

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

ASSOCIATED PRESS, et al.,	)	
	)	
Appellees,	)	
	)	DAVIDSON COUNTY
v.	)	No. M2026-____-COA-R10-CV
	)	
KENNETH NELSON, et al.,	)	
	)	
Appellants.	)	

**APPELLANT’S APPLICATION FOR EXTRAORDINARY APPEAL
PURSUANT TO TENN. R. APP. P. 10**

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QUESTIONS PRESENTED

- I. Did the trial court have authority to condition the enforcement of the Tennessee Supreme Court's execution orders on its own judicially-created procedures for expanded media access?
- II. Does the First Amendment require Tennessee to allow media witnesses to see every aspect of an execution?
- III. Do TDOC execution protocols comply with Tenn. Code Ann. § 40-23-116(a), which gives media witnesses the right to be "present at the carrying out of the death sentence"?

INTRODUCTION

The Davidson County Chancery Court has issued yet another injunction that unlawfully conditions the Tennessee Supreme Court’s unconditional execution orders. This time, the court blue-penciled the State’s execution protocol based on a flawed interpretation of the First Amendment and state law. Its injunction requires Defendants to keep the blinds of the death chamber open “until the pronouncement of the death of the condemned individual.” And it requires execution team members—now visible to witnesses—to wear “PPE suits” and “masks” to shield their identities. This injunction, which upends longstanding confidentiality protections for execution team members, crosses the line between adjudication and policymaking. The court’s order exposes execution team members to witnesses who will invariably try to identify them.¹ And it threatens the State’s ability to recruit and retain individuals who rely on assurances of anonymity when agreeing to participate. This Court should immediately intervene and swiftly vacate the injunction.

As our Supreme Court recently emphasized, trial courts lack authority to “plac[e] condition[s]” on “unconditional execution order[s].” *Black v. Strada*, 721 S.W.3d 223, 228 (Tenn. 2025) (order), *cert. denied*, No. 25-5261, 2025 WL 2204938 (U.S. Aug. 4, 2025). Yet the trial court

¹ During a press conference after the last execution, reporters were asked to identify execution participants in the death chamber before the blinds were closed, and one reporter gave her best description of those she could see. WVLT News, *Officials Hold a News Conference After the Execution of Harold Nichols* (26:30-27:14) (Dec. 11, 2025), <https://perma.cc/5MDJ-VWJ4>.

did just that, conditioning multiple upcoming executions on the State's compliance with the trial court's view of execution "best practices." *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019). That is exactly the sort of lower-court micromanaging of Supreme Court execution orders that *Black* forbids.

The trial court's ruling also reflects a plain and palpable abuse of discretion. *First*, the injunction rests on a non-existent First Amendment right to view executions, despite overwhelming precedent to the contrary. *Second*, the trial court wrongly construed witnesses' statutory right to be "present at the carrying out of the death sentence," Tenn. Code Ann. § 40-23-116(a), as requiring unlimited viewing access to preparatory acts and confirmation of death. These errors of law—both constitutional and statutory—constitute an abuse of discretion "by definition." *H & R Block E. Tax Servs., Inc. v. State, Dep't of Commerce & Ins., Div. of Ins.*, 267 S.W.3d 848, 855 (Tenn. Ct. App. 2008).

Immediate review is necessary in light of the impending execution of Tony Carruthers on May 21, 2026. *See State v. Carruthers*, No. W1997-00097-SC-DDT-DD (Tenn. Sept. 30, 2025) (order). Absent intervention by this Court (or the Supreme Court), Defendants will lose the opportunity to seek review of the trial court's erroneous decision before that execution. The high-stakes, time-sensitive, and arbitrary decision below easily satisfies Rule 10's requirements for extraordinary appeal. This Court should grant Defendants' application and summarily vacate the injunction—or, alternatively, stay the trial court's order pending appeal.

STATEMENT OF THE CASE AND FACTS

I. Legal Background

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, prohibits the government from “abridging the freedom of speech, or of the press.” U.S. Const. amend. I; *see Gilliam v. Gerregano*, --- S.W.3d ---, 2025 WL 617603, at *5 (Tenn. Feb. 26, 2025).

1. As a general rule, “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality). Although the First Amendment protects the “right to gather news,” it does not “compel others,” including the government, “to supply information.” *Id.* at 11. Nor does “[t]he First Amendment . . . guarantee the press a constitutional right of special access to information not available to the public generally.” *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

Prisons are no exception. “[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public.” *Pell v. Procunier*, 417 U.S. 817, 834 (1974). Although the “conditions in jails and prisons are clearly matters ‘of great public importance,’” *Houchins*, 438 U.S. at 8 (plurality) (citation omitted), that alone is not a “basis for reading into the Constitution a right of the public or the media to enter these institutions” with unlimited access to inmates and prison facilities. *Id.* at 9. Ultimately, the extent to which “the government should open penal institutions” to the press and public “is a

question of policy which a legislative body might appropriately resolve one way or the other.” *Id.* at 12.

2. In *Richmond Newspapers, Inc. v. Virginia*, the U.S. Supreme Court recognized a limited exception to this general rule: the public and press have a First Amendment right to attend criminal *trials*. 448 U.S. 555, 558, 580-81 (1980) (plurality); *see also Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 603 (1982) (holding that the First Amendment prohibits rule mandating courtroom closure for testimony of a child witness). The Court later extended this right to other pre-trial proceedings, such as jury voir dire, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-13 (1984) (*Press-Enterprise I*), and preliminary hearings, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (*Press-Enterprise II*).

“In cases dealing with the claim of a First Amendment right of access to criminal proceedings,” the Court applies a two-step inquiry: (1) “whether the place and process have been open to the press and general public” as a historical matter, and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise II*, 478 U.S. at 8. This is known as the “experience and logic” test, *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 175 (5th Cir. 2011), or, simply, the “*Press-Enterprise II* test.”

The U.S. Supreme Court has never applied the *Press-Enterprise II* test outside the context of criminal judicial proceedings. *See McCaleb v. Long*, 152 F.4th 728, 731 (6th Cir. 2025) (noting that the Supreme Court has only applied the *Press-Enterprise II* test “to requests for access to

criminal proceedings”). Although some lower courts have applied the test in civil contexts, those courts have generally limited its application to proceedings that are “adjudicatory” in nature. *See, e.g., id.* at 733 (declining to apply *Press-Enterprise II* test to meetings of the Tennessee Judicial Advisory Commission).

Nearly every court to address the issue has declined to apply the *Press-Enterprise II* test to executions, which are the post-judgment implementations of a death sentence, not adjudicatory criminal proceedings. *Zink v. Lombardi*, 783 F.3d 1089, 1111-12 (8th Cir. 2015); *Associated Press v. Neal*, 788 F. Supp. 3d 959, 964-66 (S.D. Ind. 2025); *BH Media Grp., Inc. v. Clarke*, 466 F. Supp. 3d 653, 662 (E.D. Va. 2020), *vacated on other grounds and remanded*, 851 F. App’x 368 (4th Cir. 2021); *Oklahoma Observer v. Patton*, 73 F. Supp. 3d 1318, 1324 (W.D. Okla. 2014). *But see California First Amend. Coal. v. Woodford*, 299 F.3d 868, 873-77 (9th Cir. 2002).

3. The American tradition of public executions was relatively short lived. As public executions across the Nation degenerated into disorderly drunken riots, private execution statutes restored social order, administrative efficiency, and privacy for the condemned. Tennessee, for its part, has held private executions, attended by a select group of official witnesses, for more than 140 years.

At the time of the Founding, all executions were public. Nicholas Levi, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 Fed. Comm. L.J. 131, 139 (2002). Hanging was the preferred method.

Id. In theory, public executions served important policy goals: “to buttress order, celebrate justice, and deter wrongdoing.” Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 Buff. L. Rev. 461, 465 (1995) (*Forbidden Spectacle*). But in reality, public executions proved disastrous.

By the late 1820s, public executions had become “festivals of disorder” that “subverted morals, increased crimes, excited sympathy with the criminal, and wasted time.” Margaret Vandiver & Michel Coconis, “Sentenced to the Punishment of Death”: Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee, 31 U. Mem. L. Rev. 861, 875 (2001) (*Executions in Shelby County*). “The crowds that gathered to witness public executions were large and often unruly, disrespectful, drunken, and dangerous.” *Id.* Thus, “fears of social unrest and disorder” prompted a national reaction against public executions. Madow, *Forbidden Spectacle*, 43 Buff. L. Rev. at 500.

In the 1830s, States began adopting private execution laws, moving executions from the public gallows to the confines of local jails and, later, state prisons. Vandiver & Coconis, *Executions in Shelby County*, 31 U. Mem. L. Rev. at 875-76. Many of those statutes provided for the attendance of “selected official witnesses.” *Id.* Although some statutes designated members of the press as official witnesses, (Appx. at 8-9), that practice was not uniform. Indeed, in 1889, Minnesota *prohibited* members of the press from witnessing an execution, a law which, the Supreme Court said, “the legislature, in its wisdom, and for the public

good, could legally prescribe.” *Holden v. Minnesota*, 137 U.S. 483, 491 (1890) (rejecting ex post facto challenge).

Tennessee, for its part, abolished public executions in 1883, requiring executions to take place within a prison, an enclosed prison yard, or an outdoor enclosure adjacent to the prison “constructed as to exclude the view of persons outside thereof.” See 1883 Tenn. Pub. Acts ch. 112, §§ 1-2. This law limited official witnesses to: (1) “the Sheriff and his assistants,” (2) a member of the clergy, (3) “the immediate family of the prisoner,” (4) three “other persons” designated by the prisoner, and (5) six “other persons” designated by the Sheriff. 1883 Tenn. Pub. Acts ch. 112, § 3.

In 1909, the General Assembly passed a law moving executions from the county of conviction to the state prison, “in strict seclusion and privacy.” 1909 Tenn. Pub. Acts ch. 500, § 1. This law also changed the number official witnesses “entitled to be present at the carrying out of [a] death sentence” to: (1) “the Warden of the State penitentiary or his duly authorized deputy,” (2) “the Sheriff of the county in which the crime was committed,” (3) “a priest or minister of the gospel who has been preparing the condemned person for death,” (4) “the prison physician,” (5) “such attendants chosen and selected by the Warden . . . as may be necessary to properly carry out the execution of the death sentence,” and (6) “members of the family of the condemned prisoner.” *Id.* It was a misdemeanor for anyone other than an official witness to be present at an execution. *Id.*

For more than 100 years, that law has remained the basic statutory framework governing official witnesses at Tennessee executions. See

Tenn. Code Ann. § 40-23-116(a). To this day, executions are carried out “in strict seclusion and privacy” at the state penitentiary, Riverbend Maximum Security Institution (RMSI) in Nashville. *Id.* And only designated official witnesses are “entitled to be present at the carrying out of the death sentence.” *Id.*

In 1994, Tennessee added members of the press as official witnesses. 1994 Tenn. Pub. Acts, ch. 675, § 1 (codified at Tenn. Code Ann. § 40-23-116(a)(6)). That amendment provided for the attendance of “[a] total of seven (7) members of the print, radio and television news media selected in accordance with the rules and regulations promulgated by the department of correction.” *Id.*; *see also* Tenn. Comp. R. & Regs. 0420-03-04-.04 (application and selection process). Additionally, media members who attend an execution “shall make available coverage of the execution to other news media members not selected to attend.” Tenn. Code Ann. § 40-23-116(a)(6).

Later amendments permitted attendance by the victim’s immediate family members, 1997 Tenn. Pub. Acts, ch. 133, §§ 1, 2, defense counsel and the Attorney General and Reporter (or his designee), 2000 Tenn. Pub. Acts, ch. 744, § 1, and the victim’s relatives/personal friends when there are no surviving immediate family members. 2012 Tenn. Pub. Acts, ch. 549, § 1.

4. Tennessee law provides for two different methods of execution—electrocution and lethal injection by pentobarbital—“a mainstay of state executions.” Tenn. Code Ann. § 40-23-114; *Barr v. Lee*, 591 U.S. 979, 980 (2020). Lethal injection is the default method of execution, but prisoners sentenced to death for crimes committed before 1999 may choose to be

executed by electrocution. Tenn. Code Ann. § 40-23-114(a), (b). The Tennessee Department of Correction (TDOC) has established protocols for both methods of execution. (Appx. at 126-239.) Both protocols call for similar procedures on the date of the execution, with differences depending on the method of execution.

Lethal Injection Protocol. Under the Lethal Injection Protocol, the Special Operations Team Leader prepares syringes of saline and pentobarbital the morning of the execution. (Appx. at 213.) At 10:00 a.m., the Restraint Team removes the condemned inmate from the holding cell, secures the inmate to a gurney with restraints, and moves the inmate to the execution chamber. (Appx. at 214.) The Warden, Attorney General or designee, defense counsel witness, and clergy enter the execution chamber with the inmate. (Appx. at 214.) Once in the execution chamber, the gurney is secured, and the inmate's arms are secured to arm extensions on the gurney. (Appx. at 214.)

Next, the IV team enters and attaches the leads from the electrocardiograph (ECG) to the inmate's chest, confirms that the ECG is functioning properly, determines the IV sites, and inserts primary and backup IV catheters. (Appx. at 215.) Once the Special Operations Team Leader determines that the catheters are properly secured, connected to the IV lines, and out of the inmate's reach, he/she opens the IV line to start a flow of sterile saline solution which is administered at a slow rate to keep the lines open. (Appx. at 215.) Any failure of the IV lines is reported to the Commissioner and, if necessary, the Physician will insert a central line. (Appx. at 215.)

Official witnesses and victim witnesses are then escorted and secured in the appropriate witness rooms, and the Attorney General or designee, defense counsel witness, and clergy member leave the execution chamber and enter the official witness room. (Appx. at 215.) A camera and audio system are activated, and the blinds in the execution chamber open to the witness rooms. (Appx. at 215.) Once the Commissioner confirms that no last-minute stay or reprieve has been granted and the inmate makes any last statements, the Warden gives the signal to proceed. (Appx. at 215.) The syringes of saline and pentobarbital are administered and, upon completion, the Special Operations Team Leader signals to the Warden. (Appx. at 215-16.)

After a five-minute waiting period, the witness blinds are closed, the camera is disengaged, the privacy curtains are closed, and the Physician enters the execution chamber to examine the inmate. (Appx. at 216.) Once the Physician determines the inmate is deceased, the Physician reports that finding to the Warden, who announces that the sentence has been carried out and directs the witnesses to exit. (Appx. at 216.)

Electrocution Protocol. The procedures under the Electrocution Protocol are substantially similar. Before the execution, a sodium chloride solution is prepared, sponges are saturated with the solution, and the condemned inmate is dressed in appropriate clothing without any metal. (Appx. at 189.) The execution chamber and equipment are prepared, and the inmate's head and legs are shaved. (Appx. at 189-90.) At 7:00 p.m., the inmate is removed from the holding cell and escorted to the execution chamber, where the inmate is secured in the electric chair

and saturated sponges are secured on the front and rear of the inmate's ankles. (Appx. at 190.)

Official witnesses and victim witnesses are then escorted and secured in the appropriate witness rooms, and the Attorney General or designee and defense counsel witness exit the execution chamber to the official witness room. (Appx. at 190.) The camera and audio system are activated and the blinds to the witness rooms are opened. (Appx. at 191.) Once the Commissioner confirms that no last-minute stay or reprieve has been granted and the inmate makes any last statements, the electrocution process proceeds. (Appx. at 191.)

When the cycle runs its course and the current is off, a five-minute waiting period begins, all blinds are closed, the camera is disengaged, and the privacy curtains are drawn. (Appx. at 191.) The chair is disconnected, and the Physician enters the execution chamber to examine the inmate. (Appx. at 191.) Once the Physician determines the inmate is deceased, the Physician reports the finding to the Warden, who announces that the sentence has been carried out and directs the witnesses to exit. (Appx. at 191.)

II. Factual and Procedural History

On October 28, 2025, a group of news organizations (“the Press Coalition” or “Plaintiffs”) filed suit in Davidson County Chancery Court alleging that TDOC’s execution protocols violate (1) media witnesses’ statutory right to be “present at the carrying out of the death sentence” under Tenn. Code Ann. § 40-23-116(a), (2) the qualified right to access judicial proceedings under the First Amendment to the U.S. Constitution, and (3) the freedom of the press to examine government

proceedings under Article I, section 19 of the Tennessee Constitution. (Appx. at 2-30.)

Plaintiffs also moved for a temporary injunction requiring Defendants to permit media witnesses to observe the following:

- (1) preparation of the syringes for use in lethal injections and of sponges for use in electrocutions;
- (2) entry of the condemned into the execution chamber;
- (3) preparation of the condemned in the execution chamber, including the insertion of intravenous lines into the condemned for lethal injections and the placement of saturated ankle sponges and the securing of the condemned to the electric chair for electrocutions;
- (4) administration of syringes of lethal injection drugs for lethal injections and the activation of the electrical current for electrocutions;
- (5) the physician examination and pronouncement of death;
- (6) any portions of the proceeding after the blinds are closed for the physician examination; and
- (7) any immediate post-execution procedures in the execution chamber.

(Appx. at 40.)

Defendants opposed the motion, arguing that (1) the trial court lacked authority to “plac[e] conditions” on the Supreme Court’s “unconditional execution order[s],” *Black*, 721 S.W.3d at 228, (2) Plaintiffs were unlikely to succeed on the merits of their claims, and (3) gross laches barred injunctive relief. (Appx. at 84-115.) Defendants also attached a declaration by RMSI Warden Kenneth Nelsen, who explained that TDOC’s execution protocols protect the confidentiality of execution participants, and that “without such assurances, execution team

members and the source(s) of the [lethal injection chemical] used in executions would likely be unwilling to participate.” (Appx. at 119.) Thus, maintaining the confidentiality of execution participants is necessary to carry out death sentences in accordance with the orders of the Tennessee Supreme Court. (Appx. at 119.)

Chancellor I’Ashea Myles held a hearing on the injunction motion on December 3, 2025. (Appx. at 256-348). More than a month later, on January 16, 2026, she granted the motion, in part, and issued an injunction requiring Defendants to implement her blue-penciled version of TDOC’s execution protocols. (Appx. at 349-77.) Specifically, the injunction requires that the blinds to the official witness room and victim witness room “shall remain open until the pronouncement of the death of the condemned individual.” (Appx. at 374-76.) In a purported effort to alleviate confidentiality concerns, the injunction also requires execution participants to wear “PPE suits” and optional “masks” one hour before the entry of official witnesses. (Appx. at 374-75.)

The trial court’s order focused on Plaintiffs’ likelihood of success on the merits of their First Amendment and statutory state-law claims. (Appx. at 354-71.) Citing constitutional avoidance principles, the trial court did not reach Plaintiffs’ state constitutional claim. (Appx. at 362.) The trial court failed to address Defendants’ arguments that the court lacked authority to grant an injunction and that gross laches barred emergency injunctive relief for a decades-old practice.

On the First Amendment claim, the trial court acknowledged that the U.S. Supreme Court has never recognized a First Amendment right to access executions. (Appx. at 355.) Yet the court accepted Plaintiffs’

invitation to apply the *Press-Enterprise II* test, without addressing the overwhelming authority that executions are not adjudicatory proceedings to which the test applies. (Appx. at 358.) Ultimately, the court concluded that both experience and logic supported a First Amendment right to access executions. (Appx. at 358-62.) The court also found that TDOC's protocols were not narrowly tailored to address confidentiality concerns. (Appx. at 371-72.)

On the statutory claim, the trial court noted that Plaintiffs “concede[d]” that they are “present” at the carrying out of a death sentence “in a sense.” (Appx. 366.) But, the court explained, Plaintiffs desire to be “fully present.” (Appx. 366.) Because “[b]oth the Press Coalition and the Defendants present[ed] differing interpretations of . . . what it means to be ‘present’ at the carrying out of the death sentence,” the trial court deemed the statutory text “ambiguous.” (Appx. 366.) Ultimately, the court ruled that TDOC's execution protocols fail to comply with statutory requirements because they limit official witnesses to seeing “a mere ten to fifteen (10-15) minutes, arbitrarily decided by the warden.” (Appx. at 370.)

After concluding that the other injunctive factors supported granting relief, (Appx. at 372-73), the trial court ordered Defendants to implement the court's blue-penciled version of the execution protocols. (Appx. at 373-76.)

STANDARD OF REVIEW

This Court may grant an extraordinary appeal “if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review.” Tenn. R. App. P. 10(a). An

extraordinary appeal is also warranted when the trial court’s ruling “is without legal authority, is a plain and palpable abuse of discretion, or results in either party losing a right or interest that may never be recaptured.” *Gilbert v. Wessels*, 458 S.W.3d 895, 898 (Tenn. 2014). “The appellate court may issue whatever order is necessary to implement review under this rule,” Tenn. R. App. P. 10(a), including summary reversal or a stay pending appeal. *Black*, 721 S.W.3d at 226 (assuming jurisdiction, granting Rule 10 application, and summarily reversing an injunction without further briefing or oral argument); *State ex rel. Dep’t of Transp. v. Thomas*, No. W2018-01541-COA-R10-CV (Tenn. Ct. App. Oct. 15, 2018) (order) (granting Rule 10 application and a stay pending appeal).

This Court reviews a trial court’s decision to grant a temporary injunction for abuse of discretion. *Black*, 721 S.W.3d at 226. But that standard of review “does not . . . immunize a lower court’s decision from any meaningful appellate scrutiny.” *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). “[A] trial court necessarily abuses its discretion when it commits an error of law.” *State v. Deberry*, 651 S.W.3d 918, 924 (Tenn. 2022) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996)); *see also Gooding v. Gooding*, 477 S.W.3d 774, 781 (Tenn. Ct. App. 2015) (“Discretionary decisions must take the applicable law . . . into account.”). Thus, when a trial court issues an injunction based on the application of “an incorrect legal standard,” the appellate court should reverse. *See Lee Medical, Inc.*, 312 S.W.3d at 524.

REASONS SUPPORTING EXTRAORDINARY REVIEW

For two reasons, “the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review.” Tenn. R. App. P. 10(a). *First*, the trial court blatantly disregarded the Tennessee Supreme Court’s recent admonition against “placing conditions” on its “unconditional execution order[s].” *Black*, 721 S.W.3d at 228. The injunction prohibits Defendants from carrying out execution orders unless they revise their protocols to enhance media viewing access. *Second*, the injunction reflects a plain and palpable abuse of discretion because it rests on two fundamental legal errors: the finding of a First Amendment violation based on an inapplicable legal standard, and an erroneous statutory interpretation analysis. At a minimum, immediate review is necessary because Defendants need clarity on their legal obligations before the next execution, which is less than four months away.

I. The Trial Court Lacked Authority to Issue the Injunction.

The trial court acted “without legal authority” by conditioning enforcement of the Supreme Court’s execution orders on expanded media viewing access. *Gilbert*, 458 S.W.3d at 898. Just a few months ago, the Supreme Court held that trial courts lack authority to place conditions on execution orders under the guise of granting injunctive relief, even on issues that are purportedly collateral to the execution itself. *Black*, 721 S.W.3d at 228. Only the Supreme Court can do that.

Black is instructive. Barely one month before his August 2025 execution date, Byron Black moved the Davidson County Chancery Court for an injunction requiring the State defendants to deactivate his

implantable cardioverter-defibrillator (ICD) via a particular method immediately before, or simultaneously with, the execution. *Black*, 721 S.W.3d at 225. The trial court granted the injunction, directing the State defendants to arrange for qualified medical personnel to deactivate the ICD on the morning of the execution. *Id.* at 225-26.

The defendants applied for an extraordinary appeal, arguing that “the trial court exceeded its authority when it directed [them] to alter their execution protocol by requiring deactivation of Mr. Black’s ICD on the day of the execution.” *Id.* at 228. They also attached a declaration from the Assistant Commissioner of TDOC stating that Nashville General Hospital, the third-party provider that managed Black’s care, was unwilling to deactivate the ICD. *Id.* at 226 & n.2.

The Tennessee Supreme Court immediately assumed jurisdiction over the appeal sua sponte and vacated the trial court’s injunction. *Id.* at 226, 229. The Court explained that “[o]rders for executions are solely within the purview of th[e] [Supreme] Court.” *Id.* at 228 (citing Tenn. Sup. Ct. R. 12(4)). Although the trial court claimed that the “delay of Mr. Black’s execution [wa]s not being countenanced,” and Black characterized the ICD claim as “a secondary issue related to the method of execution, not the execution itself,” the Supreme Court nevertheless vacated the injunction. *Id.* at 228-29. The Court held that the trial court “exceeded its authority” by “placing conditions upon this Court’s unconditional execution order.” *Id.* at 228.

After *Black*, the Court sua sponte amended Tennessee Supreme Court Rule 12(4)(E) to clarify “the procedures for state court collateral

litigation potentially affecting the method or timing of execution that is filed after a date of execution is set.” In re: Amendment of Tennessee Supreme Court Rule 12(4)(E), No. ADM2025-01930 (Tenn. Dec. 5, 2025). Specifically, “[a]fter a date of execution is set, any state court collateral litigation that would potentially affect the method or timing of execution must commence with the filing of a motion in th[e] [Supreme] Court.” *Id.* The Court may also appoint a special master for any necessary fact-finding. *Id.* This rule change reinforces the holding in *Black*: “Orders for executions are solely within the purview of th[e] [Supreme] Court.” 721 S.W.3d at 228.

Even assuming that Rule 12(4)(E) does not apply here, *Black* squarely forecloses lower courts adding conditions on execution orders—whether at the behest of a capital inmate or a third party. Last year, the Tennessee Supreme Court entered four unconditional execution orders setting the execution dates of Tony Carruthers, Anthony Hines, Christa Pike, and Gary Sutton. *See State v. Carruthers*, No. W1997-00097-SC-DDT-DD (Tenn. Sept. 30, 2025) (order); *State v. Hines*, No. M2025-00221-SC-DPE-DD (Tenn. Sept. 30, 2025) (order); *State v. Pike*, No. M2020-01156-SC-DPE-DD (Tenn. Sept. 30, 2025) (order); *State v. Sutton*, No. E1997-00196-SC-DDT-DD (Tenn. Sept. 30, 2025) (order). These orders state that “the Warden of the Riverbend Maximum Security Institution, or his designee, *shall* execute the sentence of death as provided by law” on the ordered execution date. *Id.* (emphasis added). Under *Black*, any attempt to “place[] a precondition” on those executions “must come from th[e] [Supreme] Court.” 721 S.W.3d at 228.

And yet, just as in *Black*, the trial court issued “mandatory injunctive relief” requiring Defendants “to alter their protocols.” *Id.* That injunction “placed a precondition”—expanded media access—on the enforcement of execution orders, which “are solely within the purview of th[e] [Supreme] Court.” *Id.* That is exactly the sort of lower court micromanaging that *Black* forbids. By disregarding the “supremacy of the Supreme Court,” the trial court’s overreach threatens “finality [and] stability in the law and the court system.” *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976). This Court should restore that constitutional balance by vacating the unlawful injunction.

The trial court never addressed the argument that it lacked authority to issue any injunction. Defendants clearly presented that issue in their briefing, (Appx. at 90-92), and during oral argument, (Appx. at 305-06). Instead, the trial court indicated that it had the power to condition the enforcement of execution orders so long as those conditions are *feasible*. (Appx. at 372.)²

But the lower court’s lack of authority to “condition” a Supreme Court order doesn’t turn on feasibility. It turns on the Supreme Court’s “power to enforce its judgments,” which “includes the power to protect them from interference.” *Barger*, 535 S.W.2d at 341 (citation omitted). Consider, for example, a case in which the Tennessee Supreme Court

² Defendants argued that any modifications to TDOC’s protocols were not “feasible” before the impending execution of Harold Nichols on December 11, 2025. (Appx. at 371-72.) Because the trial court delayed issuing its order until after the Nichols execution, the court dismissed this alternative argument as “moot.” (Appx. at 372.)

issued an order enjoining a university from enforcing a policy limiting students to discussing politics in a designated “free speech zone.” A lower court couldn’t “condition” enforcement of that order by issuing its own injunction requiring students to sign an anti-harassment policy before engaging in protected speech outside the “free speech zone.” That would be an end-run around the Supreme Court’s “unconditional” order enjoining enforcement of the challenged policy.

Because the trial court acted “without legal authority” by placing conditions on the Supreme Court’s unconditional execution order, *Gilbert*, 458 S.W.3d at 898, this Court should grant Defendants’ application for extraordinary appeal and summarily vacate the trial court’s unlawful injunction.

II. The Injunction Reflects a Plain and Palpable Abuse of Discretion.

Lack of authority aside, the trial court’s ruling reflects a “plain and palpable abuse of discretion” that independently warrants extraordinary review and summary reversal. *Gilbert*, 458 S.W.3d at 898. The court “necessarily abuse[d] its discretion” by erroneously concluding, as a matter of law, that Plaintiffs are likely to succeed on the merits of their First Amendment and statutory state-law claims. *Deberry*, 651 S.W.3d at 924. Relying on inapplicable legal standards and disregarding settled principles of statutory interpretation, the court transformed the press’s statutory right to be “present” at an execution into a sweeping constitutional entitlement to unlimited viewing access. But that is not the law.

A. There is no First Amendment right to access executions.

The United States Supreme Court has never recognized a First Amendment right to access non-judicial governmental proceedings, particularly those inside a prison. To the contrary, overwhelming authority points in the opposite direction: the public-trial right recognized in *Richmond Newspapers* does not extend beyond the judicial context.

1. The United States Supreme Court has repeatedly declined to hold that the press has a First Amendment right to access prison inmates and facilities beyond that of the general public.

In *Pell*, the Court upheld a state regulation prohibiting interviews with inmates against a First Amendment challenge from media members who argued that they had a “right to gather news without governmental interference.” 417 U.S. at 829. Although “[t]he First and Fourteenth Amendments bar government from interfering in any way with a free press,” the Court explained, “[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.” *Id.* at 834. Therefore, the Court held, “newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.” *Id.*

The Court reaffirmed this principle in *Houchins*, 438 U.S. 1, where media members argued that the First Amendment conferred a right to access all areas of a county jail and to take photographs and video footage inside. The Court made clear that it “has never intimated a First Amendment guarantee of a right of access to all sources of information

within government control.” *Id.* at 9 (plurality). Despite “the public importance of conditions in penal facilities and the media’s role of providing information,” the Court ruled, there is “no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes.” *Id.*; *see also id.* at 26 (Stewart, J., concurring).

Like *Pell*, *Houchins* distinguished the “privilege of *access* to information” from “a right to publish information which has been obtained.” 438 U.S. at 10 (plurality opinion). Although “the government cannot restrain communication of whatever information the media acquire,” the Court had never “remotely impl[ied] a constitutional right guaranteeing anyone access to government information beyond that open to the public generally.” *Id.* For instance, “the prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.” *Id.* at 12. The reason is simple: “The right to speak and publish does not carry with it the unrestrained right to gather information.” *Id.*

Plaintiffs’ First Amendment claim is essentially the same one the Supreme Court rejected in *Houchins*. Plaintiffs claim that, given the importance of a free press, the Constitution protects their right of access to government-held information, including their right to view executions in their entirety. (Appx. at 43-44.) But that argument runs headlong

into the Supreme Court’s precedent restricting the right of the press to access prison inmates and facilities.

2. The trial court’s contrary conclusion doesn’t hold up. First, the court found *Houchins* and *Pell* “distinguishable” because Plaintiffs are “not asking to interview the condemned person before dying.” (Appx. at 357.) It noted that “an official witness is distinguishable from the public generally, as official witnesses are created by statute.” (Appx. at 357.) But those factual distinctions make no constitutional difference. Neither the public nor the press have a First Amendment right to access prison inmates and facilities on demand. *Houchins*, 438 U.S. at 15-16; *Pell*, 417 U.S. at 834. And although Tennessee has granted the press a statutory *privilege* to attend executions, that privilege does not create a First Amendment right of access. Indeed, for more than 100 years, the press had *no* statutory right to attend private executions in Tennessee.

After sidestepping this controlling precedent, the trial court applied the *Press-Enterprise II* test, without addressing the overwhelming persuasive authorities holding that this test only applies when a party claims a First Amendment right of access to a particular *judicial* proceeding. (Appx. at 358.) The trial court abused its discretion by “applying an incorrect legal standard.” *Lee Med., Inc.*, 312 S.W.3d at 524.

As discussed, the *Press-Enterprise II* test derives from the Supreme Court’s decision in *Richmond Newspapers*, which involved the “narrow question” of whether the public had a constitutional right “to attend criminal trials.” 448 U.S. at 558 (plurality opinion). *Richmond*

Newspapers did not speak to other government proceedings, much less those that do not occur in “places traditionally open to the public, as criminal trials have long been.” *Id.* at 577 (plurality opinion). Indeed, the plurality specifically contrasted courtrooms with “penal institutions which, by definition, are not ‘open’ or public places” and “do not share the long tradition of openness” that exists in courtrooms. *Id.* at 576 n.11 (plurality opinion).

Even as the Supreme Court extended this “narrow” public-trial right to other types of judicial proceedings, it did so in the limited context of criminal prosecutions, such jury voir dire, *Press-Enterprise I*, 464 U.S. at 51-13, and preliminary hearings, *Press-Enterprise II*, 478 U.S. at 13. Thus, when the Court articulated the “experience and logic” test in *Press Enterprise II*, it naturally described the legal framework as applying to “cases dealing with the claim of a First Amendment right of access to criminal proceedings.” 478 U.S. at 8 (emphasis added). The Court has never suggested there is a freestanding “right of access” to any and all government proceedings as long as the “experience and logic” test is satisfied.

Resisting this conclusion, Plaintiffs—and the trial court—relied on the Ninth Circuit’s outlier decision in *Woodford*, 299 F.3d 868, which applied the *Press-Enterprise II* test in determining whether there is a First Amendment right to access executions. (Appx. at 36, 60, 359-62.) But *Woodford* started its analysis from a faulty premise: that “it is well-settled that the First Amendment guarantees the public—and the press—a qualified right of access to government proceedings.” 299 F.3d

at 873 (emphasis added). As discussed, nothing in the Supreme Court’s precedents confer a freestanding right to access “government proceedings.” Rather, they confer a right to access adjudicatory criminal proceedings. Moreover, *Woodford* failed to properly account for the Supreme Court’s observation in *Richmond Newspapers* that “penal institutions . . . are not ‘open’ or public places,” and therefore “do not “share the long tradition of openness” that exists in courtrooms. 448 U.S. at 576 n.11.

No other federal appellate court has adopted *Woodford*’s outlier approach of applying the *Press-Enterprise II* test to all government proceedings. To the contrary, the Eighth Circuit has rejected the notion that “an execution constitutes the kind of criminal proceeding to which the public enjoys a qualified right of access under the First Amendment.” *Zink*, 783 F.3d at 1113. Accordingly, that court has rejected prisoners’ claims that the First Amendment entitled them to information regarding the source of the drug to be used in their executions. *Zink*, 783 F.3d at 1111-12.

Similarly, the Sixth Circuit has held that the *Press-Enterprise II* framework does not apply to requests by death row inmates for information related to executions because such information is neither “the type filed in a government proceeding nor its functional equivalent.” *Phillips*, 841 F.3d at 419. Just last year, the Sixth Circuit also declined to “extend application of the [*Press Enterprise II*] test beyond the adjudicatory context” to meetings of the Tennessee Judicial Advisory Commission. *McCaleb*, 152 F.4th at 731. The court expressly rejected

the Plaintiffs’ argument (at Appx. 58-59) that the *Press-Enterprise II* framework applies “to all requests for access to government proceedings” simply because a prior opinion referred to the framework as a “test of general applicability.” *Id.* at 733 (“[T]he court meant ‘general’ in the sense of both judicial and administrative adjudicatory proceedings. It did not mean to suggest that the test applies to any request for government information.”).

District courts in Oklahoma, Virginia, and Indiana have similarly refused to follow *Woodford*. The U.S. District Court for the Western District of Oklahoma, for example, declined to find a First Amendment right to access to an execution, expressing “considerable doubt” that the *Press-Enterprise II* test “even potentially applies” to executions. *Patton*, 73 F. Supp. 3d at 1324. “To date,” the court explained, “the Supreme Court has not applied the exception outside the criminal adjudication process.” *Id.* And given “the Court’s different treatment of access issues in the prison context,” it is doubtful the Supreme Court would “take principles directed to the process of determining guilt and superimpose them in a different context—the implementation of the sentence.” *Id.* at 1325.

Before Virginia abolished the death penalty, rendering the case moot, a district court there also declined to follow the reasoning of *Woodford*, finding that “[i]t is quite a reach” to say that *Richmond Newspapers* and its progeny “dictate public, and hence press, access to executions, which do not occur in the adjudicatory process.” *BH Media Grp., Inc.*, 466 F. Supp. 3d at 662. And the court rejected the argument

that executions are part of the criminal adjudication process. *Id.* at 663. The court held that executions were part of “the penal process that follows entry of a judgment in a criminal case” and found it doubtful that the Supreme Court would “extend the public’s First Amendment right of access to the penal portion of a criminal defendant’s sentence.” *Id.*

More recently, a district court in Indiana noted that “the Seventh Circuit has never extended the *Press-Enterprise II* framework to an event beyond a judicial proceeding, let alone something after the imposition of a judgment in a case, such as an execution.” *Associated Press*, 788 F. Supp. 3d at 964-65. And, trailing the footsteps of the district courts in Oklahoma and Virginia, the court declined to “bridge the gap” by following *Woodford*, “absent authority from the Supreme Court or the Seventh Circuit.” *Id.* at 966. Like the Eastern District of Virginia, the court also rejected the argument that executions are criminal proceedings because custody of a defendant transferred to the executive branch after imposition of a sentence. *Id.*

The trial court failed to grapple with any of these persuasive authorities, which confirm that Supreme Court precedent only requires application of the *Press-Enterprise II* test to “cases dealing with the claim of a First Amendment right of access *to criminal proceedings*.” 478 U.S. at 8 (emphasis added). By following the outlier decision in *Woodford*, the trial court applied an “incorrect legal standard” and therefore abused its discretion in granting the injunction. *Lee Med., Inc.*, 312 S.W.3d at 524.

3. Even applying the *Press-Enterprise II* test, however, Plaintiffs failed to show a likelihood of success on the merits of their First

Amendment claim. Neither “experience” nor “logic” require a constitutional right to access executions. *See Arkansas Times, Inc. v. Norris*, No. 5:07CV00195 SWW, 2008 WL 110853, at *4 (E.D. Ark. Jan. 7, 2008) (“Even assuming that the [*Press-Enterprise II*] test applies here, the Court disagrees that the considerations of experience and logic prescribe a First Amendment right to public access to executions.”).

a. First, executions have not been historically “open to the press and general public” in any meaningful sense. *Press-Enterprise II*, 478 U.S. at 8. Of course, “there is historical evidence to suggest that public access to executions has existed at some times in the past.” *Oklahoma Observer*, 73 F. Supp. 3d at 1325. Tennessee, like most States, relied on public hangings. But as early as the 1830s, executions “became private events and moved from the public square to inside prison walls.” *Arkansas Times, Inc.*, 2008 WL 110853, at *4. Tennessee, for its part, has held private executions for the last 143 years—most of its history. *See* 1883 Tenn. Pub. Acts ch. 112, §§ 1-2. And select members of *the press* have only had a statutory right to be present at Tennessee executions for the last 32 years. 1994 Tenn. Pub. Acts, ch. 675, § 1. This is a far cry from the “unbroken, uncontradicted history” of public criminal trials. 448 U.S. at 573.

The trial court erred by finding the early history of public hangings dispositive. (Appx. 359-60.) Courts should not “assume[] that founding-era legislatures maximally exercised their power to regulate.” *United States v. Rahimi*, 602 U.S. 680, 739-40 (2024) (Barrett, J., concurring). In other words, courts should not assume that an absence of a restriction

suggests the restriction is unlawful. That sort of “use it or lose it” approach would result in “a law trapped in amber,” preventing subsequent legislatures from making different policy choices. *Id.* at 740. And ultimately, “[w]hether the government should open penal institutions”—or executions—to the press or public “is a question of policy which a legislative body might appropriately resolve one way or the other.” *Houchins*, 438 U.S. at 12 (plurality). Tennessee has taken different approaches to executions over the years, but the trial court wrongly elevated earlier policy preferences into an inflexible constitutional mandate.

The trial court also erred by inferring that historical statutes designating media members as official witnesses reflect an unbroken tradition of public access. (Appx. at 360-61.) These statutes undermine, rather than support, Plaintiffs’ claim. For one, the statutes authorizing media witnesses were not uniform. Tennessee, for example, did not formally designate media witnesses until 1994. 1994 Tenn. Pub. Acts, ch. 675, § 1. And an 1889 Minnesota law *banned* members of the press from attending executions, which prompted no First Amendment challenge. *Holden*, 137 U.S. at 491. For two, the trial court’s reasoning gets things backward. The public’s right to access is not measured by looking at special privileges granted to the press; on the contrary, media access directly correlates with *the public’s* right to access. *Pell*, 417 U.S. at 834. And the fact is: private execution statutes removed executions from public view. The limited statutory exceptions allowing official witnesses do not prove a general constitutional rule requiring public access.

Put simply, executions—like prisons—“do not share the long tradition of openness associated with courtrooms[.]” *Richmond Newspapers*, 448 U.S. at 577 n.11.

b. Second, public access does not “play[] a significant positive role in the functioning of” executions—especially not the preparatory acts and pronouncement of death to which the trial court’s injunction narrowly applies. *Press-Enterprise II*, 478 U.S. at 8.

Generally, executions in the United States have functioned without public access for nearly two centuries. For the entire period in which modern methods of execution and modern Eighth Amendment jurisprudence developed, executions have not been publicly accessible. This longstanding historical practice of excluding the general public from executions demonstrates that public attendance is neither integral nor beneficial to the process.

In fact, history demonstrates the opposite: unlimited public access has played a *negative* effect on the functioning of executions. By the late 1820s, public executions had become “festivals of disorder” that “subverted morals, increased crimes, excited sympathy with the criminal, and wasted time.” Vandiver & Coonis, *Executions in Shelby County*, 31 U. Mem. L. Rev. at 875. “The crowds that gathered to witness public executions were large and often unruly, disrespectful, drunken, and dangerous.” *Id.*; see also K.B. Turner & Yolanda Y. Harper, *An Overview of Capital Punishment in Tennessee: Patterns of Legal Executions, 1782-2010*, 49 Crim. Law Bulletin 4 (2013) (describing nineteenth century public hangings in Jackson, Tennessee, as “a cross between a religious

revival meeting and a carnival sideshow”). States adopted private execution statutes, in part, to *avoid* the negative consequences of unlimited public access. See Madow, *Forbidden Spectacle*, 43 Buff. L. Rev. at 500.

To be sure, the General Assembly has determined that allowing limited media access, and requiring a press conference after each execution, has social value—by promoting transparency, public confidence in the administration of capital punishment, and deterrence. But “[w]e must not confuse what is ‘good,’ ‘desirable,’ or ‘expedient’ with what is constitutionally commanded by the First Amendment.” *Houchins*, 438 U.S. at 13 (plurality). Ultimately, executions function to implement a final judgment of a court, not to serve as public commentary or to generate a record for advocacy.

Moreover, it is unclear how the trial court’s injunction—which enables witnesses to view preparatory acts and the pronouncement of death—will enhance the “functioning” of executions themselves. *Press-Enterprise II*, 478 U.S. at 8. Witnesses can already view the administration of the lethal injection or electric shocks. How will watching the condemned inmate walk into the execution chamber enhance public accountability? What is the public benefit of witnesses seeing—as opposed to hearing—the physician’s pronouncement of death? The trial court erred by concluding that media access to *every aspect* of an execution enhances the “functioning” of the procedure itself.

Even advocates of the most expansive theories of the First Amendment have warned that the public’s desire for more information could be stretched too far and “must be invoked with discrimination and

temperance.” *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring); *see also Arkansas Times, Inc.*, 2008 WL 110853, at *5 n.5. “For so far as the participating citizens need for information is concerned, there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.” *Richmond Newspapers*, 448 U.S. at 588 (cleaned up) (Brennan, J., concurring). “Without an enduring tradition of public executions,” vague notions of public benefit “cannot serve as a basis for reading a right of public access into the First Amendment.” *Arkansas Times, Inc.*, 2008 WL 110853, at *5.

4. Finally, even if the First Amendment requires States to allow media members to view executions, the trial court erred by applying strict scrutiny to TDOC’s execution protocols. (Appx. at 355, 372.) Because the protocols’ modest confidentiality provisions are akin to time, place, and manner restrictions—not outright bans—they are subject to a lower level of scrutiny.³

In *Richmond Newspapers*, the Supreme Court emphasized that the First Amendment right to access a criminal trial is not “absolute.” 448 U.S. at 581 n.18 (plurality). Just as the “government may impose reasonable time, place, and manner restrictions” in other contexts, “so may a trial judge . . . impose reasonable limitations on access to a trial.” *Id.*; *see also id.* at 598 n.23 (Brennan, J., concurring in the judgment); *id.*

³ To be sure, TDOC’s executions protocols survive even under strict scrutiny. (Appx. at 104-06.) But if this Court reaches the issue, it has a “responsibility to apply the controlling law,” *State v. Eady*, 685 S.W.3d 689, 705 (Tenn. 2024).

at 600 (Stewart, J., concurring in the judgment). For example, “when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle.” *Id.* at 598 n.23 (Brennan, J., concurring in the judgment). Nor does the First Amendment prohibit “conferences in chambers.” *Id.* Because “every courtroom has a finite physical capacity,” the trial judge may also reasonably limit the number of attendees. *Id.* at 600 (Stewart, J., concurring in the judgment). The list goes on.

In *Globe Newspaper Company*, the Court confirmed that not every restriction on the First Amendment right of access is subject to strict scrutiny. As the Court explained, “[w]here . . . the State attempts to *deny* the right to access,” such as by excluding the press from the courtroom entirely, “it must be shown that the *denial* is necessitated by a compelling government interest, and is narrowly tailored to serve that interest.” 457 U.S. at 606-07 (emphasis added). On the other hand, “limitations on the right of access that resemble ‘time, place, and manner’ restrictions on protected speech . . . would not be subject to such strict scrutiny.” *Id.* n.17 (citations omitted).

As discussed more fully below, Tennessee law grants select members of the press a statutory right to be “present at the carrying out of the death sentence.” Tenn. Code Ann. § 40-23-116(a)(6). And the law requires a press conference following the execution to “make available coverage of the execution to other news media members not selected to attend.” *Id.* Far from imposing a “prior restraint” on free speech or the

press, *Branzburg*, 408 U.S. at 681, Tennessee law facilitates and encourages media coverage about executions.

TDOC's modest confidentiality protections for execution participants—opening the blinds only after the condemned is secured to the gurney or electric chair and closing them before the physician enters the room to pronounce death—are reasonable limitations on media access. These procedures do not “deny” access by excluding the press from the witness room, *Globe Newspaper Co.*, 457 U.S. at 606-07; they are “time, place, and manner” restrictions. Specifically, they ensure that the press can watch the condemned inmate die, while respecting “the public policy of Tennessee to favor the anonymity of those involved in carrying out capital punishment.” *West v. Schofield*, 460 S.W.3d 113, 123-25 (Tenn. 2015); *cf.* Tenn. Code Ann. § 10-7-504(h)(1).

The trial court's effort to identify “the least restrictive means” of protecting the confidentiality of execution participants was a misguided effort. Even assuming the press had a First Amendment right of access, TDOC is entitled to place reasonable “time, place, and manner” restrictions on that right. By applying the incorrect level of scrutiny to a non-existent First Amendment right, the trial court abused its discretion twice over. *See Upsolve, Inc. v. James*, 155 F.4th 133, 137 (2d Cir. 2025) (vacating injunction “[b]ecause the district court applied the incorrect level of scrutiny”).

B. TDOC's execution protocols comply with statutory requirements.

The trial court also abused its discretion by erroneously concluding that Plaintiffs showed a likelihood of success on the merits of their claim

that TDOC’s execution protocols violate their right to be “present at the carrying out of the death sentence.” Tenn. Code Ann. § 40-23-116(a). TDOC’s execution protocols ensure that media witnesses attend each execution and that they can personally observe the most critical aspects of the execution, including the inmate’s death. That is all Tennessee law requires.

A court’s role in statutory interpretation is “to determine what a statute means.” *Deberry*, 651 S.W.3d at 924. “Original public meaning is discerned through consideration of the statutory text in light of ‘well-established canons of statutory construction.’” *Id.* (quoting *State v. Sherman*, 266 S.W.3d 395, 401 (Tenn. 2008)). The Court must give words in a statute “their natural and ordinary meaning in the context in which they appear and in light of the statute’s general purpose.” *Ellithorpe v. Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015). For undefined terms, courts may look to “authoritative dictionaries published around the time of a statute’s enactment.” *Deberry*, 651 S.W.3d at 925.

Under the plain language of the statute, designated members of the press have a right to be “present at the carrying out of the death sentence.” Tenn. Code Ann. § 40-23-116(a). “Present,” in this context, means “being at hand or in attendance.” *Present*, The American Heritage Dictionary of the English Language 1432 (3d ed. 1992); *see also Present*, Black’s Law Dictionary (12th ed. 2024) (“In attendance; not elsewhere”). “Carry out,” as used here, means “to bring to a conclusion; accomplish.” *Carry out*, The American Heritage Dictionary of the English Language 294 (3d ed. 1992); *see also Carry Out*, Merriam-Webster Online

Dictionary (“to bring to a successful issue: complete, accomplish”), <https://perma.cc/TGG9-A5XG>. Thus, a person is “present” at the “carrying out of the death sentence” when he or she is “in attendance” at the “conclusion” or “accomplish[ment]” of the death sentence—i.e., the moment of death itself.

The “statutory context” supports this interpretation. *Lawson v. Hawkins Cnty.*, 661 S.W.3d 54, 59 (Tenn. 2023). Tenn. Code Ann. § 40-23-116(a) requires that death sentences be carried out “in strict seclusion and privacy.” This text reflects the statute’s purpose of ensuring that death sentences are carried out privately. Given that purpose, the court should not construe the word “present” as a license for official witnesses to view anything and everything that is remotely connected to an execution. That would turn the statute’s focus on “strict seclusion and privacy” on its head.

Plaintiffs “concede[d]” that media members are “present” at an execution “in a sense,” (Appx. 366), but they argued that the legislature’s “intent” was to allow media members to have unlimited viewing access. (Appx. at 245, 273.) They also challenged Defendants’ proffered definition of “carry out,” citing other available definitions to argue 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.” (Appx. at 245-46.) But the only way to divine the legislature’s “intent” is through statutory text and statutory context, which heavily informs original meaning. *See Edwards v. Peoplease, LLC*, --- S.W.3d ---, 2025 WL 3706216, at *9 (Tenn. Dec. 22, 2025). And carry out, in the context of a death sentence, most naturally refers to

implementing, or “accomplishing,” the object of the sentence, namely, the inmate’s death.

Plaintiffs also relied on a non-binding decision of the Oregon Supreme Court, which interpreted the word “execution” in a similar statute as encompassing “actions that are linked inextricably with the administration of the fatal drugs.” (Appx. at 246 (citing *Oregon Newspaper Publishers Ass’n v. Oregon Dept. of Corrections*, 988 P.2d 359, 364 (Or. 1999).) That interpretation, however, finds no support in the statutory text here. Even the dictionary definition the court cited—“a putting to death as a legal penalty”—does not conjure up notions of other “actions” that are “linked inextricably” with the administration of lethal drugs. *Oregon Newspaper Publishers Ass’n*, 988 P.2d at 363. And the court offered no practical guidance on how a court might discern which actions are “linked inextricably” with the execution and which are “remote activities that precede that process.” *Id.* at 364. That standardless construction would only invite further confusion.

In this case, the trial court found the statutory text “ambiguous” because “[b]oth the Press Coalition and the Defendants present[ed] different interpretations of the statute.” (Appx. at 366.) But the Supreme Court recently cautioned courts against “summarily concluding that [statutory language] [i]s ambiguous because the parties ha[ve] provided two reasonable statutory interpretations.” *Deberry*, 651 S.W.3d at 929-30 (cleaned up). “A court should deem statutory language ambiguous,” the Court explained, “only *after* employing all of the traditional tools of statutory construction, including consulting dictionary definitions, examining statutory structure and context, and

applying well-established canons of statutory construction.” *Id.* at 930 (emphasis added). That “may require some effort,” but “that effort does not make a text ambiguous.” *Id.* (citation omitted).

Furthermore, when a statute is truly ambiguous, an agency’s interpretation “is entitled to consideration and respect and should be awarded appropriate weight,” although it is “not binding on the courts.” *Pickard v. Tenn. Water Quality Bd.*, 424 S.W.3d 511, 523 (Tenn. 2013); *see also Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 385-86, 399 (2024) (overruling *Chevron* “deference” to agency interpretations of federal statutes but clarifying that courts may continue to show “the ‘respect’ historically given to Executive Branch interpretations”). Thus, even if Tenn. Code Ann. § 40-23-116(a) is ambiguous, TDOC’s interpretation is entitled to “consideration and respect and should be awarded appropriate weight.” *Pickard*, 424 S.W.3d at 523.

The trial court also erred by relying on legislative history. (Appx. at 368.) Following Plaintiffs’ lead, the court cited Senator Gilbert’s statement in support of the 1994 amendment adding media members as official witnesses. (Appx. at 368.) The Senator’s statement, of course, does not address the narrow issue here: whether the press has a right to see every aspect of an execution, including preparatory and post-execution acts. And regardless, the court again put the cart before the horse. “[W]hen the plain meaning of a statute is clear after application of the traditional tools of statutory interpretation, a court should not ‘delve into the legislative history of an unambiguous statute.’” *Deberry*, 651 S.W. at 930 (citation omitted). Indeed, “[w]here there is no ambiguity

in the language of an act, comments of legislators, or even sponsors of the legislation, before its passage are not effective to change the clear meaning of the language of the act.” *Id.* (quoting *D. Canale & Co. v. Celauro*, 765 S.W.2d 736, 738 (Tenn. 1989)). The court erred by relying on legislative history to stretch the statute beyond its ordinary meaning.

Finally, the trial court erred by finding that TDOC’s execution protocols deprive the press of “the right to be present in the fullest sense of the word by diminishing that right to a mere ten to fifteen (10-15) minutes, arbitrarily decided by the warden.” (Appx. at 370.) In effect, the trial court blamed TDOC for the efficiency with which it conducts executions. But death is not *supposed* to be prolonged. Tennessee adopted the method of lethal injection, in part, to ensure the quick and painless death of the condemned. That is a feature, not a bug. The efficiency of an execution does not affect whether a witness is “present” or not.

And the minor limitations on viewing access are anything but “arbitrary.” Under the current protocols, witnesses observe the most critical aspects of the execution. They see the condemned on the gurney or electric chair. They hear the condemned’s last statement. They observe the condemned’s interactions with a spiritual advisor.⁴ And they

⁴ Although the protocols state that the spiritual advisor exits the execution chamber before the blinds are open, the Warden generally allows spiritual advisors to remain in the room, as reflected by media coverage of recent executions. WVLT News, *Officials Hold a News Conference After the Execution of Harold Nichols* (5:18) (Dec. 11, 2025), <https://perma.cc/5MDJ-VWJ4>.

see the condemned die as the lethal injection or electric shocks are administered. After the blinds are closed, the witnesses can also hear the physician's pronouncement of death through the audio system. The only portions concealed from view are preparatory or post-execution steps that involve other members of the execution team, whose anonymity and cooperation are essential to implementing the sentence of death. Nothing about that process is "arbitrary."

To sum up, the trial court abused its discretion by relying on a novel and plainly erroneous construction of a century-old statute. By ignoring settled principles of statutory interpretation, the trial court transformed a limited statutory right to be "present" into a permission slip for unlimited viewing access, even for preparatory and post-execution procedures. Because the injunction rests on an error of law, this Court should reverse.

III. Immediate Review is Necessary.

At the very least, this Court should grant immediate review because Defendants need clarity on their legal obligations before the next scheduled execution on May 21, 2026. *See State v. Carruthers*, No. W1997-00097-SC-DDT-DD (Tenn. Sept. 30, 2025) (order). A Rule 10 appeal is appropriate when the challenged ruling "results in either party losing a right or interest that may never be recaptured." *Gilbert*, 458 S.W.3d at 898. As the trial court recognized, "[e]ach execution is a single event that will not occur again." (Appx. at 372.) Therefore, unless Defendants can seek immediate review, they will lose their opportunity to challenge the trial court's unlawful injunction before the next execution.

And appellate courts routinely grant Rule 10 review at media intervenors' request. For decades, the Tennessee Supreme Court has granted review to media intervenors seeking immediate review of closure orders in a criminal trial. In *State v. Drake*, the Court held that “[a]ppellate review [of a closure order] *shall be available* to intervening parties as provided in Rule 10, T.R.A.P. from the trial court to the Court of Criminal Appeals, and, if necessary, to this Court.” 701 S.W.2d 604, 608 (Tenn. 1985) (emphasis added). “Such review is appropriate,” the Court explained, “because if the trial judge is in error in issuing the closure order the intervening party will lose a right or interest that may never be recaptured.” *Id.* at 609. The Court later incorporated *Drake*’s holding into Tenn. Sup. Ct. R. 30E, which provides that “[a]ppellate review of a presiding judge’s decision to terminate, suspend, limit, or exclude media coverage shall be in accordance with Rule 10 of the Tennessee Rules of Appellate Procedure.”

The same principles that support extraordinary review of trial court *closure* orders in a criminal case also support extraordinary review when a trial court requires an execution to be held *in the open*. In either scenario, the challenged order “results in [one] party losing a right or interest that may never be recaptured.” *Gilbert*, 458 S.W.3d at 898. To prevent that injustice, this Court should grant Defendants’ application for extraordinary appeal and review the questions presented on the merits.

CONCLUSION

This Court should swiftly grant review and summarily vacate the injunction or, alternatively, stay the trial court's order pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46 § 3.02, the total number of words in this application, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, and Attorney Signature Block, is 10,663. This word count is based upon the word processing system used to prepare this application.

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