

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

**PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR
TEMPORARY INJUNCTION**

Tennessee law, the First Amendment, and the Tennessee Constitution all confirm that the public and the press have a right of access to executions conducted by the Tennessee Department of Correction (“TDOC”). As explained in Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Motion for Temporary Injunction (“Plaintiffs’ Opening Memorandum” or “Pls. Mem.”), Defendants must shoulder a heavy burden to justify restricting the window for the statutorily mandated press witnesses to observe execution proceedings to a mere 10- to 15-minute period, which excludes critically important portions of the proceedings such as the entry of the condemned into the execution chamber and their preparation, the administration of lethal injection drugs and electrical current, and the declaration of death.

Defendants have failed to carry that burden. Injunctive relief here would vindicate the Plaintiffs’ statutory and constitutional rights. But it would not place a “condition” on or stay or enjoin the upcoming execution of Harold Wayne Nichols on December 11, 2025. While feasibility of compliance may appropriately shape the precise terms of any injunctive relief this Court may issue, constitutional protections cannot be waived on grounds of convenience. “The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation[s]” *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring).¹ And, in any event, accommodating Plaintiffs’ right of access here would impose only minimal burdens that could readily be accommodated by tailoring the relief to what TDOC can feasibly accomplish.

Tenn. Code Ann. § 40-23-116, the First Amendment, and Article I, Section 19 of the Tennessee Constitution all protect the public’s right of access to execution proceedings, and Tennessee has selected the press to vindicate that right. In arguing otherwise, Defendants at bottom assert that they have unfettered discretion to close almost the entirety of execution proceedings—except the “moment of death itself”—against the weight of precedent, historical tradition, and logic. But Tennessee law and the federal and State constitutions demand more.

¹ Pursuant to Local Rule 26.04, all cases that are not published decisions from Tennessee state courts that were not previously attached to Plaintiffs’ Opening Memorandum are attached as **Compiled Exhibit 46**.

For the reasons in Plaintiffs’ Opening Memorandum and those discussed herein, during the pendency of remaining proceedings in this case, this Court should bar Defendants from enforcing the challenged portions of the Execution Protocols and require Defendants to permit Plaintiffs, and other similarly situated members of the press, to observe the execution proceeding in its entirety, including those portions that are inextricably intertwined with the execution of the condemned.

I. This Court has the authority and ability to grant the relief requested.

Defendants go to great lengths to push back against a position Plaintiffs have never even remotely advocated: that the scheduled execution of Harold Wayne Nichols must be stayed. The question whether this Court has the “authority” to “stay, modify, or condition” an execution order from the Supreme Court is simply irrelevant, since Plaintiffs are not asking the Court to do any such thing. *Black v. Strada*, 721 S.W.3d 223, 228 (Tenn. 2025). The current Execution Protocols violate Plaintiffs’ access rights under the First Amendment, Tennessee Constitution and Tenn. Code Ann. § 40-23-116, and must accordingly be modified. But Plaintiffs recognize that the necessary changes may not be feasible before Mr. Nichols’s execution on December 11, and have never asserted that the execution must be stayed pending those changes.

To buttress their efforts to defeat this strawman, Defendants exaggerate the burdens of implementing execution protocols that comply with these legal obligations, insisting that curing the deficiencies would require “numerous changes to TDOC’s facilities, operating procedures, and training,” up through and including

“redesign[ing] and reconstruct[ing]” the entire Capital Punishment Unit. Defs.’ Resp. in Opp’n to Pls.’ Mot. for Temporary Inj. (“Defs. Opp’n”) at 9. That is plainly not so, and courts have not hesitated to reject similar arguments from state authorities in this same context. *See, e.g., Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (“[I]n light of the minimal changes that an injunction might require . . . we have trouble imagining why an alteration to the training procedures would be necessary. Even if such a change were required, the State has not explained why it would delay the execution.”).

Relief should only be “tailored as precisely as possible to the exact needs of the case,” and would not entail the wholesale upending of the entire Tennessee penal system. *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183–84 (1968). Much could be accomplished, for example, by simply opening the window blinds between the witness room and the execution chamber a few minutes earlier and closing them a few minutes later. In addition, the Lethal Injection Protocol makes clear there is already a closed-circuit camera capturing footage of the drug administration. *See* Lethal Injection Protocol (Compl. Ex. 1) at 34–35. Facilitating access to that feed would require minimal changes to existing procedures and aligns with the type of relief courts have ordered in similar cases. *See Guardian News & Media LLC v. Ryan*, 225 F. Supp. 3d 859, 869 (D. Ariz. 2016) (concluding government’s concerns about “physical and logistical difficulties” carried “no weight” where closed-circuit television was already used to allow witnesses to view the insertion of the intravenous lines, and there was “no reason” same equipment could

not be used to provide a view of the chemical room where drugs were administered); accord *First Amend. Coal. of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1078 (9th Cir. 2019) (concluding that leaving existing microphone in execution chamber on for witnesses throughout process would “involve at most only a *de minimis* cost”).

In any event, even if some modifications to the Execution Protocols would be burdensome, that would not allow the State or the Court to simply ignore constitutional requirements. And it certainly would not justify the State’s apparent position that the press and public have no choice but to live with the current limited access, and that this Court is powerless to order Defendants to make *any* changes.

Contrary to Defendants’ contention, the relief Plaintiffs seek is entirely within the power of this Court to grant.

II. The Press Coalition is likely to prevail on its claims.

Defendants advance a number of arguments to avoid the conclusion that the Execution Protocols violate Plaintiffs’ statutory and constitutional rights and must be enjoined. All of these arguments fall flat.

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

Defendants take the extreme position that the statutory provision stating that press witnesses are “entitled to be present at the carrying out of the death sentence” (Tenn. Code Ann. § 40-23-116(a)) confers only a right to view “the moment of death itself.” Defs. Opp’n at 12. This interpretation finds no support in the law or common sense.

In construing statutes, Tennessee courts “seek to ascertain the intention of the Legislature as it is expressed in the words of the statute and should look to the entire Act and give consideration to the purpose, objective and spirit behind the legislation.” *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976). Tenn. Code Ann. § 40-23-116(a)(6) is a remedial provision designed to ensure public scrutiny of execution proceedings. *See Loftin v. Langsdon*, 813 S.W.2d 475, 479 (Tenn. Ct. App. 1991) (“Statutes which introduce regulations conducive to the public good are remedial statutes.”). Accordingly, the provision must be “liberally construed in furtherance of [this] purpose.” *Dailey v. State*, 470 S.W.2d 608, 610 (1971). The plain intent of § 40-23-116 is to provide a measure of transparency for the exercise of the most “awesome power” a state wields. 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). It aligns with other statutes, such as the Tennessee Open Meetings Act and Public Records Act, which confirm the “policy of this state” that “public business” “shall not be conducted in secret.” Tenn. Code Ann. § 8-44-101(a); *see Dorrier*, 537 S.W.2d at 892 (explaining that such statutes must be read to “implement[] the constitutional requirement of open government”).

Here, the statute allows witnesses to be “present at the carrying out of the death sentence.” Defendants cherry-pick one definition of “carry out” to support their view that the statute applies only to the “moment of death.” But in citing the *third* definition of the term in the American Heritage Dictionary (“[t]o bring to a conclusion”), *see* Defs. Opp’n at 12, they ignore the *first* definition in that same

dictionary (“[t]o put into practice or effect”),² as well as other common definitions (“to put into execution” or “to continue to an end or stopping point”).³ These plain definitions reinforce that the legislature intended to provide for witnesses to observe the full process of the execution, not only a brief set of moments when the inmate’s life ends.

Notably, in pushing their crabbed reading of the statutory language, Defendants ignore a decision from another state’s Supreme Court that addresses this exact same issue. *See Or. Newspaper Publishers Ass’n v. Or. Dep’t of Corr.*, 988 P.2d 359, 360–61 (Or. 1999); Pls. Mem. at 15–16. As here, the Oregon legislature passed a statute permitting witnesses to “be present at the execution,” but the Department of Corrections rule improperly restricted witnesses to viewing only “the moments during which the lethal injection is administered and causes death.” 988 P.2d at 363. The Oregon Supreme Court sensibly held that this statutory language “requires that the execution, not just the dying, be observed by the witnesses.” *Id.* Defendants offer no reason as to why Tennessee’s statute should be interpreted differently.

B. The Execution Protocols’ limitation on access to execution proceedings violates the First Amendment.

Because Plaintiffs are seeking access to government proceedings, the First Amendment analysis in this case is governed by the well-established “experience and logic” test of *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-*

² See *Carry Out*, Am. Heritage Dictionary (5th ed. 2022), <https://ahdictionary.com/word/search.html?q=carry>.

³ See *Carry Out*, Merriam-Webster (updated Nov. 14, 2025), <https://www.merriam-webster.com/dictionary/carrying%20out>.

Enterprise II”). In a bid to avoid a straightforward application of *Press-Enterprise II*, the State mischaracterizes the scope of Plaintiffs’ claims. For the avoidance of doubt: Plaintiffs are not attempting to assert a right of access to “*all* information related to” execution proceedings, as in *Phillips v. DeWine*, 841 F.3d 405, 419 (6th Cir. 2016); to “information regarding the source of the compounded pentobarbital,” as in *Zink v. Lombardi*, 783 F.3d 1089, 1113 (8th Cir. 2015); or to information about prison operations generally, as in *Pell v. Procunier*, 417 U.S. 817 (1974), and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). All of those cases are inapplicable here. Instead, because Plaintiffs seek to vindicate the public’s right to access a particular kind of government *proceeding* that the government has elected to hold at a prison, *Press-Enterprise II* governs that analysis. See *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002) (applying *Press-Enterprise II* “to conclude that the public has a First Amendment right to view executions”); accord *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 370–71 (M.D. Pa. 2012) (same).

The State tries to steer the Court away from even applying the *Press-Enterprise II* “experience and logic” test at all under the theory that executions are “not part of the criminal adjudication process.” Defs. Opp’n at 15. But this puts the cart before the horse. The State may (and does) argue that “experience” or “logic” weigh against finding a qualified right of access to execution proceedings—that is, that Plaintiffs’ claims do not *pass* the *Press-Enterprise II* test—but the notion that the test itself can only apply to certain types of government proceedings finds no support in the Supreme Court’s jurisprudence. As explained in Plaintiffs’ Opening

Memorandum at 18–19, the experience and logic test of *Press-Enterprise II* is not limited to proceedings within the criminal adjudication process. It has been applied to government proceedings both in the civil and criminal judicial context as well as the non-judicial context and has been described as a “test of general applicability” by the Sixth Circuit. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002).

Defendants try to wave away the 9th Circuit Court of Appeals’ decision in *Woodford*, 299 F.3d 868, even though it is the only federal appeals court to have squarely addressed the question of whether the First Amendment provides a right of access to execution proceedings, and even though no other federal appeals court has departed from *Woodford*. Compare *Phillips*, 841 F.3d at 419 (declining to resolve question of whether “the public has a right of access to executions”), with *Zink*, 783 F.3d at 1112 (assuming, without deciding, that “*Press–Enterprise* analysis applies to executions”). The State argues that instead of *Woodford* and its progeny, this Court should follow the handful of lower federal court decisions that have declined to apply the *Press-Enterprise II* analysis to execution proceedings at all. But each of the lower court decisions on which the State relies incorrectly treated the fact that executions occur within prison walls as dispositive.⁴ Just as criminal proceedings are still governed by *Press-Enterprise II* when they are held within prisons, see, e.g., *Tex. Trib.*

⁴ See, e.g., *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1324 (W.D. Okla. 2014) (relying on the “different treatment of access issues in the prison context”); *BH Media Grp., Inc. v. Clarke*, 466 F. Supp. 3d 653, 663 (E.D. Va. 2020), *vacated and remanded*, 851 F. App’x 368 (4th Cir. 2021) (same); see also *Associated Press v. Neal*, 788 F. Supp. 3d 959, 965 (S.D. Ind. 2025) (same).

v. Caldwell Cnty., 121 F.4th 520, 528–29 (5th Cir. 2024) (applying experience and logic test to bail hearings), so too are executions.

Defendants’ arguments that “experience and logic” weigh against finding a right of access to execution proceedings are entirely unpersuasive. Defendants cannot meaningfully dispute the strong historical tradition of permitting public and press observers at executions throughout the United States, *see* Pls. Mem. at 21–29, and 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; *see also* Pls. Mem. at 30–35.

Defendants limply assert that media access to proceedings in which the government lawfully takes a person’s life would serve little purpose, since journalists are “without medical or legal expertise” and therefore would not be in a position to “identify constitutional violations.” Defs. Opp’n at 20. But the purpose of public transparency is to allow people of all stripes to access the workings of their government, and the legislature has explicitly selected the press as the appropriate witness to the “carrying out of [a] death sentence.” Tenn. Code Ann. § 40-23-116(a). Moreover, Defendants’ assertion is inaccurate as a factual matter. Plaintiffs’ journalists have cultivated expertise in observing executions and are incredibly well-suited to spotting irregularities. *See, e.g.*, Sweeney Decl. ¶ 15 (noting subtle difference between executions); Kruesi Decl. ¶ 28 (same).

Defendants cannot seriously dispute that public access, through journalists’ careful reporting, both “promote[s] the public perception of fairness and transparency

concerning the death penalty” and “exposes the execution process to public scrutiny” so that it may improve and the people can have confidence the process is being “carr[ied] out” in a fair and humane manner. *Phila. Inquirer*, 906 F. Supp. 2d at 371–72. State law and TDOC’s own regulations recognize the importance of the media’s presence by requiring media witnesses to participate in a press conference immediately after each execution.

Finally, because they assume that the *Press-Enterprise II* test cannot possibly apply at all, Defendants make almost no effort to meet their burden of overcoming the Press Coalition’s qualified right of access to execution proceedings, including all of the steps that are “inextricably intertwined with the process.” *Woodford*, 299 F.3d at 877. The only justification they even allude to is protecting the identities of the officials administering the process. *See* Defs. Opp’n at 21–22. But Defendants do not present any *evidence* that would establish that anonymity is even necessary, let alone constitutes an “overriding interest,” *Press-Enterprise II*, 478 U.S. at 9 (citation omitted);⁵ and even if it did, Defendants do not attempt to show that wholesale blocking of access to all but a few minutes of the proceeding is “narrowly tailored to serve that interest.” *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*“Press-Enterprise I”*). That would require courts to look to whether “reasonable

⁵ *Cf. Doe v. Doe*, 127 S.W.3d 728, 736 (Tenn. 2004) (holding that protecting reputation of an attorney and the Bar from meritless complaints, protecting the anonymity of complainants raising alleged disciplinary violations by lawyers, and maintaining the integrity of investigations, while “legitimate,” were not “sufficiently compelling” interests to survive First Amendment scrutiny of a content-based restriction).

alternatives to closure” exist. *Press-Enterprise II*, 478 U.S. at 14. Defendants offer no evidence that the confidentiality of staff identities could not be just as effectively protected by any number of less restrictive means, including the wearing of surgical masks or similar equipment. *See Woodford*, 299 F.3d at 885; *Phila. Inquirer*, 906 F. Supp. 2d at 373 (holding that availability of these options defeated the government’s attempt to justify closure based on concerns for staff confidentiality).

In sum, Defendants’ efforts to avoid constitutional scrutiny of the access the State grants to execution proceedings should be rejected. Based on the *Press-Enterprise II* test, Plaintiffs have a qualified right of access to execution proceedings, which Defendants have not remotely overcome.

C. The Execution Protocols violate Article I, Section 19 of the Tennessee Constitution.

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 State urges the Court to adopt an exceedingly narrow reading of this provision as applicable only to “prior restraints on the publication and dissemination of materials critical of governmental actions.” Defs. Opp’n at 24. This is squarely at odds with the plain, forceful language of this provision—and is contradicted by settled Tennessee law. As explained in Plaintiffs’ Opening Memorandum, in *Dorrier v. Dark*, the Tennessee Supreme Court read Article I, Section 19 as enshrining a “constitutional requirement of open government.” 537 S.W.2d at 892; *see* Pls. Mem. at 37.

Defendants’ reading of Article I, Section 19 would eviscerate the constitutional guarantee of “freedom of the press, *open government* and freedom of speech.” *Dorrier*, 537 S.W.2d at 892 (emphasis added). Their reliance on the Court of Appeals’ decision in *Mayhew v. Wilder*, 46 S.W.3d 760, 772 (Tenn. Ct. App. 2001), to rebut this basic principle is misplaced. *See* Defs. Opp’n at 23. The conclusion that Article I, Section 19 did not grant a right of “unrestricted free access to all legislative sessions, or its committee meetings” (which the Tennessee Constitution itself expressly provides must sometimes be “kept secret,” Tenn. Const. art. II, § 22) has little bearing on the need for transparency into the process of state executions.

Because Tennessee courts have recognized that Article I, Section 19 provides greater protections for access to government proceedings than the First Amendment, the Court can and should find that Plaintiffs are likely to succeed on the merits of their claims, even if the First Amendment did not also require that result.

III. The doctrine of laches does not apply.

As the State concedes, “[t]he doctrine of laches generally applies to actions that are not governed by a statute of limitations.” *Finova Cap. Corp. v. Regel*, 195 S.W.3d 656, 660 (Tenn. Ct. App. 2005). And even where it does apply, “courts are reluctant to sustain the defense.” *Whitehaven Util. Dist. of Shelby Cnty. v. Ramsay*, 387 S.W.2d 351, 353 (Tenn. 1964); *see also S. M. Williamson & Co. v. Ragsdale*, 95 S.W.2d 922, 926 (Tenn. 1936). Above all, laches “requires more than mere delay.” *Long v. Bd. of Pro. Resp. of Sup. Ct.*, 435 S.W.3d 174, 181 (Tenn. 2014). Not only must the defendant demonstrate “negligence and unexcused delay,” *Brown v. Ogle*, 46 S.W.3d 721, 726 (Tenn. Ct. App. 2000), that delay must cause “prejudice to the defendant such as the

loss of evidence and witnesses or a considerable accumulation of interest,” *Grand Valley Lakes Prop. Owners Ass’n, Inc. v. Burrow*, 376 S.W.3d 66, 84 (Tenn. Ct. App. 2011) (citation omitted); *see also Evans v. Steele*, 145 S.W. 162, 165 (Tenn. 1912); *Assocs. Asset Mgmt. LLC v. Blackburn*, No. W2016–00801–COA–R3–CV, 2017 WL 1077060, at *4 (Tenn. Ct. App. Mar. 22, 2017).

The State has not made, and cannot make, this showing. As an initial matter, Plaintiffs sent a letter to TDOC Commissioner Frank Strada over three months ago on August 15, 2025, requesting greater access to execution proceedings and detailing the claims Plaintiffs are now pressing. Compl. ¶ 55; *id.* Ex. 35. Plaintiffs’ letter, to which the State never responded, came only ten days after the execution of Byron Black, *see* Compl. ¶ 47; Pls. Mem. Ex. 43, and less than three months after the execution of Oscar Smith, the State’s first execution following a three-year moratorium, *see, e.g.,* Steven Hale, Steve Cavendish & Shauna Reynolds, *Tennessee Carries out First Execution Since 2020, Killing Oscar Smith by Lethal Injection*, Nashville Banner (May 22, 2025) (Compl. Ex. 23). Had Plaintiffs brought this claim before Mr. Smith’s execution—as Defendants seem to suggest would have been necessary—the State would have argued that the claims were not yet ripe or that Plaintiffs lacked standing. And with five executions currently scheduled in Tennessee in the next 12 months, Defendants’ reasoning would make it impossible to ever file an action raising these claims. Indeed, there will be no time to file this action when an execution is not imminent.

Defendants cannot seriously contend that requiring the State to facilitate greater access to execution proceedings going forward amounts to “prejudice” that could defeat Plaintiffs’ claims. As discussed above, there are myriad steps the State could take that would almost entirely cure the deficiencies without requiring significant overhaul or expense. Defendants have no argument that the timing of this action even slightly affects the feasibility or burdensomeness of those steps. Laches simply has no application to this motion or the action as a whole.

CONCLUSION

For the reasons set forth above and in Plaintiffs’ Opening Memorandum, Plaintiffs request that the Court issue a temporary injunction barring Defendants from enforcing the challenged portions of the Execution Protocols, and requiring Defendants to 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.

Dated: November 26, 2025

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** Pro hac vice application pending*

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served upon counsel for Defendants by email, as agreed by the parties, on:

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