

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

ASSOCIATED PRESS, et al.,

Plaintiffs-Appellees,

v.

KENNETH NELSEN, et al.,

Defendants-Appellants.

**DAVIDSON COUNTY
No. M2026-00150-SC-R10-CV**

**PLAINTIFFS-APPELLEES' OPPOSITION TO
APPELLANTS' MOTION FOR STAY PENDING APPEAL**

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INTRODUCTION

In a thorough and well-reasoned decision, the Davidson County Chancery Court issued a temporary injunction vindicating Plaintiffs’ constitutional and statutory rights to view execution proceedings from the moment the condemned enters the execution chamber until the pronouncement of death. Defendants sought extraordinary review of that decision in the Court of Appeals under Tenn. R. App. P. 10, and after that application was denied, App’x at 470, Defendants filed an Application for Extraordinary Appeal (“Application” or “Appl.”) in this Court. Defendants concurrently filed a Motion For Stay Pending Appeal (“Motion” or “Mot.”).

Defendants’ Motion should be rejected because they have failed to satisfy the prerequisites for extraordinary review mandated by Rule 10.¹ Because Defendants’ Application fails, their Motion fails too.

Even if the Court were to accept this appeal, a stay pending resolution would be inappropriate. Though Defendants represent the trial court’s injunction as “re[writing] Defendants’ execution protocols,” Defs. Mot. at 3, in reality, the trial court’s injunction only requires simple measures to ensure access—that the curtains between the execution chamber and the witness room be open from the moment the condemned enters the execution chamber until after the pronouncement of death, and that members of the execution team wear PPE suits to cover their

¹ Pursuant to this Court’s Order, Plaintiffs’ opposition to Defendants’ Application is due on March 27, 2026. Plaintiffs will explain more fully in that forthcoming opposition the reasons why the Application should be denied.

identification badge and hair and be permitted to wear a mask to the extent necessary to shield their identities. App’x at 373–76.

The trial court’s injunction fully accommodates Defendants’ asserted interests in the anonymity of execution staff, and Defendants will not incur any irreparable harm from complying with the injunction’s requirements during the pendency of this appeal. Meanwhile, the injunction ensures Plaintiffs’ rights under the First Amendment and Tenn. Code Ann. § 40-23-116(a)—rights which Defendants are not likely to succeed in abrogating in this appeal. A stay would threaten to deprive Plaintiffs of their right to observe the four executions that are scheduled to occur in the coming months, thereby depriving the public of valuable information about those execution proceedings.

For these and for the reasons herein, Defendants’ Motion should be denied.

LEGAL STANDARD

“A stay is an ‘intrusion into the ordinary processes of administration and judicial review.’” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). While appellate courts have power to stay lower-court orders when doing so is necessary to ensure “considered review,” the issuance of a stay “is not a matter of right,” and reviewing courts should not “reflexively hold[] a final order in abeyance pending review.” *Id.* (citation omitted).

Rather, in determining whether to grant a stay, reviewing courts consider four factors: (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.” *Id.* at 434 (citation omitted). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the reviewing court’s] discretion.” *Id.* at 433–34.

REASONS TO DENY A STAY

I. Defendants have failed to show that this appeal is appropriate in the first instance.

As a preliminary matter, a stay is inappropriate because the State has not satisfied the prerequisites under Rule 10 to justify extraordinary appeal. The Court of Appeals has already denied Defendants’ first application for review, App’x at 470, and the instant application suffers the same infirmities as the last.

Extraordinary appeals are appropriate *only* where an applicant has established that “the court’s ruling represents a fundamental illegality, the ruling fails to proceed according to the essential requirements of the law, the ruling is tantamount to the denial of a party’s day in court, the trial court’s action is without legal authority, the action of the trial court constitutes a plain and palpable abuse of discretion, or either party has lost a right or interest that may never be recaptured.” *State v. McKim*, 215 S.W.3d 781, 791 (Tenn. 2007). Defendants ask this Court to grant review based on little more than disagreement with the trial court’s analysis and a desire to raise new legal theories that were not raised before the trial court. But the trial court’s thorough and well-reasoned opinion correctly applied bedrock principles of constitutional law and

statutory interpretation. There was accordingly no lack of legal authority and no abuse of discretion at all—let alone a “plain and palpable” one, *Gilbert v. Wessels*, 458 S.W.3d 895, 898 (Tenn. 2014)—so as to warrant an extraordinary appeal. Because Defendants’ Rule 10 Application cannot succeed, their Motion also fails.

II. Defendants face no realistic threat of irreparable harm from compliance with the injunction pending appeal.

Even if this Court were to grant Defendants’ Rule 10 Application, a stay would be inappropriate because Defendants have not shown they will be “irreparably injured” by complying with the injunction during the pendency of this appeal. *See Nken*, 556 U.S. at 434 (citation omitted). Indeed, Defendants offer little more than speculation that the injunction “threatens to reveal the identities of execution participants,” Defs. Mot. at 6, and “may” require Defendants to “swap out” execution participants, *id.* at 7. To be clear, Defendants have submitted no evidence either in the trial court or in this appeal that any execution participant has ever been identified by a media witness, much less that any participants have ever become “unwilling to participate” as a result. *Contra id.* (quoting App’x at 119). That lack of evidence is conspicuous, considering that the record here reveals that at least some execution participants have long been visible to witnesses without *any* protective garb to obscure their identities,² while other participants have previously *announced their*

² Defendants’ Appendix, submitted in conjunction with their Application, does not include the declarations of Plaintiffs’ reporters submitted with the Motion for Temporary Injunction in the trial court. To supplement the record on appeal, Plaintiffs attach to this filing two declarations by Plaintiffs’ reporters: (1) the Declaration of Associated

names.³ Plaintiffs’ reporters have already had ample opportunity to identify participants, but Defendants produce no evidence that any harm has befallen previous participants or affected the State’s ability to conduct executions. Instead, Defendants rely on a news conference that followed Harold Nichols’s execution in December, during which a reporter for the *Tennessean* responded to a question about who was in the room with Nichols by stating there was “a younger, maybe a little bit older than me, gentleman, in a black suit who was standing there with his arms crossed,” and “another older gentleman, also in a black suit.” WVLT News, *Officials Hold a News Conference After the Execution of Harold Nichols*, YouTube (Dec. 11, 2025), at 26:30–27:14.⁴ Defendants cannot seriously claim that the risk that reporters will provide that kind of utterly banal and generic description of participants in the execution process poses a serious threat to their anonymity, much less the State’s ability to conduct executions.

Press reporter Kimberlee Kruesi; and (2) the Declaration of Nashville Public Radio reporter Catherine Sweeney. As recounted by Ms. Kruesi, at an execution in 2018, guards were “inside the chamber,” with their faces fully visible to witnesses because “they were not wearing face coverings.” Ex. 1, Decl. of Kimberlee Kruesi ¶ 17.

³ As recounted by Ms. Sweeney, at the execution of Byron Black in 2025, the physician “announced himself and provided his name.” Ex. 2, Decl. of Catherine Sweeney ¶ 20. Although he was not visible to witnesses, she chose not to publish that name because “he was not the focus of the story.” *Id.*

⁴ Available at https://www.youtube.com/watch?v=CNsg5_HqeHo.

In any event, the current injunction addresses this risk by allowing execution participants to wear PPE and masks that obscure their identities. On this point, Defendants complain that the record lacks development about whether PPE and masks “would adequately prevent witnesses from identifying participants,” Defs. Mot. at 6, but that argument is a red herring. Both at the trial court and in this appeal, Defendants bear the burden of demonstrating that closure of the portions of the execution proceedings to which Plaintiffs seek access is justified by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (“*Press-Enterprise II*”) (citation omitted); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (where state seeks to deny access to a proceeding, “it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest”). Defendants must also show that no “reasonable alternatives to closing the proceeding” suffice to protect that interest. *Waller v. Georgia*, 467 U.S. 39, 48 (1984); see also *State v. Franklin*, 585 S.W.3d 431, 470 (Tenn. Crim. App. 2019) (relying on *Waller* and noting “the party seeking a closure” bears the burden of satisfying each prong of test). Defendants must accordingly show why the less restrictive alternative of wearing surgical garb would *not* suffice to protect their asserted interests in staff confidentiality, and their failure to do so is not grounds for a stay.

III. Defendants are unlikely to prevail on appeal.

A. Both the First Amendment and Tennessee law protect the public's right of access to execution proceedings.

Even if this Court were to accept Defendants' Application, Defendants are not likely to succeed on the merits of their appeal. The trial court undertook a First Amendment analysis governed by the well-established "experience and logic" test of *Press-Enterprise II*, consistent with precedent from the only federal Court of Appeals to have considered the question of whether the First Amendment protects a right of access to execution proceedings. *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002) (applying the *Press-Enterprise II* test to find a First Amendment right of access to executions). Defendants are incorrect that that test applies only to criminal or adjudicatory proceedings; as Plaintiffs have now explained twice over, the *Press-Enterprise II* factors are broadly applicable and have been used by courts to determine whether there is a right of access to a broad range of government proceedings, in both the civil and criminal judicial contexts, and in non-judicial government proceedings. *See* App'x at 59–60 (collecting cases).

Defendants next insist that TDOC's protocols do not "*deny* media access; they merely *limit* access during brief periods" such that they should be subject to the less stringent "time, place, and manner" test sometimes applied to content-neutral restrictions on First Amendment rights. Defs. Mot. at 10 (emphasis in original). That argument fails because, among other reasons, Defendants waived it by failing to raise it in the trial court. *See Martin v. Rolling Hills Hosp., LLC*, 600 S.W.3d

322, 337 (Tenn. 2020) (“Issues not raised in the trial court or in the intermediate appellate courts may be deemed waived when presented to this Court.” (citation omitted)); *see also* App’x at 104–05 (arguing in the trial court that TDOC’s restrictions were “essential to preserve higher values” and “narrowly tailored to serve that interest” under strict scrutiny framework and not raising intermediate scrutiny issue).

To be clear, however, closing the blinds during critical portions of the execution—where the condemned enters the execution chamber, is prepared for the execution, and is examined and pronounced dead—*does* entirely deny access to those portions of the proceeding. Because TDOC’s restrictions “deny the right of access,” Defendants must meet the strict scrutiny test by showing “that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” *Globe Newspaper Co.*, 457 U.S. at 606–07; *see also Press-Enterprise II*, 478 U.S. at 9 (“The presumption [of openness] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” (citation omitted)). The trial court committed no error in applying the appropriate analysis.

The trial court also committed no error when it correctly applied the well-established rules of statutory construction and found that the Execution Protocols violated Tenn. Code Ann. § 40-23-116(a). App’x at 362–71. Tenn. Code Ann. § 40-23-116(a) provides that specified witnesses are “entitled to be present at the carrying out of the death sentence,” including “[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.” The “natural and ordinary meaning,” *Ellithorpe v. Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015) (citation omitted), of being “present” at the “carrying out of the death sentence” is exactly the meaning that the trial court applied: “to be present, not for a portion of the carrying out of the death sentence, but for the entire event,” App’x at 367. The trial court’s analysis was further buttressed by its conclusion that the legislative history of the statute “further confirms the importance of an open process to the official witnesses,” consistent with its interpretation of the language of the statute. App’x at 368. Persuasive precedent from another state’s supreme court addressing a strikingly similar statute, App’x at 370 (discussing *Oregon Newspaper Publishers Association v. Oregon Department of Corrections*, 988 P.2d 359, 360–63 (Or. 1999)), likewise reinforced the trial court’s conclusion.

B. *Black v. Strada* is inapplicable here.

Despite Defendants’ repeated attempts to insist otherwise, this Court’s recent decision in *Black v. Strada*, 721 S.W.3d 223 (Tenn. 2025), has no application here. “The narrow issue” decided in *Black* was “whether, in the context of an impending execution, [a] trial court ha[s] the authority to grant mandatory injunctive relief to the moving party *that effectively modifies this Court’s unconditional execution order.*” *Id.* at 228 (emphasis added). The temporary injunction here does not modify any execution orders, which makes *Black* entirely inapplicable. In *Black*, the injunction required the State to adopt an “alternative method of execution—injection of a single lethal dose of pentobarbital only after deactivation of the [condemned’s] ICD by a qualified medical professional

on his scheduled execution date,” and thus “effectively and practically operated as a stay.” *Id.* Here, the injunction does not require the State to adopt additional or different medical procedures on the day of the execution and does not threaten to stay any existing or future execution orders by imposing conditions the State is incapable of meeting.

This Court’s recent amendment to Tenn. Sup. Ct. R. 12(4)(E) confirms that *Black* does not apply. Rule 12(4)(E) now clarifies that “collateral litigation that would potentially affect *the method or timing of execution* must commence with the filing of a motion in this Court.” In re: Amendment of Tenn. Sup. Ct. R. 12(4)(E), No. ADM2025-01930 (Tenn. Dec. 5, 2025) (emphasis added). Neither the position of witness room curtains nor the execution team’s clothing affects “the method or timing of execution,” and Defendants’ arguments against this common sense reality lack any merit.

IV. A stay would result in irreparable harm to Plaintiffs by preventing their reporters from observing upcoming executions.

Crucially, staying the trial court’s injunction would result in concrete and irreparable harm to Plaintiffs’ constitutional and statutory right to observe executions in their entirety. There are four executions currently set to occur in the coming months, on May 21, August 13, September 30, and December 3. *See* Order, *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).

Defendants’ request for a stay pending resolution of this appeal threatens Plaintiffs’ access to each of those executions.⁵

As discussed *supra*, Section III.A, the trial court correctly concluded that both the First Amendment and Tenn. Code Ann. § 40-23-116(a) protect Plaintiffs’ right of access to executions, and Defendants’ arguments to the contrary are not likely to succeed. But whether assessed through the lens of a deprivation of access under the First Amendment or under Tenn. Code Ann. § 40-23-116(a), “the denial of [plaintiffs’] right to observe” any one execution or portion thereof suffices to show irreparable injury, *see Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (concluding denial of right to attend upcoming execution in its entirety constituted an irreparable injury). As to the First Amendment claim, irreparable harm is presumed. *See Fisher v. Hargett*, 604 S.W.3d 381, 415 (Tenn. 2020) (“When constitutional rights are threatened or impaired, irreparable injury is presumed,’ especially where (as here) monetary damages cannot make the plaintiffs whole.” (citation omitted)). And as to the statutory claim, the statutory right to attend executions is “of such a nature as to implicate a right or interest that may never be recaptured once lost,” *In re Lucas H.*, 634 S.W.3d 1, 8 (Tenn. Ct. App. 2021), because each execution is a singular event.

⁵ The executions that a stay would likely affect were scheduled by orders filed on September 30, less than a month before Plaintiffs filed their complaint on October 28. Accordingly, Defendants’ attempt to rely on purported delay by Plaintiffs in filing this suit falls flat. *Contra* Defs. Mot. at 8.

V. The public interest does not favor a stay.

Lastly, the public interest weighs decisively in favor of enforcing this injunction. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (“[T]he public as a whole has a significant interest in . . . protection of First Amendment liberties.”); *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) (explaining that the public interest in enforcing an injunction is presumed where the recipient of the injunction has established a likelihood of success on First Amendment claims).

Indeed, the public interest in enforcing this particular injunction could not be stronger, as vindicating Plaintiffs’ First Amendment and statutory rights of access vindicates the *public’s* interest in understanding how the State carries out the death penalty. As both state law and TDOC’s own regulations recognize, press witnesses act as surrogates for the public. *See* Tenn. Code Ann. § 40-23-116(a)(6) (requiring “news media members allowed to attend any execution of a sentence of death” to “make available coverage of the execution to other news media members not selected to attend”); Tenn. Comp. R. & Regs. 0420-03-04-.05(1) (requiring press witnesses to participate in “a news conference” “[i]mmediately after the execution of the death sentence is complete”).

By permitting press witnesses to observe and report on critical portions of the proceeding currently shielded from view, the injunction

ensures that the public receives accurate and complete information about how the State exercises one of its most awesome and formidable powers. Because they cannot seriously contest this, Defendants revert to baseless speculation about how the injunction might jeopardize the anonymity of execution team members. They fail to offer any evidence that anonymity concerns justify a stay, or that those individuals' anonymity is not reasonably protected by the trial court's injunction. *See App'x at 371–72.*

CONCLUSION

For all the reasons set forth herein, the Court should deny Defendants' request for a stay pending appeal.

Dated: March 23, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 23, 2026, a true and correct copy of the foregoing was served through the Court's e-filing system on:

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