

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

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

APPELLANTS' MOTION FOR STAY PENDING APPEAL

JONATHAN SKRMETTI
Attorney General & Reporter

J. MATTHEW RICE
Solicitor General

EDWIN ALAN GROVES, JR.
Assistant Solicitor General
Office of Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-2850
Alan.Groves@ag.tn.gov
B.P.R. No. 036813

TABLE OF CONTENTS

INTRODUCTION.....	3
LEGAL STANDARD	4
REASONS FOR GRANTING A STAY.....	5
I. The Equities Favor a Stay.	5
A. Defendants will lose anonymity protections and meaningful review before the next execution.....	6
B. Plaintiffs will suffer no injury.....	8
II. Defendants Will Likely Prevail on Appeal.	9
A. Plaintiffs have no right to view preparatory and post-execution procedures.....	9
B. The injunction violates <i>Black</i>	11
III. The Public Interest Favors a Stay.	12
CONCLUSION.....	13

INTRODUCTION

Just four months before the State's next scheduled execution, the Davidson County Chancery Court rewrote Defendants' execution protocols. The court's new procedures are untested, will subject execution participants to a substantial risk of public exposure, and—worse still—were crafted to cure legal violations that don't exist. As Defendants explain in their application for extraordinary appeal, review of this order is warranted. But absent a stay, Defendants will be forced to deviate from their carefully crafted and practiced execution protocol before any court has reviewed the trial court's revisions.

This Court should stay the trial court's order. The balance of equities weighs decisively in favor of Defendants, who will be forced to implement untested procedures crafted by a single trial court judge and expose execution participants to a substantial risk of identification by witnesses during the next execution on May 21, 2026. Plaintiffs, on the other hand, unreasonably delayed challenging media restrictions that have been in place for decades, and regardless face no injury from a stay because they have no right to view preparatory and post-execution procedures. Defendants are also likely to succeed on the merits given the trial court's application of incorrect legal standards and lack of authority to meddle with this Court's unconditional execution orders. And the public interest strongly favors a stay to protect the anonymity of execution participants, who are essential to carrying out lawfully imposed death sentences for Tennessee's most violent offenders.

This Court should thus stay the injunction to ensure meaningful review.

LEGAL STANDARD

Tennessee Rule of Appellate Procedure 10 authorizes this Court to “issue whatever order is necessary to implement review,” Tenn. R. App. P. 10(a), including a stay pending appeal. *See, e.g., State v. Abdelnabi*, No. E2017-00237-CCA-R3-CD, 2018 WL 3148003, at *9 (Tenn. Crim. App. June 26, 2018) (referencing a stay of proceedings granted under this authority).¹ Indeed, this Court may “grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal” or “make any order appropriate to preserve the status quo.” Tenn. R. Civ. P. 62.08.

In determining whether to grant a stay, courts traditionally consider: (1) “whether the stay applicant has made a strong showing that he is likely to succeed on the merits,” (2) “whether the applicant will be irreparably injured absent a stay,” (3) “whether issuance of the stay will substantially injure the other parties interested in the proceeding,” and (4) “where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see In re Conservatorship of Malone*, 691 S.W.3d 365, 371 (Tenn. 2024) (citing *Nken*).

¹ *See also Jones v. State*, No. W2020-01347-CCAR10-PD (Tenn. Crim. App. Nov. 6, 2020) (order) (granting Rule 10 application and a stay pending appeal); *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); *State v. Woodard*, No. E2017-02307-CCA-R10-CD, 2019 WL 454276, at *2 (Tenn. Crim. App. Feb. 5, 2019) (order) (similar).

REASONS FOR GRANTING A STAY

The Court should stay the trial court's order pending appeal. Without a stay, Defendants will lose the opportunity for meaningful review before having to alter the State's execution protocol and subject execution participants to significant risk of exposure during the next execution on May 21, 2026. Plaintiffs, in turn, will suffer no injury from a stay because the State's execution protocol neither threatens nor violates their rights. Defendants are also likely to prevail on the merits, and the public interest in maintaining the anonymity of execution participants counsels further in support of a stay. A single chancery court judge should not be able to blue-pencil the State's carefully crafted protocols, threatening to expose execution participants, without appellate review.

I. The Equities Favor a Stay.

Irreparable injury is among “the most critical” factors guiding a stay decision. *Nken*, 556 U.S. at 434. In the prison context, “the Court must tread carefully” in considering irreparable injury to the government, “recogni[zing]” that the state prison setting is unique, and any relief that would remove from prison officials the deference that they are generally afforded in the administrative and control of the prison would necessarily be disruptive and harmful.” *Eads v. Tennessee*, No. 1:18-CV-00042, 2018 WL 4283030, at *16 (M.D. Tenn. Sept. 7, 2018).

Here, the threat of irreparable injury runs in one direction: Defendants will have to rewrite their execution protocols and expose execution participants to public view unless this Court stays the injunction before the next execution. Plaintiffs, for their part, will still

have the opportunity to be “present at the carrying out of the death sentence,” Tenn. Code Ann. § 40-23-116(a), as they have for decades. The balance of the equities, therefore, supports the issuance of a stay pending appeal.

A. Defendants will lose anonymity protections and meaningful review before the next execution.

The next execution is scheduled for May 21, 2026. *State v. Carruthers*, No. W1997-00097-SC-DDT-DD (Tenn. Sept. 30, 2025) (order). Unless this Court stays the injunction, Defendants must implement the chancery court’s blue-penciled protocols, which call for watered-down and untested privacy protections for execution participants. *See App.*, 19-22.² This will irreparably injure Defendants in at least two ways.

First, the injunction threatens to reveal the identities of execution participants. Exposing execution participants to public view directly undermines the State’s interest in protecting “the anonymity of those involved in carrying out capital punishment.” *West v. Schofield*, 460 S.W.3d 113, 124-25 (Tenn. 2015). The trial court’s provision for PPE suits and masks is insufficient. There is *zero* evidence in the record that those measures would adequately prevent witnesses from identifying participants. And the media has a history of attempting to do just that. *See* WVLT News, Officials Hold a News Conference After the Execution of Harold Nichols (26:30-27:14) (Dec. 11, 2025) (reporter attempting to identify execution participants before the blinds were closed),

² Citations to “App.” refer to Defendants’ concurrently filed application for extraordinary appeal.

<https://perma.cc/5MDJ-VWJ4>. Requiring Defendants to comply with these untested and judicially invented privacy measures presents more than a “possibility of irreparable injury.” *Nken*, 556 U.S. at 434. It subjects execution participants to a substantial risk of exposure that cannot be remediated by after-the-fact judicial review. *Cf. Priorities USA v. Nessel*, 978 F.3d 976, 985 (6th Cir. 2020) (finding irreparable harm where keeping district court order in place would deprive legislature of ability to enforce regulation during upcoming election). In the context of an impending execution, that is unacceptable.

Second, Defendants have assured execution participants they will remain anonymous. According to the Warden, “without such assurances, execution team members . . . would likely be unwilling to participate.” Appx., 119. That should not be surprising. *See West*, 460 S.W.3d at 123 (citing similar concerns). Therefore, if the injunction stands during the next execution, Defendants may have to swap out trained execution participants unwilling to face the risk of identification with new team members who may have less experience and less time to practice under the revised protocols. Once again, after-the-fact judicial review cannot redress this harm.

Defendants will be irreparably harmed absent a stay pending appeal. Given the substantial risk of exposure and the likelihood of other logistical challenges with implementing the trial court’s injunction, “judicial review would be an idle ceremony” if Defendants must comply with the injunction during the next execution. *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 10 (1942).

B. Plaintiffs will suffer no injury.

For their part, Plaintiffs will suffer no injury from a stay pending appeal. As Defendants have explained, App. at 22-39, Plaintiffs have no First Amendment right to view executions, let alone preparatory and post-execution procedures. *See also infra* 7-10. Therefore, Plaintiffs cannot hide behind the general rule that “when constitutional rights are threatened or impaired, irreparable injury is presumed.” *Churchill Downs Technology Co. v. Michigan Gaming Control Bd.*, 162 F.4th 631, 642 (6th Cir. 2025). The same goes for their statutory claim. Unless a remedial statute mandates injunctive relief, courts will not presume irreparable injury from an alleged statutory violation. *First W. Cap. Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1142 (10th Cir. 2017); *see also Lincoln Cercpac v. Health & Hospitals Corp.*, 920 F. Supp. 488, 495-96 (S.D.N.Y. 1996). Regardless, Plaintiffs cannot make that showing either, *see* App. at 35-39. No right to access means there’s no irreparable injury.

Plaintiffs’ delay also cuts against any claim of injury from a stay pending appeal. A party seeking an injunction “must generally show reasonable diligence.” *Benisek v. Lamone*, 585 U.S. 155, 159 (2018). Although the State’s execution protocols have changed over the years, the challenged media restrictions have been in place for at least two decades. Appx., 109-13. And yet, Plaintiffs delayed filing suit until October 2025. That “unreasonable delay [further] undercuts irreparable injury.” *Churchill Downs Technology Co.*, 162 F.4th at 642.

The balance of the equities strongly favors a stay pending appeal. Maintaining the status quo will allow media witnesses to continue reporting on executions as they have for decades, while protecting the

anonymity of execution participants and preserving the State’s opportunity for meaningful review before the next execution. *See* Tenn. R. Civ. P. 62.08.

II. Defendants Will Likely Prevail on Appeal.

The trial court’s application of incorrect legal standards—and attempt to condition executions on untested, judicially crafted protocols—ensure Defendant’s likelihood of success on the merits of this appeal. Along with the risk of irreparable injury, this is one of “the most critical” factors of the stay analysis. *Nken*, 556 U.S. at 434. And it cuts decisively in Defendants’ favor.

A. Plaintiffs have no right to view preparatory and post-execution procedures.

The trial court “necessarily abuse[d] its discretion,” *State v. Deberry*, 651 S.W.3d 223, 228 (Tenn. 2025), by applying incorrect legal standards—(1) an inapplicable First Amendment test, (2) an incorrect level of scrutiny (assuming a First Amendment right exists), and (3) an erroneous statutory interpretation analysis. App., 22-39. The trial court’s reliance on badly reasoned, outlier precedents from other jurisdictions cannot cure these fundamental legal errors. It’s turtles all the way down.

First, the trial court erroneously applied the *Press-Enterprise II* test in determining that there is a First Amendment right to access executions. App., 25-28. By its own terms, the test only applies in “cases dealing with the claim of a First Amendment right of access *to criminal proceedings*.” *Press-Enterprise II*, 478 U.S. at 8 (emphasis added). And most jurisdictions have declined to extend the test beyond the

“adjudicatory” context. *See, e.g., McCaleb v. Long*, 152 F.4th 728, 733 (6th Cir. 2025); App., 8-9 (compiling cases). The Ninth Circuit’s outlier decision to the contrary, *California First Amend. Coal. v. Woodford*, 299 F.3d 868, 873-77 (9th Cir. 2002), is not enough to overcome the clear weight of authority supporting Defendants’ position.

Second, even assuming Plaintiffs have a qualified right to access executions (including preparatory and post-execution procedures), the trial court clearly erred by applying strict scrutiny to TDOC’s protocols. App., 32-34. The right to access “is not absolute,” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) (plurality), and the government may impose reasonable “time, place, and manner restrictions.” *Id.*; *see also id.* at 598 n.23 (Brennan, J., concurring in the judgment); *id.* at 600 (Stewart, J., concurring in the judgment). Indeed, “limitations on the right of access that resemble ‘time, place, and manner’ restrictions on protected speech . . . [are] not be subject to such strict scrutiny.” *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 n.17 (1982). TDOC’s protocols do not *deny* media access; they merely *limit* access during brief periods when execution participants perform preparatory or post-execution procedures. To the extent a right of access exists, it is subject to reasonable time, place, and manner restrictions—not strict scrutiny. And the trial court’s application of the wrong level of scrutiny is reversible error. *See Upsolve, Inc. v. James*, 155 F.4th 133, 137 (2d Cir. 2025).

Third, the trial court’s statutory interpretation analysis rested on a host of legal errors. Despite this Court’s renewed focus on interpreting

statutory text in light of well-established canons of statutory construction, *Deberry*, 651 S.W.3d at 930, the trial court rushed to find “ambiguity” where none exists, delved into the legislative history to divine legislative “intent,” and relied on non-binding, out-of-state authorities to construe words in a way that clashes with their natural and ordinary meaning. App., 36-39. If given the opportunity, Defendants will refute those interpretive errors and demonstrate that TDOC’s protocols comply with statutory requirements.

Because the trial court’s discretionary decision to grant an injunction was “guided by erroneous legal conclusions,” *Koon v. United States*, 518 U.S. 81, 100 (1996), Defendants have shown a likelihood of success on the merits of Plaintiffs’ claims. This reinforces the need for a stay pending appeal.

B. The injunction violates *Black*.

This Court’s recent decision in *Black v. Strada*, 721 S.W.3d 223, 228 (Tenn. 2025) (order), further undermines the lawfulness of the trial court’s injunction. App., 39-42. In *Black*, the Court broadly held that “[a] trial court does not have the authority to stay, modify, or condition this Court’s execution order.” *Id.* at 228 (emphasis added). As discussed in Defendants’ application, the trial court’s order “conditions” future executions on expanded media access, which directly interferes with this Court’s “unconditional execution order[s].” *Id.* Until this Court says otherwise, *Black*’s sweeping language appears to categorially prohibit trial courts from issuing *any* injunctive relief that would place conditions on enforcement of this Court’s execution orders. There is no media-

plaintiff exception. Accordingly, Defendants are likely to succeed in their argument that the trial court lacked authority to issue the injunction.

III. The Public Interest Favors a Stay.

When the State is a party, two stay factors—irreparable injury to the government and the public interest—“merge.” *Nken*, 556 U.S. at 435. TDOC carefully crafted execution protocols to achieve the government’s (and therefore the public’s) interest in the efficient administration of capital punishment. But the trial court’s injunction throws out important anonymity protections and replaces them with untested procedures that no one even requested. The public interest is not served by this casual judicial rewrite of the execution protocols.

This Court has long recognized that “the public policy of Tennessee . . . favor[s] the anonymity of those involved in carrying out capital punishment.” *West*, 460 S.W.3d at 124-25. That’s because anonymity protects execution participants and their families from “harassment” and “retaliation” by the prisoner’s supporters and anti-death penalty activists. *West*, 460 S.W.3d at 123. Indeed, without assurances of anonymity, execution team members may become “unwilling to participate.” *Id.* at 124. This is not a theoretical concern. As mentioned, the Warden states that “without such assurances, execution team members . . . would likely be unwilling to participate.” Appx., 119. Because the trial court’s injunction threatens to derail future executions, the public interest favors keeping the current protocols in place.

To be sure, the public also has an interest in receiving accurate information about executions. But TDOC’s execution protocols already

accomplish that. Under the protocols, seven media witnesses may observe the most critical aspects of the execution. They see the prisoner in the execution chamber. They hear the prisoner's last statement. They observe the prisoner's interactions with a spiritual advisor. They see the prisoner die. And they hear the physician's pronouncement of death. Media witnesses report their observations at a press conference immediately following the execution. This amply satisfies the public's interest in obtaining accurate information about executions—as it has for decades.

CONCLUSION

The Court should stay the trial court's order pending appeal.

Respectfully submitted,
JONATHAN SKRMETTI
Attorney General & Reporter

J. MATTHEW RICE
Solicitor General

s/ Edwin Alan Groves, Jr.

EDWIN ALAN GROVES, JR.
Assistant Solicitor General
Office of Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-2850
Alan.Groves@ag.tn.gov
B.P.R. No. 036813