of blood on his right side. She said it took 10 minutes for the tubes to be attached, which first brought saline and then pentobarbital.” Steven Hale et al., *In Painful Execution, Attorney Says Byron Black was ‘Tortured’ by the State of Tennessee*, Nashville Banner (Aug. 5, 2025) (Compl. Ex. 29). And reporting by the *Tennessean* on Black’s execution reported that “Black’s attorneys and those who opposed his execution had warned his implantable cardioverter-defibrillator (ICD) for congestive heart failure, which works like a pacemaker, would shock him repeatedly as his heart stopped beating.” Kelly Puente & Evan Mealins, *Byron Black showed signs of distress, said he was in pain, witnesses of execution report*, *Tennessean* (Aug. 5, 2025) (Compl. Ex. 28). However, it was

“unclear if that was the case” to media witnesses viewing only a portion of the execution proceeding. *Id.* The same article recounted that “Black groaned on the gurney and attempted to lift his head multiple times as the lethal injection drugs flowed through him.” *Id.*

TDOC’s official statement following the execution, by contrast, reads simply: “[T]he Department of Correction carried out the death sentence of Byron Lewis Black by means of lethal injection at the Riverbend Maximum Security Institution.” Media Advisory, Tenn. Dep’t of Corr. (Aug. 5, 2025) (Ex. 43). The question of whether the execution was conducted competently and humanely remains unanswered, since the restrictions placed on media witnesses prevented independent verification of what happened during the IV insertion stage. *See* Sweeney Decl. ¶ 24 (“[I]nsertion of the IV is a vital step in the execution process, and that [] is also notoriously where things often go wrong[.]”); Cavendish Decl. ¶ 30 (“Seeing the IV insertion stage would give us more information about whether they are having trouble finding a vein.”).

The press was similarly limited in their ability to observe the execution proceedings for Oscar Franklin Smith in May 2025, Donnie Johnson in 2019, and Billy Ray Irick in 2018. Fiscus Decl. ¶ 4; Walters Decl. ¶ 6; Loller Decl. ¶¶ 8, 10; Cavendish Decl. ¶¶ 5, 21; North Decl. ¶ 5. During Mr. Smith’s execution, media witnesses were denied access to observe the execution chamber until after Mr. Smith was already restrained to the gurney, and the IV line had been established in his arm. *E.g.*, Loller Decl. ¶ 17. Journalists could not observe whether the execution staff encountered difficulties establishing the IV line. *Id.* ¶ 31. Once inside,

journalists were not informed when the lethal drugs were administered; instead, they were left to speculate based on Mr. Smith’s reactions. *Id.* ¶¶ 21–22; Fiscus Decl. ¶¶ 14–17; Walters Decl. ¶¶ 20–21; Cavendish Decl. ¶¶ 14–16. Mr. Smith’s body was covered with white sheets, which made it difficult to observe his breathing and his hands were bounded which also made it difficult for witnesses to ascertain whether and how he was reacting to the drugs. Fiscus Decl. ¶ 16.

In executions by electrocution, media witnesses are similarly limited in their view of the execution process. For example, during the electrocutions of Leroy Hall, Nicholas Sutton, Edmund Zagorski, and David Earl Miller, media witnesses were denied access to observe the execution chamber until after the condemned men were already strapped to the electric chair. Kruesi Decl. ¶¶ 6, 23; Loller Decl. ¶¶ 7, 9; Farmer Decl. ¶ 5; North Decl. ¶ 24. As AP reporter Kimberlee Kruesi recounted about witnessing Hall’s execution, reporters “just see the inmate strapped down, but we don’t know if he put up a fight and we don’t know how long he’s been sitting there. A lot could go wrong, and we would not see it.” Kruesi Decl. ¶ 30.

Tennessee is currently scheduled to execute inmate Harold Wayne Nichols on December 11, 2025. Compl. ¶ 56 & Compl. Ex. 36 (order setting execution). And on September 30, 2025, the Tennessee Supreme Court set four executions for 2026. Compl. ¶ 58 & Compl. Exs. 37–40 (orders setting executions for May 21, 2026, August 13, 2026, September 30, 2026, and December 3, 2026). The Press Coalition intends to send their journalists to observe Nichols’s execution and other, future executions. Compl. ¶¶ 59, 63, 70, 94; Loller Decl. ¶ 12; Sweeney Decl. ¶ 29; Cavendish Decl. ¶ 34;

Lamb Decl. ¶ 26; Fiscus Decl. ¶ 24; Farmer Decl. ¶ 20; Walters Decl. ¶ 28; North Decl. ¶ 32. If Defendants continue to enforce their restrictive execution protocols, Plaintiffs will again be prevented this December from observing the most significant aspects of Mr. Nichols’s execution proceeding, resulting in incomplete accounts and depriving the public of an accurate, independent record of how the State carries out the ultimate exercise of its power.

LEGAL STANDARD

A court may grant a temporary injunction “if it is clearly shown by verified complaint, affidavit or other evidence that the movant’s rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.” Tenn. R. Civ. P. 65.04(2). “Like the federal courts, Tennessee trial courts consider four factors in determining whether to issue a temporary injunction: ‘(1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.’” *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020) (citation omitted). “Where, as here, the temporary injunction is sought on the basis of an alleged constitutional violation, the third factor—likelihood of success on the merits—often is the determinative factor.” *Id.*; see also *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (holding that in First Amendment cases “the likelihood

of success on the merits often will be the determinative factor”). That’s because the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” and “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Connection Distrib. Co.*, 154 F.3d at 288 (citations omitted).

ARGUMENT

I. The Press Coalition is likely to succeed on the merits of its claims.

A. The Execution Protocols’ limitations on access to executions violate Tenn. Code Ann. § 40-23-116.

Tenn. Code Ann. § 40-23-116(a) lists nine categories of witnesses who are “entitled to be *present at the carrying out of the death sentence*.” (emphasis added). Yet the Execution Protocols violate this provision by barring media witnesses from being “present” for critical stages of the “carrying out” of the execution. *See supra* pp. 7–12. Media witnesses are allowed to be “present” for only a brief 10- to 15-minute window where, if things go as Defendants plan, the witnesses watch the condemned die, but cannot observe any other portion of the execution.

One of the sponsors of the bill that became Tenn. Code Ann. § 40-23-116(a)(6), Senator C. Coulter Gilbert, explained the importance of having neutral “media” observers at Tennessee’s executions: “to spread the news that it’s being done as a deterrent, but to also make sure that the State exercises that awesome power with the highest level of decorum and that it’s carried out appropriately.” Statement of Sen. C. Coulter Gilbert on S.B. 2287, *supra*, at Tr. 4:21–5:4 (Compl. Ex. 12). The explicit language of the statute dictates that the only way to fulfill that aim is for the

witnesses to be “present” for the *entire* process of “carrying out” the execution, not isolated moments. *See, e.g.,* Kruesi Decl. ¶ 35 (describing executions as an “intricate process that has many moving parts” with “many opportunities to go wrong because human beings are inherently flawed”).

Observation of the insertion of the IV line is especially important in ensuring that executions are “carried out appropriately.” The “insertion of the IV is a vital step in the execution process, and that [] is also notoriously where things often go wrong.” Sweeney Decl. ¶ 24. And “[s]eeing the IV insertion stage would give [media witnesses] more information about whether they are having trouble finding a vein,” Cavendish Decl. ¶ 30, as Black’s attorneys alleged was the case during his execution, but which media witnesses could not independently confirm, *e.g.,* Sweeney Decl. ¶ 25 (“I had to rely on the account of [Black’s] legal team rather than my own observations[.]”); Cavendish Decl. ¶ 29 (recounting there was “no way to verify” the information about IV insertion from Black’s attorney). The district court in *Philadelphia Inquirer v. Wetzel*, 906 F. Supp. 2d 362 (M.D. Pa. 2012), reviewed whether similar obstructions and impediments to a more fulsome view of the execution process were constitutional under the First Amendment and explained that “full access to Pennsylvania’s process and experience will allow for a more thorough evaluation of how the Commonwealth’s procedures comport with evolving constitutional standards.” *Id.* at 371.

Although Tennessee courts have not interpreted the scope of a witness’s “entitle[ment] to be present at the carrying out of the death sentence,” the Oregon

Supreme Court reviewed a case with a strikingly similar claim and held that fulsome access to all stages of the execution proceeding was required. In *Oregon Newspaper Publishers Association v. Oregon Department of Corrections*, a media coalition challenged the validity of an Oregon rule that, among other things, “limited access that witnesses have to viewing the actual procedures by which the execution is carried out,” arguing that the rule violated the statutory provision permitting the witnesses to “be *present* at the execution.” 988 P.2d 359, 360–61 (Or. 1999) (emphasis added) (quoting Or. Rev. Stat. Ann. § 137.473). Specifically, the rule restricted witnesses to viewing only “the moments during which the lethal injection is administered and causes death” but did not “permit them to witness the entire execution.” *Id.* at 363.

In ruling for the media coalition, the Oregon Supreme Court explained that “[t]he statute requires that the execution, *not just the dying*, be observed by the witnesses.” *Id.* at 363 (emphasis added). “The execution is the process of putting the prisoner to death. It follows that remote activities that precede that process, such as holding the prisoner in a special cell or giving the prisoner a special ‘last meal,’ are not a part of ‘the execution.’” *Id.* at 363–64. “On the other hand, it equally is clear that those actions that are linked inextricably with the administration of the fatal drugs are part of the execution.” *Id.* at 364. “Those acts include connecting special

monitoring equipment to the prisoner, placing the prisoner in restraints, and inserting a catheter that later will be used to administer the fatal drug.” *Id.*

Here, like in Oregon, the Lethal Injection Protocol prohibits media witnesses from observing the preparation of the syringes, the entrance of the condemned into the execution chamber, the insertion of the IV line, the physician’s examination and pronouncement of death, and any post-execution procedures, Lethal Injection Protocol (Compl. Ex. 1) at 17–22, in violation of their statutory right to “be present at the carrying out of the death sentence,” Tenn. Code Ann. § 40-23-116(a). Similar prohibitions in the Electrocution Protocol also violate that right. Electrocution Protocol (Compl. Ex. 2) at 64–67. And these restrictions significantly impair the Press Coalition’s ability to attend and report fully on the carrying out of the death sentence. *E.g.*, Loller Decl. ¶ 34 (“The more fully the news media witnesses are allowed to observe the totality of the execution proceeding, the better we are able to inform and report on the process for all stakeholders.”).

Because the Execution Protocols plainly violate Tenn. Code Ann. § 40-23-116(a), the Press Coalition is likely to succeed on the merits of its claim.

B. The Execution Protocols’ limitations on access to execution proceedings violate the First Amendment.

In a series of decisions in the 1980s, the United States Supreme Court established a First Amendment right of access to criminal proceedings, including criminal trials, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion); minor witness testimony in criminal trials, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–07 (1982); voir dire in criminal cases, *Press-*

Enter. Co. v. Superior Court, 464 U.S. 501, 505–10 (1984) (“*Press-Enterprise I*”); and criminal preliminary hearings, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (“*Press-Enterprise II*”). The presumption of access to such proceedings “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise II*, 478 U.S. at 9 (citation omitted). The Court must also consider reasonable alternatives to the restrictions in the Execution Protocols. *Press-Enterprise I*, 464 U.S. at 511 (requiring “consideration of alternatives to closure”); cf. *State v. Drake*, 701 S.W.2d 604, 608 (Tenn. 1985) (“[T]he trial court must consider reasonable alternatives to closing the proceeding[.]”).

The test for deciding whether there is such a qualified right of access to a type of proceeding is often referred to as the “*Press-Enterprise II* test.” That test entails examination of two “complementary considerations”: (i) “whether the place and process have historically been open to the press and general public,” and (ii) “whether public access plays a significant positive role in the functioning of the particular process in question.”⁴ 478 U.S. at 8. The U.S. Court of Appeals for the Sixth Circuit

⁴ *Press-Enterprise II*’s “experience and logic” test is derived from Justice Brennan’s concurrence in *Richmond Newspapers*, which described the two considerations as “helpful principles” in deciding when the right to gather information should apply. Compare *Richmond Newspapers*, 448 U.S. at 588–89 (Brennan, J., concurring), with *Globe Newspaper Co.*, 457 U.S. at 605–06 (discussing what would become the experience and logic test with citations to Justice Brennan’s concurrence in *Richmond Newspapers*), and *Press-Enterprise II*, 478 U.S. at 8–9 (discussing Justice Brennan’s concurrence through the *Globe Newspaper* opinion); see also *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (explaining the experience and logic test originated in Justice Brennan’s concurrence in *Richmond Newspapers*).

has properly described this as a “test of general applicability” for deciding whether there is a constitutional right of access to particular government proceedings. *Detroit Free Press*, 303 F.3d at 700.

Under that framework, the Press Coalition is likely to succeed on the merits of its First Amendment claim for three reasons. First, application of the *Press-Enterprise II* factors is the appropriate test to determine whether there is a First Amendment right of access to execution proceedings, particularly given that execution of a death sentence is part of—indeed, is the culmination of—criminal judicial proceedings. Second, under the *Press-Enterprise II* test, experience and logic dictate that there is a qualified right of access to executions. And third, Defendants cannot overcome the presumptive right of access to executions.

1. The *Press-Enterprise II* test is the applicable test for deciding whether there is a First Amendment right of access to executions.

Even though the *Press-Enterprise II* test arose in the context of criminal proceedings, the factors have been used by courts to determine whether there is a right of access to a broad range of government proceedings (and records from those proceedings), in both the civil and criminal judicial contexts, and in non-judicial government proceedings.⁵

⁵ These include cooperation agreements in criminal cases (*United States v. Kincaide*, 119 F.4th 1074, 1077 (6th Cir. 2024)), audio recordings of court hearings and trials (*Stevens v. Mich. State Ct. Admin. Off.*, No. 21-1727, 2022 WL 3500193, at *5 (6th Cir. Aug. 18, 2022)), protests in public forums (*Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 829–30 (9th Cir. 2020)), plea agreements (*United States v. DeJournett*, 817 F.3d 479, 484 (6th Cir. 2016)), presentence submissions (*In re Morning Song Bird Food Litig.*, 831 F.3d 765, 777 (6th Cir. 2016)), municipal administrative proceedings (*N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286,

Crucially, the *Press-Enterprise II* framework has been applied to find a qualified right of access to execution proceedings. In *California First Amendment Coalition v. Woodford*, the Ninth Circuit applied the experience and logic factors to find “a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the process.” 299 F.3d at 877. In *Associated Press v. Otter*, the court applied the same analysis to the execution process in Idaho and reversed the denial of a preliminary injunction challenging the state’s protocols that limited access. 682 F.3d 821, 826 (9th Cir. 2012). And in *First Amendment Coalition of Arizona, Inc. v. Ryan*, the same framework was used to determine that the public has a constitutional right to hear the entire execution process. 938 F.3d 1069, 1075 (9th Cir. 2019); *see also Phila. Inquirer*, 906 F. Supp. 2d at 368 (applying experience and logic framework to find qualified right of access to portions of execution that Pennsylvania corrections department protocol instructed its employees to obstruct).

298–300 (2d Cir. 2012)), Bureau of Land Management “horse roundup” events (*Leigh v. Salazar*, 677 F.3d 892, 898–900 (9th Cir. 2012)), search warrant documents (*In re Search of Fair Fin.*, 692 F.3d 424, 429–30 (6th Cir. 2012)), student disciplinary proceedings at a public university (*United States v. Miami Univ.*, 294 F.3d 797, 821–23 (6th Cir. 2002)), special interest deportation proceedings (*N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 208–09 (3d Cir. 2002)), administrative deportation proceedings (*Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694–96 (6th Cir. 2002)), municipal planning commission meetings (*Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180–81 (3d Cir. 1999)), eligible voter lists (*Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 960 F.2d 105, 109–10 (9th Cir. 1992)), summary jury trials (*Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 902–03 (6th Cir. 1988)), court proceedings on potential disqualification of judge and conflicts of interest by attorneys in case (*In re Nat’l Broad. Co.*, 828 F.2d 340, 345 (6th Cir. 1987)), and state environmental agency records (*Cap. Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (en banc)).

As the long line of precedent cited above demonstrates, the experience and logic factors are the appropriate framework for determining whether a right of access exists as to any government proceeding. *Cf. Detroit Free Press*, 303 F.3d at 700 (characterizing framework as a “test of general applicability”). To be sure, application of the test does not mean that a First Amendment right of access will be found. There are plenty of situations where experience and/or logic would weigh against a right of access; for example, there is no tradition of access to jury deliberations, and providing such access would undermine the privacy necessary for candid discussions of the evidence.

At the same time, *Richmond Newspapers* and its progeny confirm the First Amendment right of access “is grounded generally in a ‘purpose of assuring freedom of communication on matters relating to the functioning of government.’” *In re Search of Fair Fin.*, 692 F.3d at 429 (quoting *Richmond Newspapers*, 448 U.S. at 575 (plurality opinion)). Indeed, “[p]eople 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 (plurality opinion). The experience and logic framework reflects the Supreme Court’s understanding that “a major purpose of th[e] [First] Amendment was to protect the free discussion of governmental affairs.” *Globe Newspaper Co.*, 457 U.S. at 604–05 (citation omitted). By “offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Id.*; see also *Press-Enterprise I*, 464 U.S. at 511 n.10 (the

First Amendment protects “opportunities for the communication of thought and the discussion of public questions” (citation omitted)). “[O]ur republican system of self-government” requires “uninhibited, robust, and wide-open” debate about governmental affairs that is “informed” by observing its proceedings. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (citation omitted). This concern for informed, wide-open debate on governmental affairs is at the heart of this case, which involves the State’s imposition of the most severe punishment available under our criminal laws.

This Court should find that executions are government proceedings to which the *Press-Enterprise II* test applies, and then apply the experience and logic test to decide that there is a First Amendment right of access to executions.

2. There is a First Amendment right of access to executions under the *Press-Enterprise II* experience and logic test.

Applying the *Press-Enterprise II* test compels the conclusion that the First Amendment guarantees a right of access to execution proceedings. That right flows naturally from the well-established right of access to criminal judicial proceedings recognized in *Richmond Newspapers* and its progeny. After all, the execution is the culmination of a criminal judicial proceeding.⁶ And though executions are performed

⁶ Black’s Law Dictionary includes an extensive quote from an 1899 treatise in the definition of “Proceeding” that “‘Proceeding’ is a word much used to express the business done in courts,” “is an act done by the authority or direction of the court, express or implied,” and it “may include ... the enforcement of the judgment ... as may be directed by the court of last resort.” *Proceeding*, Black’s Law Dictionary (12th ed. 2024) (quoting Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3–4 (2d ed. 1899)).

by TDOC, the execution occurs in the context of adjudicatory procedures in the courts. Tenn. Sup. Ct. R. 12.4(A) (providing that executions only take place after the State files a Motion to Set Execution Date); Tenn. Sup. Ct. R. 12.4(E) (mandating that if the State’s Motion to Set Execution Date is granted, “*the Court* shall set the date of execution no less than thirty (30) days from the date of the order granting the State’s motion” (emphasis added)).⁷ In fact, “[c]overing an inmate’s execution is an important part of the story of that individual’s crimes and the state’s case against them.” North Decl. ¶ 31. Accordingly, this Court should conclude that a First Amendment right of access to execution proceedings is simply a logical extension of the right of access to criminal judicial proceedings generally. But even if an execution is considered a separate proceeding, both the “experience” and “logic” factors weigh strongly in favor of a right of access.

a. The United States has an extensive historical tradition of permitting the public and the press to witness executions.

The first prong of the *Press-Enterprise II* test looks to “whether the place and process have historically been open to the press and general public” because “a ‘tradition of accessibility implies the favorable judgment of experience[.]’” 478 U.S. at 8 (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)). The “‘experience’ test . . . does not look to the particular practice of any one jurisdiction, but instead ‘to the experience in that *type* or *kind* of hearing throughout the United

⁷ The Tennessee Supreme Court’s orders for the five currently set future executions are attached to the Complaint as Exhibits 36–40.

States.” *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)).

As the *Woodford* court explained, “[h]istorically, executions were open to all comers” in both England and the United States. 299 F.3d at 875; *see also* Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. Rich. L. Rev. 693, 696 (2015) (“In early America, as in England, public hangings were the most common method of execution.”); Stuart Banner, *The Death Penalty: An American History* 24 (2002) (explaining “[u]ntil the nineteenth century, hangings were conducted outdoors, often before thousands of spectators” in a ceremony that was “as conspicuous as any event could possibly be”). Tennessee, for its part, executed condemned prisoners by public hanging until well into the nineteenth century. *See, e.g., The Death Penalty: Execution of Knox Martin, the Bell’s Bend Murderer*, *The Nashville Tennessean* (Mar. 29, 1879) (Compl. Ex. 3) (estimating that “ten to twelve thousand people were present” at 1879 hanging of Knox Martin in Nashville).

In 1883, Tennessee passed a law requiring executions to be held in jail yards—rather than public gallows—thereby limiting the number of witnesses who could attend. 1883 Tenn. Acts 139–40, Ch. CXII, § 1 (Compl. Ex. 4). That shift was consistent with the practice of other states. In northern states, executions began shifting to prison yards “[b]etween 1830 and 1860,” while in southern states “most kept the ceremony open to the public until the later nineteenth and early twentieth centuries.” Banner, *supra*, at 146.

Even after this shift, members of the press and the public generally continued to attend jail yard executions. *Woodford*, 299 F.3d at 875–76 (“When executions were moved out of public fora and into prisons, the states implemented procedures that ensured executions would remain open to some public scrutiny,” including by providing that members of the public or press would attend as official witnesses to “act as representatives for the public at large”); *Phila. Inquirer*, 906 F. Supp. 2d at 370 (explaining that while public executions in Pennsylvania were abolished in 1834, “the state still required the presence of twelve reputable witnesses to attend the executions”); *see also* Banner, *supra*, at 157–58 (noting that “[j]ail-yard hangings were thus still conducted before a crowd, but a smaller and more elite crowd than before” and that “[s]paces were normally reserved for journalists”); Dane A. Drobný, Note, *Death TV: Media Access to Executions Under the First Amendment*, 70 Wash. Univ. L. Q. 1179, 1193 (1992) (“[J]ournalists prevented private executions from becoming completely private. Before the abolition of public executions, newspapers devoted little attention to a hanging. This changed significantly in the nineteenth century when the media reported the final moments of a condemned man’s life in full detail.” (citations omitted)). Thus, there emerged a tradition of providing public access to executions in the United States that bridged the historical shift in the mid- to late-1800s from hangings in the public square to the proceedings more characteristic of the 1900s and present day. *Woodford*, 299 F.3d at 875; *First Amend. Coal. of Ariz.*, 938 F.3d at 1075–76; *Phila. Inquirer*, 906 F. Supp. 2d at 370.

Many states passed laws permitting either official witness access or press access to such jail yard executions.⁸ New York, for example, passed a law in 1835 requiring sheriffs to invite “twelve reputable citizens” to attend execution proceedings. 1835 N.Y. Laws 299, § 2. New Hampshire passed a similar law in 1836, as did Delaware in 1849, as did California and Kansas in 1858, Illinois in 1859, Maryland in 1882, Louisiana in 1884, Arizona and Missouri in 1887, and Nevada in 1901.⁹ In several states that adopted such statutes—including Iowa, Illinois, and New York—members of the press were regularly invited to attend executions.¹⁰ Although Tennessee’s 1883 law initially comported with this emerging consensus—

⁸ The historical session laws referred to herein reflecting representatives of the public’s access to executions are attached hereto as **Compiled Exhibit 44**.

⁹ 1836 N.H. Laws 241–42, § 5; 1849 Del. Laws 366–67, § 2; 1858 Cal. Laws 192, § 1; 1858 Kan. Terr. Laws 190, § 13; 1859 Ill. Laws 17, § 2; 1882 Md. Laws 630–31, § 31; 1884 La. Laws 102; 1887 Ariz. Terr. Laws 807, § 1849; 1887 Mo. Laws 169, § 1; 1901 Nev. Laws 68, § 11.

¹⁰ Compare 1878 Iowa Laws 152, § 13 (sheriff to select “twelve respectable citizens”), with *The First Judicial Hanging in the State in Six Years*, Mount Pleasant Weekly News, Nov. 7, 1894, at 6, <https://perma.cc/XZFF5-8BKU> (describing 1894 execution of James Dooley in Iowa, noting that “representatives of a score of newspapers and as many sheriffs, together with a dozen privileged persons, were admitted”); compare 1859 Ill. Laws 17, § 2 (requiring sheriff “to invite the presence of . . . twelve reputable citizens” to attend), with *Expiate Crimes on the Gallows*, Urbana Daily Courier, Apr. 23, 1904, at 1, <https://idnc.library.illinois.edu/?a=d&d=TUC19040423.2.1> (“The newspapers were represented” at triple execution in Illinois in 1904); compare 1892 N.Y. Laws 36, § 1 (providing for selection of “twelve reputable citizens”), with Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 Wm. & Mary L. Rev. 551, 603–05 (1994) (discussing press access to first execution by electrocution in New York, prison authorities’ short-lived efforts to exclude press from several executions thereafter, and noting that “[t]he press’ continued criticism and suspicion over their exclusion from these six executions resulted in their invitation to witness the seventh electrocution, that of Charles E. MacElvaine, on February 8, 1892”).

allowing sheriffs to designate “other persons . . . not exceeding six in number” to attend, 1883 Tenn. Acts 140, Ch. CXII, § 3 (Compl. Ex. 4)—in 1909, the State removed the designated witness provision, 1909 Tenn. Acts 1810–11, Ch. 500, § 1 (Compl. Ex. 7).

Other states enacted statutes that specifically provided for press access to executions.¹¹ Ohio, for example, adopted a statute entitling members of the media to be present at executions as early as 1885. 1885 Ohio Laws 170, S.B. 409, § 7341 (permitting “a reporter for each one of the two leading newspapers of opposite politics published in said county that the sheriff may designate” to be present at the execution). Over the next century, many other states enacted statutes providing for press access to executions: Connecticut enacted its statute in 1893, with New Jersey doing the same in 1898, New Mexico in 1903, Kentucky in 1910, Alabama in 1923, Florida in 1939, Oklahoma in 1951, Mississippi in 1954, South Dakota in 1979, Utah in 1980, South Carolina in 1997, Montana in 1999, Oregon in 2001, and both Nebraska and Pennsylvania in 2009.¹² Prior to adopting such statutes, several of those states had long provided for members of the public to attend executions,

¹¹ The historical session laws referred to herein reflecting press access to executions are attached hereto as **Compiled Exhibit 45**.

¹² 1893 Conn. Laws 282–83, § 3; 1898 N.J. Laws 913, § 132; 1903 N.M. Terr. Laws 141, § 2; 1910 Ky. Acts 112, § 4; 1923 Ala. Laws 760, § 7; 1939 Fla. Laws 1373–74, § 272; 1951 Okla. Laws 64, Ch. 17a, § 1; 1954 Miss. Laws 246, Ch. 220, § 2; 1979 S.D. Laws 206, § 36; 1980 Utah Laws 146, § 77-19-11; 1997 S.C. Laws 566–67, § 1; 1999 Mont. Laws 1440, § 1; 2001 Or. Laws 488, Ch. 213, § 1; 2009 Neb. Laws 53, L.B. 36, § 15; 2009 Pa. Laws 223, § 4305.

including Pennsylvania, Ohio, Montana, and South Carolina.¹³ Tennessee joined this consensus in 1994 when it enacted Tenn. Code Ann. § 40-23-116. 1994 Tenn. Pub. Acts, Ch. 675, § 1 (requiring “[a] total of seven (7) members of the print, radio and television news media” to attend).

Consistent with historical practice, of the twenty-seven states that maintain the death penalty today, twenty-five have provided some degree of public access.¹⁴ Fourteen provide for press access by statute.¹⁵ Seven others have provided for members of the general public to serve as witnesses,¹⁶ and at least four of those have adopted regulations that provide for press witnesses to attend.¹⁷ Four other states

¹³ 1833–34 Pa. Laws 234–35, § 1; 1844 Ohio Laws 71, § 2; 1864 Mont. Terr. Laws 250, § 222; 1912 S.C. Laws 703, § 4.

¹⁴ Four of the states included in this analysis—California, Oregon, Pennsylvania, and Ohio—have execution moratoriums in place. Only two states—Indiana and Wyoming—have departed from this consensus. Ind. Code Ann. § 35-38-6-6(a); Wyo. Stat. Ann. § 7-13-908.

¹⁵ Ala. Code § 15-18-83(a)(6); Ky. Rev. Stat. Ann. § 431.250; Fla. Stat. Ann. § 922.11(2); Miss. Code Ann. § 99-19-55(2); Mont. Code Ann. § 46-19-103(6)(b); Neb. Rev. Stat. Ann. § 83-970; Ohio Rev. Code Ann. § 2949.25(A)(7); Okla. Stat. tit. 22, § 1015(B); Or. Rev. Stat. Ann. § 137.473(1); 61 Pa. Stat. and Cons. Stat. Ann. § 4305(a)(4); S.C. Code Ann. § 24-3-550(A)(3); S.D. Codified Laws § 23A-27A-34; Tenn. Code Ann. § 40-23-116(a)(6); Utah Code Ann. § 77-19-11(4).

¹⁶ Ariz. Rev. Stat. Ann. § 13-758; Ark. Code Ann. § 16-90-502(e)(1)(D); Cal. Penal Code § 3605(a); Kan. Stat. Ann. § 22-4003(a); La. Stat. Ann. § 15:570(A)(6); Mo. Ann. Stat. § 546.740; Nev. Rev. Stat. Ann. § 176.355(2)(e).

¹⁷ Those states are Arizona, Louisiana, Missouri, and Nevada. *Compare* Ariz. Rev. Stat. Ann. § 13-758, *with* Ariz. Dep’t of Corr., Rehab. & Reentry, Order No. 710 – Execution Procedures § 5.1.1.2 (May 20, 2025), <https://perma.cc/ZP7G-76KY> (providing that twelve citizens will include “up to five members of the media”); *compare* La. Stat. Ann. § 15:570(A)(6), *with* La. Dep’t of Pub. Safety & Corr., Regulation No. OP-D-8 § 7(E)(1) (Feb. 7, 2025), <https://perma.cc/3PC8-Q2C4> (providing that two of the “other witnesses” “shall be members of the news media”);

do not statutorily require public or press witnesses, but have promulgated policies or rules allowing press access.¹⁸ The federal government also requires access for the press and public to witness executions. 28 C.F.R. § 26.4(c)(4)(i)–(ii).

While public access to executions has certainly evolved with our society, “at the time when our organic laws were adopted,” *Richmond Newspapers*, 448 U.S. at 569 (plurality opinion), there was unquestioned public access to executions, *see, e.g., Woodford*, 299 F.3d at 875; *see also* Malik & Holdsworth, *supra*, at 696 (“In early America, as in England, public hangings were the most common method of execution.”); Banner, *supra*, at 24 (explaining “[u]ntil the nineteenth century, hangings were conducted outdoors, often before thousands of spectators” in a ceremony that was “as conspicuous as any event could possibly be”). But even when public access was curtailed, it was not completely eliminated, and the tradition of public access continued in such a way as to bridge the historical transition from public square executions to those more characteristic of the present day. *Woodford*, 299 F.3d

compare Mo. Ann. Stat. § 546.740, *with* Mo. Dep’t of Corr., Execution Witnesses § II(A)(3)(c) (Nov. 15, 2018), <https://perma.cc/FR2K-M5AH> (providing for selection of media representatives); *compare* Nev. Rev. Stat. Ann. § 176.355(2)(e), *with* Nev. Dep’t of Corr., Execution Manual §§ 101.03 & 102.01 (June 9, 2021), <https://perma.cc/6NU6-6DB6> (providing director discretion to select media witnesses).

¹⁸ Those states are Texas, Georgia, North Carolina, and Idaho. *Compare* Tex. Code Crim. Proc. Ann. art 43.20, *with* *Viewing Executions*, Tex. Dep’t of Crim. Just., <https://perma.cc/P3UR-3VBZ> (last visited July 10, 2025); *compare* Ga. Code Ann. § 17-10-41, *with* *For Media – Access for Scheduled Executions*, Ga. Dep’t of Corr., <https://perma.cc/P75U-HG69> (last visited July 10, 2025); *compare* N.C. Gen. Stat. Ann. § 15-190, *with* *Selection of Execution Witnesses*, N.C. Dep’t of Adult Corr., <https://perma.cc/MMG7-9YYD> (last visited July 10, 2025); Idaho Dep’t of Corr., Execution Procedures, at 11 (Oct. 11, 2024), <https://perma.cc/3NDW-7LP9>.

at 875–76; *see also Associated Press v. Tewalt*, 780 F. Supp. 3d 1052, 1074 (D. Idaho 2025) (“[C]apital punishment in the United States has historically been open to the public [T]he means and methods of an execution were also open and obvious, allowing the public to witness not only the execution itself, but the cause and effect of the execution method used.”).

Moreover, even a shorter history of access can be enough to satisfy the experience prong from *Press-Enterprise II*, especially “where the beneficial effects of access to that process are overwhelming and uncontradicted.”¹⁹ *Detroit Free Press*, 303 F.3d at 701 (citing *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)). In Tennessee alone, in addition to the centuries of uncontradicted public access to executions before the shift during the 19th and early 20th centuries, the press has been specifically permitted to attend executions for the last 31 years. 1994 Tenn. Pub. Acts, Ch. 675, § 1 (enacting Tenn. Code Ann. § 40-23-116(a)(6)). Given the overwhelming and uncontradicted discussion, *infra*, of the beneficial effects of public access, especially press access, to witness executions, the *Press-Enterprise II* test is plainly satisfied here.

¹⁹ Similarly, “the Third Circuit has found that courts ‘need not postulate a span as extensive as that in civil and criminal trials,’ but should instead be guided by the ‘unique history and function’ of the process in question.” *Phila. Inquirer*, 906 F. Supp. 2d at 367 (quoting *First Amend. Coal. v. Jud. Inquiry & Rev. Bd.*, 784 F.2d 467, 472 (3d Cir. 1986)).

b. Public access to execution proceedings plays a significant role in the functioning of the proceedings.

The Press Coalition also satisfies the “logic” prong of the *Press-Enterprise II* test because “public access plays a significant positive role in the functioning” of executions. *Press-Enterprise II*, 478 U.S. at 8. Permitting the Press Coalition as surrogates for the public to access all of the key stages of an execution proceeding—and not the sliver currently allowed by the Execution Protocols—will ensure that executions are competently and humanely administered consistent with the Eighth Amendment. *Woodford*, 299 F.3d at 876–77; *Phila. Inquirer*, 906 F. Supp. 2d at 371. In the context of lethal injections, the question whether a lethal injection protocol is “administered as intended” or is performed in a way that creates an “objectively intolerable” risk of pain is a consideration that the Supreme Court has recognized as directly relevant to the Eighth Amendment analysis. *See Baze v. Rees*, 553 U.S. 35, 62 (2008) (citation omitted) (rejecting challenge to Kentucky’s lethal injection protocol under objectively intolerable risk framework). And observation of the insertion of the IV line is especially important because when done improperly, it can be “‘perilously close’ to falling outside of the constitutional safe harbor created by *Baze*.” *First Amend. Coal. of Ariz., Inc.*, 938 F.3d at 1072 (quoting *Lopez v. Brewer*, 680 F.3d 1068, 1075 (9th Cir. 2012)); *see also Phila. Inquirer*, 906 F. Supp. 2d at 371 (“The portion of the execution process that Defendants wish to obscure from Plaintiffs’ view are the exact portions at issue in *Baze* and [Third Circuit precedent applying *Baze*] . . .”).

Past Tennessee executions illustrate the need for neutral observers to provide comprehensive and accurate information to the public about all relevant aspects of the proceedings. As recounted above, the Press Coalition’s reporting on the execution of Byron Black was forced to rely on accounts by Black’s attorney that “medical personnel had trouble finding the veins in both of his arms, leading to a puddle of blood on his right side.” Hale et al., *supra* (Compl. Ex. 29); *cf.* Sweeney Decl. ¶ 25 (“I had to rely on the account of [Black’s] legal team rather than my own observations or reporting.”); Cavendish Decl. ¶ 29 (recounting there was “no way to verify” the information about IV insertion from Black’s attorney); Loller Decl. ¶ 31 (noting that “the insertion process can be rife with complications” and that she has “heard of things happening during [the] preparation process that would be of interest to note to the public; however, [she has] been unable to confirm it and therefore cannot report on it”). In contrast, TDOC’s official statement made no mention of those issues. Media Advisory, *supra* (Ex. 43). As that dichotomy illustrates, “[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information.” *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979). But neither should the press have to rely solely on information from advocates or other interested parties; the reality is there is simply no substitute for first-hand, independent observation by members of the press to report on execution proceedings. *See, e.g.*, Fiscus Decl. ¶ 23 (“[T]he media provides an objective recounting of what happens during an execution . . . in ways that other witnesses to executions like prison officials or the attorneys for the condemned are not able to do.”); Lamb Decl. ¶ 24

(collaboration between media witnesses “paints the picture of truth from an independent group of people rather than a group that you cannot necessarily trust to give you an unbiased view of what’s going on”).

In the context of electrocutions, observation of the full proceeding is just as critical. For example, observation of the immediate post-execution procedures is particularly important to determine whether the procedure went as intended or involved “something more than the mere extinguishment of life,” which again factors into assessing the constitutionality of that method of execution. *Compare In re Kemmler*, 136 U.S. 436, 446–47 (1890) (concluding execution by electrocution did not generally violate Eighth Amendment), *with, e.g., Dawson v. State*, 554 S.E.2d 137, 143 (Ga. 2001) (concluding execution by electrocution violated Georgia constitutional provision against cruel and unusual punishment based on its “mutilating effects” as observed in Georgia autopsy reports); *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (“[D]eath by electrocution as provided in § 29–2532 violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9.”).

Relatedly, permitting Plaintiffs to observe the entirety of executions will contribute to an informed public debate about the death penalty. *Woodford*, 299 F.3d at 876. Simply put, consistent, mandatory access for the press “promote[s] the public perception of fairness and transparency concerning the death penalty, which can only be achieved by permitting full public view of the execution.” *Phila. Inquirer*, 906 F. Supp. 2d at 371. In fact, informing the debate regarding capital punishment policy by the press can lead directly to legislative action. In Arizona, for example, media

witness accounts of the “gruesome” prolonged death of a man executed by gas chamber in 1992 prompted the state to adopt lethal injection as its execution method. Bob Baker & Laura Laughlin, *Arizona Executes Killer; State Gripped by Grisly Accounts*, L.A. Times (Apr. 7, 1992), <https://perma.cc/M6VA-YYMN>; *Gruesome Death in Gas Chamber Pushes Arizona Toward Injections*, N.Y. Times (Apr. 25, 1992), <https://perma.cc/CP4H-ETP5>. And in 1906 in Minnesota, members of the media reported on the botched hanging of William Williams, which lasted fourteen minutes. Ben Welter, *Feb. 13, 1906: Minnesota’s Last Execution*, Minn. Star Trib. (May 1, 2014), <https://perma.cc/WLJ7-2RTS>. These reports “ignited a movement . . . to abolish capital punishment” in the state, and governors commuted every death sentence imposed in Minnesota until the death penalty was abolished by the legislature five years later. John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 Fed. Commc’ns L. J. 355, 364 & n.42 (1993). At the same time, media witnesses can also inform the public when an execution is performed in accordance with the necessary decorum and fidelity that taxpayers expect, thereby bolstering confidence in the State’s process. Farmer Decl. ¶ 19 (“Media witnesses are important in an execution not so journalists have a ‘scary’ story to write, but so that someone is there to keep everybody doing what they say they are going to do how they said they were going to do it.”); Kruesi Decl. ¶ 34 (“To kill a person on the taxpayer’s dime is significant, so the public has a right to know what TDOC is doing.”).

Permitting public observers at executions also promotes the intended deterrent effect of that punishment. The death penalty has been said to “serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.” *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); *Kennedy v. Louisiana*, 554 U.S. 407, 420, *as modified* (Oct. 1, 2008) (“[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.”). While the deterrence rationale has been subject to significant public debate, it is self-evident that public and press access to executions increases their salience, thereby contributing to any such deterrent effect. *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 711–16 (2005) (surveying empirical studies on deterrence rationale and noting that, at least as a theoretical matter, “[i]f executions are highly salient and cognitively available, some prospective murderers will overestimate their likelihood, and will be deterred as a result”); *see also* Statement of Sen. C. Coulter Gilbert on S.B. 2287, *supra*, at Tr. 4:21–5:4 (Compl. Ex. 12) (recognizing media’s role in “spread[ing] the news that it’s being done as a deterrent”).

Lastly, access to execution proceedings “serve[s] an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.” *Richmond Newspapers*, 448 U.S. at 571 (plurality opinion). “Although this may reflect the dark side of human nature . . . the public must be permitted to see justice done[.]” *Woodford*, 299 F.3d at 877. “When a shocking crime occurs,” as in most, if

not all, capital cases, “no community catharsis can occur if justice is done in a corner [or] in any covert manner.” *Richmond Newspapers*, 448 U.S. at 571 (plurality opinion) (citation and internal quotation marks omitted).

Ultimately, when deciding the logic prong of the *Press-Enterprise II* test, “what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). Public access to execution proceedings—including not only the isolated moments when death occurs but all of the steps and procedures that are “inextricably intertwined with the process,” *Woodford*, 299 F.3d at 877—is integral to the very process of the execution. From spreading the word about the execution for its possible deterrent effect to ensuring the State conducts its executions in a constitutional manner to informing the public debate on the very question of whether executions should take place, the presence of neutral observers to witness and report on these proceedings is vital to the State’s ability to exercise this awesome power in a democratic society, where power exists by the consent of the governed. As such, the Court should find that the logic prong of the *Press-Enterprise II* test supports a qualified right of access to executions.

c. Defendants cannot overcome Plaintiffs’ presumptive right of access to executions.

Since the *Press-Enterprise II* framework applies and the experience and logic test weighs in favor of a First Amendment right of access to execution proceedings, Defendants bear the heavy burden of overcoming that presumption. *Detroit Free Press*, 303 F.3d at 705. Defendants will need to demonstrate “an overriding interest

based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise I*, 464 U.S. at 510.

The overriding interest referred to in *Press-Enterprise II* has also been referred to as an “exacting standard,” *DeJournett*, 817 F.3d at 485, which can be satisfied with “[o]nly the most compelling reasons” to deny access, *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016) (citation omitted). “Moreover, the greater the public interest” in the proceeding, “the greater the showing necessary to overcome the presumption of access.” *Id.* (discussion in sealing of court records case). The Supreme Court has found that “capital punishment categorically differs from other penalties, requiring increased transparency in its implementation.” *Associated Press*, 780 F. Supp. 3d at 1074 (citing *Gregg*, 428 U.S. at 188 (plurality opinion)) (“As such, restriction on the public’s right of access to a government proceeding carries greater consequences in the context of capital punishment.”).

At this stage of the case, the Press Coalition does not know what interests the Defendants may assert to attempt to carry their burden, but Defendants cannot show that those interests are sufficiently compelling to overcome the profound public need for maximal transparency, and certainly will not be able to show that the limitations imposed by the Execution Protocols are narrowly tailored as required to overcome the First Amendment right of access. *See Phila. Inquirer*, 906 F. Supp. 2d at 373 (holding that asserted interest in obscuring view of execution did not overcome First Amendment right of access, including because it was not narrowly tailored).

C. The Execution Protocols’ limitations on access violate Article I, Section 19 of the Tennessee Constitution.

Even if the Court did not recognize a right of access to execution proceedings under the First Amendment, the Press Coalition is still likely to succeed on the merits of its claim that the Execution Protocols violate Article I, Section 19.²⁰ Article I, Section 19 provides, in pertinent part, “[t]hat the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.” The Tennessee Supreme Court has explained that this provision “*is a substantially stronger provision than that contained in the First Amendment*” and that “[t]his mandate of Tennessee’s Constitution requires that any infringement upon the ‘free communication of thoughts’ and any stumbling block to the complete freedom of the press ‘to examine (and publish) the proceedings ... of any branch or officer of the government’ is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.” *Press, Inc. v. Verran*, 569 S.W.2d 435, 441–42 (Tenn. 1978) (emphasis added). In fact, “in the first two sentences of [Article I, Section 19], the Constitution provides freedom of the press, *open government* and freedom of speech.” *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976) (emphasis added).

Plain within the constitutional right of open government and prohibition against “any stumbling block to the complete freedom of the press ‘to examine (and

²⁰ It is also worth noting that Article I, Section 19 is a part of the Tennessee Constitution’s Declaration of Rights, which has its own separate provision that makes

publish) the proceedings ... of any branch or officer of the government,” is a right of access to government proceedings that is broader and stronger than the First Amendment right of access to government proceedings. If there were any doubt that the First Amendment encompassed a right of access beyond judicial proceedings—which, as discussed *supra* pp. 18–21, there is not—Article I, Section 19 is not limited to any particular part of government, but instead explicitly encompasses “proceedings of the Legislature; or of any branch or officer of the government.” The Tennessee constitutional right of access is stronger in that “no law shall ever be made to restrain the right thereof.” While that language has not been construed to be absolute, despite its plain language, *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 524 (Tenn. 1993) (citing *Leech v. Am. Booksellers Ass’n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979)), any restriction on the right of access to government proceedings “is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment,” *Verran*, 569 S.W.2d at 442.

Given the prohibitory language in Article I, Section 19, any infringement upon the right to “examine” a government proceeding should, at a minimum, be analyzed under the *Press-Enterprise II* standard, which requires that “the

plain its place in Tennessee’s organic law. Tenn. Const. art. XI, § 16 (“The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.”).

presumption [of access] [] be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”²¹ *Press-Enterprise II*, 478 U.S. at 9 (quoting *Press-Enterprise I*, 464 U.S. at 510); see also *Drake*, 701 S.W.2d at 608 (“[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, [and] the trial court must consider reasonable alternatives to closing the proceeding[.]” (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984))). Defendants cannot make this showing.

And there should be no doubt that executions are government proceedings to which the Article I, Section 19 right of access attaches. “Proceedings” is defined as “events, happenings.” *Proceeding*, Merriam-Webster, <https://perma.cc/PV6W-CBP3> (last updated Oct. 20, 2025). The carrying out of the death sentence of a condemned prisoner is a carefully orchestrated, heavily regulated event or happening that Defendants are bound by law to complete, involving multiple branches of government. Tenn. Code Ann. § 40-23-116(a). Unlike the implementation of other criminal sentences, the execution of a condemned prisoner includes provisions of state law, *id.*, a Tennessee Supreme Court Rule, Tenn. Sup. Ct. R. 12, a motion to set the proceeding, *id.* at 12.4(A), an order from the Tennessee Supreme Court setting the date for the execution proceeding, *id.* at 12.4(E), and detailed protocols

²¹ An overriding interest is a “compelling” one. *E.g.*, *Press-Enterprise I*, 464 U.S. at 510 (explaining that a denial of access “is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest” (citation omitted)).

for conducting the proceeding, Lethal Injection Protocol (Compl. Ex. 1); Electrocutation Protocol (Compl. Ex. 2). And executions do not happen on a daily basis in Tennessee, but instead are sporadic. *See, e.g.*, Compl. ¶¶ 56–58 & Compl. Exs. 36–40 (orders setting executions for December 11, 2025, May 21, 2026, August 13, 2026, September 30, 2026, and December 3, 2026).

Article I, Section 19 provides stronger protections for access to government proceedings than the First Amendment; accordingly, even if the Court had any doubt about application of the First Amendment right of access to execution proceedings, the Court readily can and should find that the Press Coalition is likely to succeed on the merits of its claim that Defendants’ Execution Protocols violate Article I, Section 19.

II. The remaining temporary injunctive factors favor granting relief.

Each of the other three temporary injunction factors also favor issuance of the requested relief.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (quoting *Elrod*). The same is true for the violation of Tenn. Code Ann. § 40-23-116(a) and Article I, Section 19 of the Tennessee Constitution because not only is the latter of similar constitutional cloth as the First Amendment, but denial of the temporary injunction “is not fully compensable by monetary damages.” *Obama for Am. v.*

Husted, 697 F.3d 423, 436 (6th Cir. 2012) (citation omitted).²² Similar to the preliminary injunction for deportation proceedings in *Detroit Free Press v. Ashcroft*, “no subsequent measures can cure [the inability to attend a government proceeding], because the information contained in the appeal or transcripts will be stale, and there is no assurance that they will completely detail the proceedings.” 303 F.3d at 710–11. Therefore, when media witnesses are denied the opportunity to observe critical stages of an execution, the resulting harm is the permanent loss of the ability to observe and report on that specific government proceeding. Such a loss is an irreparable injury.

Moreover, the balance of equities and public interest also weigh in Plaintiffs’ favor based on the presumed harm from deprivation of First Amendment freedoms and related state constitutional and statutory rights because injunctions protecting First Amendment rights are always in the public’s interest. *E.g.*, *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” (citation omitted)); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (“[T]he public as a whole has a significant interest in ... protection of First Amendment liberties.”).

CONCLUSION

Plaintiffs request that the Court issue a temporary injunction that bars Defendants from enforcing the Execution Protocols and requires Defendants to

²² The *Husted* case was repeatedly cited favorably by the Tennessee Supreme Court in *Hargett* on points related to the issuance of a temporary injunction. 604 S.W.3d at 394, 405 n.20.

permit Plaintiffs, and other similarly situated members of the press, to observe the otherwise obscured portions of the execution proceeding, from the time the condemned enters the room until after the physician pronounces the condemned dead, and all initial steps in the proceeding, such as the preparation of syringes for use in lethal injections or sponges for use in electrocutions, that are inextricably intertwined with the execution of the condemned.

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** Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served with the Petition and Summons upon the Defendants.

/s/ Paul R. McAdoo

Counsel for Plaintiffs