

No. M2026-00150-SC-R10-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ASSOCIATED PRESS, et al.,

Plaintiffs – Appellees,

v.

KENNETH NELSEN, et al.,

Defendants – Appellants.

On Appeal from the Davidson County Chancery Court
Case No. 25-1513-III

ANSWER TO APPELLANTS' RULE 10 APPLICATION FOR
EXTRAORDINARY APPEAL

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<i>Carry Out</i> , Merriam-Webster, https://www.merriam-webster.com/dictionary/ carrying%20out (last updated Mar. 23, 2026)	38
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QUESTIONS PRESENTED

Extraordinary review pursuant to Tenn. R. App. P. 10 is not warranted in this case. However, should review be granted, the Court should address the following questions:

1. Did the trial court properly exercise its authority to address the merits of Plaintiffs' motion for temporary injunction, which sought greater access to observe executions?
2. On the likelihood of success on the merits, did the trial court properly find that there is a qualified First Amendment right of access to execution proceedings and that Defendants have not carried their burden to overcome that presumption of access?
3. On the likelihood of success on the merits, did the trial court properly construe Tenn. Code Ann. § 40-23-116(a), which entitles selected media witnesses to be "present at the carrying out of the death sentence," to include being present at the execution from the moment the condemned enters the execution chamber to the moment the condemned is pronounced dead?
4. Because the Court can affirm on any grounds, is there a likelihood of success on the merits that Article I, Section 19 of the Tennessee Constitution provides a right of access to executions that independently supports the trial court's temporary injunction order?

INTRODUCTION

In a thorough and well-reasoned decision, the Davidson County Chancery Court issued a temporary injunction vindicating Plaintiffs’¹ 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 under Tenn. R. App. P. 10(a), App’x at 378–423, and the Court of Appeals denied their application, App’x at 470. Defendants now ask this Court for an extraordinary appeal. But Defendants still have not met their burden of showing that immediate review is necessary.

First, Defendants have pointed to nothing that prevents them from complying with the injunction, and nothing that shows they will be harmed or prejudiced by its enforcement pending further proceedings. For example, Defendants have not shown that execution participants face a realistic threat of being identified or that the trial court’s order requiring participants to wear identity-protecting attire is insufficient to address any such risk.

Second, the trial court’s temporary injunction order does not constitute an abuse of discretion, let alone a “plain and palpable” one sufficient to warrant extraordinary review under Tenn. R. App. P. 10. *Gilbert v. Wessels*, 458 S.W.3d 895, 898 (Tenn. 2014). The trial court’s conclusion that the First Amendment guarantees a right to access execution proceedings is amply supported by well-established case law.

¹ The Plaintiff Press Coalition is comprised of the Associated Press, Gannett Co., Inc., Nashville Public Media, Inc., Nashville Public Radio, Scripps Media, Inc., Six Rivers Media, LLC, and TEGNA Inc.

Indeed, the only appellate court to have considered this question reached the same result by applying the same bedrock legal principles. And the trial court’s conclusion that the State’s access restrictions violate the Press Coalition’s statutory right to be “present at the carrying out of the death sentence,” Tenn. Code Ann. § 40-23-116(a), is grounded in basic principles of statutory construction, persuasive precedent, and common sense. These well-reasoned conclusions are a far cry from the kinds of arbitrary action that warrant Rule 10 review.

Finally, the temporary injunction here is not barred by this Court’s decision in *Black v. Strada*, 721 S.W.3d 223 (Tenn. 2025), because, unlike in that case, the injunction here does not affect the method or timing of any future executions or otherwise impact any execution order from this Court. It does not require Defendants to adopt different or additional medical procedures on the day of the execution, and it does not threaten to stay any future executions by imposing conditions the State is unable to meet. It simply requires Defendants to keep witness-room blinds open during these executions and to provide personal protective equipment (“PPE”) to shield the anonymity of execution staff. This eminently straightforward and feasible order was entirely within the Chancery Court’s power to grant.

In sum, because Defendants have not met—and cannot meet—their heavy burden to justify this extraordinary appeal, their Application should be denied.

BACKGROUND

On October 28, 2025, the Press Coalition filed this action alleging that, by restricting access to execution proceedings, the Tennessee

Execution Protocols, App'x at 126–239, violate (1) its statutory right to be “present at the carrying out of the death sentence” under Tenn. Code Ann. § 40-23-116(a), (2) its right to access government proceedings under the First Amendment of the United States Constitution, and (3) its right to access government proceedings under Article I, Section 19 of the Tennessee Constitution. App'x at 2–30. The Complaint seeks, among other things, declaratory relief and an injunction requiring Defendants “to permit the public and the press to observe the totality of executions, including those pre- and post-execution procedures inextricably intertwined with the execution process.” App'x at 28–29.

On October 29, 2025, the Press Coalition moved for a temporary injunction requiring Defendants to permit media witnesses “to observe the entirety of execution proceedings, either through direct observational or closed circuit audio and video access,” including the following steps:

- (1) the preparation of the syringes for use in lethal injections and of sponges for use in electrocutions;
- (2) the entry of the condemned into the execution chamber;
- (3) the 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) the 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.

App'x at 39–40. Defendants opposed the motion. App'x at 84–114. The Chancery Court held a hearing on the Press Coalition's temporary injunction motion on December 3, 2025. App'x at 256–348.

On January 16, 2026, “[a]fter studying the record, the law, the affidavits, and considering the argument of Counsel, and all evidence presented,” the trial court granted Plaintiffs’ motion, finding that “the Plaintiffs stand to suffer immediate and irreparable harm should this relief fail to be granted.” App'x at 350. The court also found that the Press Coalition was likely to succeed on the merits of its First Amendment and statutory claims and that the remaining injunctive relief factors favored temporary relief. App'x at 352–73. Citing constitutional avoidance principles, the court did not reach the Press Coalition's state constitutional claim. App'x at 362 n.5.

Having found that TDOC's current Execution Protocols likely violate the First Amendment and Tennessee law, the court ordered Defendants (1) to provide each execution team member “a disposable coverall PPE suit which shall fully cover the team member's regular work uniform and name/identification badge and hair,” as well as “a mask to further conceal his or her identity should they so choose to wear one,” and (2) to amend the Execution Protocols to provide that curtains to the official witness room shall be opened when the condemned is escorted into the execution chamber “and shall remain open until the pronouncement of the death of the condemned individual, at which time the curtains shall be closed.” App'x at 373–76. The trial court did not

hold that the Execution Protocols needed to be revised with regard to the other aspects of access sought by the Press Coalition, like the preparation of the syringes.

On February 4, 2026, Defendants applied to the Tennessee Court of Appeals for an extraordinary appeal of the trial court’s order pursuant to Tenn. R. App. P. 10. App’x at 378–423. The Press Coalition opposed Defendants’ application, App’x at 425–69, and on February 27, 2026, the Court of Appeals issued a *per curiam* order denying the application, App’x at 470.

LEGAL STANDARD

An appellate court may grant an application for an extraordinary appeal pursuant to Rule 10 only (1) “if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review” or (2) “if necessary for complete determination of the action on appeal as otherwise provided in [the Rules of Appellate Procedure].” Tenn. R. App. P. 10(a). In other words, appeals under Rule 10(a) “are reserved only for *extraordinary* departures from the accepted and usual course of judicial proceedings.” *Gilbert*, 458 S.W.3d at 898 (emphasis in original). Accordingly, “[i]t is important for appellate courts to exercise restraint in granting Rule 10 appeals.” *Id.*

In practice, extraordinary appeals are granted *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).

REASONS TO DENY EXTRAORDINARY REVIEW

Defendants have wholly failed to show that any circumstance justifying extraordinary review is present here. Defendants take issue with the trial court’s power to decide this case and its analysis of the merits of Plaintiffs’ constitutional and statutory claims because they believe the merits should have come out in their favor. But the trial court issued a thorough and well-reasoned opinion correctly applying bedrock principles of constitutional law and statutory interpretation while posing no realistic threat of harm to Defendants or any execution participants. Accordingly, there is no risk of irreparable harm, no lack of legal authority, and no abuse of discretion at all—let alone a “plain and palpable” one—so as to warrant this extraordinary appeal.² *McKim*, 215 S.W.3d at 791. The State’s Rule 10 Application should be denied.

² Indeed, Defendants could not even make the requisite showing under the more forgiving, but still stringent, standard for reviewing a trial court’s decision to grant a temporary injunction: abuse of discretion. *See Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020) (trial court “abuses its discretion” only when “it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence” (citation omitted)). This standard “does not permit reviewing courts to second-guess the court below, or to substitute their discretion for the lower court’s,” *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 305 (Tenn. 2020) (citation omitted), which is exactly what Defendants ask this Court to do.

I. Defendants face no realistic threat of irreparable harm from compliance with the injunction while this case proceeds.

While Defendants insist that enforcement of the injunction will cause them to lose “a right or interest that may never be recaptured,” they offer little more than speculation that the injunction threatens “the anonymity of execution participants” and may require Defendants to “swap out” execution participants. Defs. Appl. at 19–20. Defendants have not shown that execution participants face a realistic risk of identification or that the trial court’s order does not adequately address any such risk by requiring execution participants to wear PPE obscuring their identities. Accordingly, extraordinary review is inappropriate.

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 the State has ever needed to “swap out” participants as a result. *Contra* Defs. Appl. at 20. This failure is conspicuous, because the record here reveals that at least some execution participants have long been visible to witnesses without *any* protective garb to obscure their identities,³ while other participants have previously

³ 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 submit a Supplemental Appendix including the declarations of two of Plaintiffs’ reporters: (1) the Declaration of Associated 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.” Suppl. App’x at 5 (Kruesi Decl. ¶ 17).

*announced their names.*⁴ 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 2025, 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 26:30–27:14.⁵ Defendants cannot seriously claim that the risk that reporters will provide that kind of utterly generic description of participants in the execution process poses a serious threat to their anonymity, much less the State’s ability to conduct executions.

Defendants also rely heavily on *West v. Schofield*, 460 S.W.3d 113 (Tenn. 2015), but that case is entirely distinguishable. *West* concerned a trial court discovery order that would have required the State to provide “the identity of persons involved in facilitating and carrying out executions” to the plaintiffs, a group of condemned inmates challenging

⁴ As recounted by Ms. Sweeney, at the execution of Byron Black in 2025, the physician “announced himself and provided his name.” Suppl. App’x at 15 (Sweeney Decl. ¶ 20). Ms. Sweeney chose not to publish that name because “he was not the focus of the story.” *Id.*

⁵ Available at https://www.youtube.com/watch?v=CNsg5_HqeHo.

the State's lethal injection protocol. *Id.* at 116. This Court concluded that the order was inappropriate under a straightforward application of Tenn. R. Civ. P. 26.02, because the identities were not relevant to the condemned plaintiffs' challenge, *id.* at 127, and because the trial court "failed to give adequate consideration to the State's need to protect the privacy of those involved in the execution of condemned inmates and its need to protect those persons from annoyance, embarrassment, and/or oppression," *id.* at 128. Here, by contrast, the trial court's injunction does not require Defendants to identify any persons involved in the execution process. It simply requires Defendants to open the curtains before the entry of the condemned and leave them open until after the pronouncement of death. It is far from clear that this would create a realistic threat that Plaintiffs' reporters will be able to identify those participants, much less report their identities to the public.

In any event, the trial court's injunction already addresses any hypothetical risk by requiring execution participants to wear PPE that obscures their identities. App'x at 373–77. Defendants' assertion that this reasonable alternative to closure is "half-baked," *see* Defs. Appl. at 18, disregards precedent from other jurisdictions that have mandated similar alternatives. *See Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 885 (9th Cir. 2002) (concluding there was "no error in the district court's finding that surgical garb can be worn without compromising the guards' security and efficacy and is thus an available, effective alternative" to closure of California executions); *Associated Press v. Otter*, 682 F.3d 821, 825 (9th Cir. 2012) (endorsing "use of surgical garb [as] a practical alternative to restricting access" to Idaho executions (citation

omitted)); *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 374 (M.D. Pa. 2012) (dismissing staff confidentiality concerns where state could “take affirmative steps to keep the identities of the lethal injection team members confidential”). Defendants make no effort to engage with these precedents and do not cite any evidence of harm that flowed to execution participants in those jurisdictions.⁶

Instead, Defendants complain that “[t]here is no record evidence to suggest that the trial court’s judicially crafted procedures will be sufficient to conceal the identities of execution participants.” Defs. Appl. at 19. But this turns the burden of proof on its head. Both at the trial court and in this appeal, Defendants bear the burden of demonstrating that closure of the portions of the execution 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) (requiring state to show that denial of access to government proceeding “is necessitated by a compelling governmental interest, and is narrowly tailored to serve that

⁶ In the Ninth Circuit, California has conducted three executions post-*Woodford*, Arizona has conducted twenty, Nevada has conducted three, and Idaho has conducted two. *See* Execution Database, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/facts-and-research/data/executions> (last visited Mar. 26, 2026) (filtering data for executions after August 2, 2002, and by state). Pennsylvania has not conducted any executions post-*Philadelphia Inquirer*. *Id.* (filtering data for executions after November 6, 2012 in Pennsylvania).

interest”). Likewise, Defendants must 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 also show why the less restrictive alternative of requiring staff to wear PPE would *not* suffice to protect their asserted interests in staff confidentiality. It was not Plaintiffs’ burden—much less the trial court’s—to build out a record to rebut evidence that Defendants did not and could not offer.⁷

Defendants also argue that they are entitled to immediate review of an order *opening* a proceeding because media intervenors ordinarily have the right to appeal an order *closing* a proceeding, but this argument

⁷ In a footnote in their Application, Defendants for the first time cite a study they claim “suggest[s]” that masks are insufficient to conceal identities. Defs. Appl. at 19 n.3 (citing Yi-Lang Chen & Shu-Yu Wang, *Challenges of Face Identification with Varied Mask Coverage in the Post COVID-19 Era*, *Frontiers in Psych.* (Feb. 27, 2025), <https://perma.cc/2DF9-GLA5>). That study is not properly before this Court, because it was not before the trial court, and thus the trial court could not have committed any error in failing to address it. In any event, the study does not support Defendants’ argument that PPE does not sufficiently protect the anonymity of execution participants. In the study, participants were shown full-resolution computer images of “a masked target face corresponding to one of the three coverage levels, alongside four full-face images” and were asked to “choose the image that best matched the masked target face.” Chen & Wang, *supra*. The study did not ask participants to watch a masked stranger from a distance while that stranger prepares a condemned inmate to die and/or examines the inmate to pronounce death and then later ask the participants to guess those strangers’ names.

is nonsensical. When members of the press or public are denied the right to attend a proceeding, immediate review is necessary because once the proceeding is over, the intervenor has lost “a right or interest that may never be recaptured.” *State v. Drake*, 701 S.W.2d 604, 608–09 (Tenn. 1985). By contrast, when the State fails to carry its burden of showing that an alternative to closure is inadequate, all it “loses” is the ability to use its preferred means of advancing whatever interest it asserts rendered closure necessary. Here, all the State loses is its ability to protect its “interest in maintaining the anonymity of execution participants,” Defs. Appl. at 21, by closing portions of the execution proceeding entirely rather than by requiring execution participants to wear PPE. Such a loss is far from sufficient to warrant extraordinary review.

II. The injunction does not reflect a plain and palpable abuse of discretion.

A. The trial court correctly concluded that Plaintiffs were likely to succeed on the merits of their First Amendment challenge.

1. The *Press-Enterprise II* “experience and logic” test governs Plaintiffs’ First Amendment claims.

The trial court undertook a First Amendment analysis governed by the well-established “experience and logic” test of *Press-Enterprise II*, 478 U.S. 1 (1986), consistent with precedent from the only federal Court of Appeals to have considered the question, *Woodford*, 299 F.3d at 877 (applying the *Press-Enterprise II* test to find a First Amendment right of access to executions). The *Press-Enterprise II* framework—comprised of two “complementary considerations”: (i) “whether the place and process

have historically been open to the press and general public,” and (ii) “whether public access plays a significant positive role in the functioning of the particular process in question,” 478 U.S. at 8—properly governs Plaintiffs’ First Amendment claim.

In a bid to avoid a straightforward application of *Press-Enterprise II* to Plaintiffs’ claims, Defendants rely primarily on *Pell v. Procunier*, 417 U.S. 817 (1974), and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). Those cases are not “controlling” here, though Defendants might wish them to be. *Contra* Defs. Appl. at 24. In fact, both *Pell* and *Houchins* are entirely beside the point. Plaintiffs here are not seeking access to prisons or to information about their operations generally, as in *Pell* and *Houchins*, nor are Plaintiffs asserting a “First Amendment right to access prison inmates and facilities on demand,” as Defendants claim. *Contra id.* Instead, Plaintiffs seek to vindicate the public’s right of access via the press to a particular kind of government proceeding that the government has elected to hold at a prison.

The fact that Plaintiffs are media organizations does not make *Pell* or *Houchins* any more applicable here than *Press-Enterprise II*. As the trial court rightly acknowledged, in the execution context “an official witness is distinguishable from the public generally, as official witnesses are created by statute.” App’x at 357; Tenn. Code Ann. § 40-23-116(a)(6). Just as *Press-Enterprise II* applies to criminal trials even though “preferential seating for media representatives” has long been a feature of those proceedings, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) (plurality opinion), it applies to execution

proceedings even though the State has by statute selected those who will occupy the limited number of seats, *see* Tenn. Code Ann. § 40-23-116(a)(6) (permitting seven members of the press “selected in accordance with the rules and regulations promulgated by the department of correction” to attend executions).

Defendants make much of language in *Richmond Newspapers*, noting that “penal institutions . . . are not ‘open’ or public places,” Defs. Appl. at 25–26 (quoting 448 U.S. at 576 n.11), but restrictions on access to prisons or to inmates simply cannot be evaluated in the same way as restrictions on access to *proceedings* held within prisons, *see Tex. Trib. v. Caldwell Cnty.*, 121 F.4th 520, 528–29 (5th Cir. 2024) (applying *Press-Enterprise II* framework to hybrid bail proceedings held partly within a jail). By way of analogy, courthouses—where there is no dispute that *Press-Enterprise II* generally applies—are also not open to the public at all times and for all purposes; access to a courtroom hallway or lobby would be evaluated differently than access to a proceeding in a courtroom.

Defendants are incorrect that the *Press-Enterprise II* test applies only to judicial proceedings or more narrowly to “adjudicatory criminal proceedings.” Defs. Appl. at 26. As the Supreme Court unequivocally wrote in *Press-Enterprise II*, “the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, ‘trial’ or otherwise[.]” 478 U.S. at 7. Thus, rather than adopting a categorical approach based on the type of proceeding at issue, the Supreme Court instructed courts to consider the broadly applicable “complementary considerations” of

experience and logic. *Id.* at 8. While Defendants may not like the Supreme Court’s test, that does not make it any less binding. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (“When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which [future courts] are bound.”); *see also Ramos v. Louisiana*, 590 U.S. 83, 104 (2020) (Gorsuch, J., plurality opinion) (“It is usually a judicial decision’s reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.”).

Courts have used the *Press-Enterprise II* factors 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 the context of non-judicial government proceedings. *See* App’x at 59–60 (collecting cases). True, in *McCaleb v. Long*, the Sixth Circuit suggested the *Press-Enterprise II* test did not apply to proceedings of the Tennessee Judicial Advisory Commission because those meetings were “advisory, not adjudicatory.” 152 F.4th 728, 730 (6th Cir. 2025). But that does not resolve the question of whether the test applies to *executions*. The only guidance that decision offers in classifying a proceeding as either “advisory” or “adjudicatory” is to consider whether those proceedings are “adversarial” or have any “real operative effect.” *Id.* at 733 (citation omitted). Executions *are* adversarial, *see Coe v. Bell*, 89 F. Supp. 2d 962, 966 (M.D. Tenn. 2000) (requiring defense counsel “be permitted to witness [their client’s] execution”), and have the extraordinary and non-reversible “operative effect” of extinguishing a life, *McCaleb*, 152 F.4th

at 733 (citation omitted). In any event, those questions are beside the point, because *Press-Enterprise II* provides a complete and proper framework for determining whether the public has a right of access to a particular proceeding. That framework is particularly useful for proceedings that, like executions, “are creatures unto themselves” and are “unique.” App’x at 355.

Defendants ask this Court to hold that the trial court committed a plain and palpable abuse of discretion by following the lead of the Ninth Circuit Court of Appeals—the only federal circuit court of appeals to have directly considered the question of a First Amendment right of access to execution proceedings. In fact, that court has *thrice* applied the *Press-Enterprise II* framework to find a qualified right of access to execution proceedings. See *Woodford*, 299 F.3d at 877 (“[T]he public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the process[.]”); *Otter*, 682 F.3d at 826 (applying the same analysis to the execution process in Idaho and reversing the denial of a preliminary injunction challenging the state’s protocols that limited access); *First Amend. Coal. of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1075 (9th Cir. 2019) (the public has a constitutional right to hear the entire execution process).

To paint *Woodford* as an outlier, Defendants misrepresent the Eighth Circuit’s holding in *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015). To be clear, in that case, the Eighth Circuit stated that “unlike the Ninth Circuit, *we have not ruled* that an execution constitutes the

kind of criminal proceeding to which the public enjoys a qualified right of access under the First Amendment.” *Id.* at 1112 (emphasis added). In addition to omitting the portion of the quoted sentence wherein the Eighth Circuit made clear it had neither adopted nor rejected *Woodford*, Defendants ignore the fact that the *Zink* court “[a]ssum[ed] for the sake of analysis” that “the *Press-Enterprise* analysis applies to executions,” and fail to mention that the court’s ultimate holding was only that there is no First Amendment right to access the “identities of the pharmacy that compounds the pentobarbital and of its suppliers of chemicals.” *Id.* In short, *Zink* says nothing about how the experience and logic factors apply to executions themselves, and contrary to Defendants’ representations, *supports* the view that the *Press-Enterprise II* framework supplies the appropriate test to resolve that question. Similarly, the Sixth Circuit in *Phillips v. DeWine* made clear it had “neither adopted nor rejected the Ninth Circuit’s position” in *Woodford*. 841 F.3d 405, 419 (6th Cir. 2016).

Defendants also make no reference to *Philadelphia Inquirer v. Wetzel*, in which a federal trial court in Pennsylvania applied the *Press-Enterprise II* framework to find a qualified right of access to portions of executions that Pennsylvania corrections department protocol instructed its employees to obstruct. 906 F. Supp. 2d at 368. Instead, they rely on several federal trial court decisions that have declined to follow *Woodford*. But those decisions all committed the same error: they treated the *place* where executions occur—within prison walls—as dispositive. *See, e.g., Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1324 (W.D. Okla.

2014) (relying on the “different treatment of access issues in the prison context”); *BH Media Grp., Inc. v. Clarke*, 466 F. Supp. 3d 653, 663 (E.D. Va. 2020), *vacated and remanded*, 851 F. App’x 368 (4th Cir. 2021) (same); *Associated Press v. Neal*, 788 F. Supp. 3d 959, 965 (S.D. Ind. 2025) (same). As explained above, the fact that executions occur within prisons does not render *Press-Enterprise II* any less applicable. The trial court here rightly avoided that error, and this Court should do the same.

2. The trial court correctly concluded that the experience and logic prongs of *Press-Enterprise II* were satisfied with respect to executions.

The trial court correctly concluded that both “experience” and “logic” confirm a First Amendment right to access executions, finding that executions “were historically open to the public” and that public access to such proceedings “plays a significant role in promoting transparency, accountability, and public confidence in the administration of capital punishment in the United States.” App’x at 359, 362. In arguing otherwise, Defendants abandon all pretense of attempting to justify their extraordinary appeal with reference to Rule 10’s standard. Rather than identifying any “plain and palpable abuse of discretion” in the trial court’s analysis, *see McKim*, 215 S.W.3d at 791, the State simply argues that the analysis should have come out in its favor. Because that is not a basis for extraordinary review, Defendants’ Application should be denied.

The “experience” prong of the *Press-Enterprise II* test looks to “whether the place and process have historically been open to the press and general public.” 478 U.S. at 8. The State oddly argues that the trial

court “erred by finding the early history of public hangings dispositive,” Defs. Appl. at 29, but the trial court did no such thing, *see* App’x at 360 (noting that “even when moved to jail yards, members of the press were still allowed to be fully present for those executions”). Rather, the trial court thoroughly and thoughtfully evaluated the history of access to executions in the United States, giving full force to the various forms that access has taken as execution methods have evolved and concluded that “executions were historically open to the public.” App’x at 359.

The trial court also considered authority confirming the historical and modern-day statutory tradition of permitting official and press witnesses at executions in nearly every jurisdiction. App’x at 66–69 (collecting authorities). Defendants argue that these historical and modern-day authorities “were not uniform,” Defs. Appl. at 29, but uniformity is not what the experience test requires. The “‘experience’ test . . . does not look to the particular practice of any one jurisdiction, but instead ‘to the experience in that *type* or *kind* of hearing throughout the United States[.]’” *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). While Tennessee did not “formally” designate media witnesses until 1994, *see* 1994 Tenn. Pub. Acts, Ch. 675, § 1, Defendants cannot seriously contest that for the majority of Tennessee’s history, members of the public and/or press have maintained access to its executions. The State conducted public hangings until 1883; it allowed six official witnesses from 1883 to 1909, *compare* 1883 Tenn. Acts 139–40, Ch. CXII, §§ 1, 3, *with* 1909 Tenn. Acts 1810–11, Ch. 500, § 1

(removing designated witness provision); and it did not conduct executions *at all* from 1960 to 2000, *see* Executions, Tenn. Dep’t of Corr., <https://www.tn.gov/correction/about-us/executions.html> (last visited Mar. 26, 2026).⁸

Defendants’ alternative argument that “[t]he public’s right to access is not measured by looking at special privileges granted to the press” fares no better. *Contra* Defs. Appl. at 30. Evaluating the history of access—and taking account of preferential seating arrangements states have traditionally adopted to vindicate the public’s right of access—is exactly what the experience prong of the *Press-Enterprise II* analysis requires.

In short, the trial court did not disregard any portion of the history of access to executions in the United States, nor did it improperly elevate the practice of any one jurisdiction above the overwhelming weight of authorities in others. The court thoughtfully concluded that “[e]ven when executions were moved into prison yards and to the inside of prison walls, official press witnesses and other witnesses were still allowed in to be present to observe the proceedings,” App’x at 361—a conclusion consistent with the Ninth Circuit’s conclusion in *Woodford*, 299 F.3d at

⁸ The Court may take judicial notice of the contents of the State’s own website detailing the history of its executions. *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009) (noting trial and appellate courts “may take judicial notice whether requested or not and may do so at any stage of the proceeding” (citations and internal quotation marks omitted)); *see also Hicks v. Seitz*, No. E2014–02225–COA–R3–CV, 2015 WL 5602285, at *5 & n.2 (Tenn. Ct. App. Sept. 23, 2015) (taking judicial notice of contents of federal government website).

875–76. It committed no error in doing so—much less did it commit a “plain and palpable abuse of discretion” sufficient to warrant extraordinary review. *McKim*, 215 S.W.3d at 791.

In a thinly veiled attack on the utility of the logic prong of *Press-Enterprise II*, which is binding precedent, the State repackages its dissatisfaction with the trial court’s analysis of the historical record before it into the argument that “executions in the United States have functioned without public access for nearly two centuries.” Defs. Appl. at 30. But that assertion is counterfactual and contrary to the record: members of the public and press *have* maintained access to executions throughout the modern era and have contributed to their functioning. Indeed, the trial court held that “public access plays a significant positive role in the functioning” of executions because that access “plays a significant role in promoting transparency, accountability, and public confidence in the administration of capital punishment in the United States,” App’x at 361–62 (quoting *Press-Enterprise II*, 478 U.S. at 8).

Finally, when deciding the logic prong of the *Press-Enterprise II* test, “what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). Here, of course, public access to executions—including not only the isolated moments when death occurs but all of the steps and procedures that are “inextricably intertwined with the process,” *Woodford*, 299 F.3d at 877—is integral to the positive functioning of those proceedings. It ensures that executions are competently and humanely administered consistent

with the Eighth Amendment. *Id.* at 876–77; *Phila. Inquirer*, 906 F. Supp. 2d at 371; *see also* App’x at 71–73 (noting the question whether a lethal injection protocol is “administered as intended” or is performed in a way that creates an “objectively intolerable” risk of pain is a consideration that the Supreme Court has recognized as directly relevant to the Eighth Amendment analysis); *Baze v. Rees*, 553 U.S. 35, 62 (2008) (citation omitted) (rejecting challenge to Kentucky’s lethal injection protocol under objectively intolerable risk framework). Public and press access to executions may also contribute to the intended deterrent effect. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 711–16 (2005); App’x at 368 (recognizing media’s role in “spread[ing] the news that it’s being done as a deterrent” (quoting Statement of Sen. C. Coulter Gilbert on S.B. 2287, 98th Gen. Assemb. (Tenn. Mar. 9, 1994), at Tr. 4:21–5:4)).

In sum, the trial court thoroughly considered both the experience and logic prongs of the *Press-Enterprise II* standard in accordance with established precedent, and there can be no serious argument that the court’s thoughtful opinion “so far departed from the accepted and usual course of judicial proceedings as to require immediate review.” Tenn. R. App. P. 10(a).

3. The trial court correctly concluded that Defendants did not overcome the First Amendment right of access.

The trial court's conclusion that *Press-Enterprise II* establishes a First Amendment right of access to executions does not create the “inflexible constitutional mandate” boogeyman that the State suggests. *Contra* Defs. Appl. at 29. Rather, it simply means that the public has a *presumptive* right of access to the proceeding at issue. But that right is *qualified*, meaning that the government may overcome it and close a particular proceeding where it demonstrates an “overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest,” *Press-Enterprise II*, 478 U.S. at 9 (citation omitted), and that no “reasonable alternatives to closing the proceeding” suffice to protect that interest, *Waller*, 467 U.S. at 48.

In applying this standard, the trial court reasonably concluded that the access restrictions in the Execution Protocols were not narrowly tailored to Defendants' asserted confidentiality concerns. App'x at 371–72. While acknowledging that Tennessee has a policy of protecting the anonymity of execution team members, the court noted that this policy could readily “co-exist” with the Press Coalition's First Amendment rights “without eroding the rights of the press and without compromising the identities of the members of the execution team.” App'x at 372.

In a last-ditch attempt to resist straightforward application of the *Press-Enterprise II* framework, the State raises a new theory that it did not raise in the trial court: that opening the blinds after the preparatory stages of the execution and closing them before the pronouncement of

death does not really “deny” access at all, and that this protocol should accordingly be evaluated as a “time, place, and manner” restriction. Defs. Appl. at 32–33 (citing *Globe Newspaper Co.*, 457 U.S. at 606–07 & n.17). But Defendants waived this argument 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). While appellate courts may excuse a defendant’s failure to raise a legal theory in some circumstances upon *accepting* an appeal, see *State v. Eady*, 685 S.W.3d 689, 705 (Tenn. 2024) (exercising “discretion to consider the State’s argument” after accepting appeal), that does not mean that Defendants’ wish to raise a new legal theory provides a good reason to grant extraordinary review. Defendants cannot seriously claim the trial court committed a plain and palpable abuse of discretion in not *sua sponte* considering an argument that Defendants failed to raise.

In any event, Defendants’ “time, place, and manner” theory lacks merit. Closing the blinds during portions of the execution *does* deny access to those portions of the proceeding. The portions of the execution where the condemned is entering the execution chamber, being prepared for the execution, and being pronounced dead are not akin to a collateral proceeding such as an “interchange[] at the bench,” or “conference[] in

chambers.” *Contra* Defs. Appl. at 33 (quoting *Richmond Newspapers*, 448 U.S. at 598 n.23 (Brennan, J., concurring)). Rather, they are integral to the very process of the execution and “inextricably intertwined” with that process. *Woodford*, 299 F.3d at 877. Nor is blocking media representatives from observing those portions akin to reasonably limiting the number of attendees by providing “preferential seating for media representatives.” *Richmond Newspapers*, 448 U.S. at 581 n.18 (plurality opinion).

Because the State’s restrictions amount to “deny[ing] the right of access” to critical portions of the execution proceeding, the State must meet strict scrutiny 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, and that no “reasonable alternatives to closing the proceeding” suffice to protect that interest, *Waller*, 467 U.S. at 48. The State has not done so. As the trial court rightly found, “[t]he protection of the identities of those involved in the implementation of the death sentence and the statutory right of the Press Coalition to be present can co-exist with one another without eroding the rights of the press and without compromising the identities of the members of the execution team.” App’x at 372. Thus, the trial court’s injunction readily accommodates anonymity concerns by allowing staff to wear disposable coverall suits to cover their regular work uniform and to wear masks, should they so choose. App’x at 373–76.

Moreover, even applying the intermediate-scrutiny test for “time, place, and manner” restrictions that Defendants now propose, Tennessee’s restrictions still would not pass muster because they burden

Plaintiffs’ right of access far more than is necessary to accommodate the State’s anonymity concerns. Even time, place, and manner restrictions must be “narrowly tailored to serve a significant governmental interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). Thus, while the government is not required to use the “least restrictive” means to satisfy the intermediate scrutiny test, it still must show that it “‘seriously undertook to address’ the problems it faces ‘with less intrusive tools readily available to it.’” *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 403–04 (6th Cir. 2022) (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)). The State has not even attempted to do so. Allowing staff to wear disposable coverall suits to cover their regular work uniforms and masks, should they so choose, is an “alternative measure[] that burden[s] substantially less speech,” see *McCullen*, 573 U.S. at 467, and the State has not demonstrated that this reasonable alternative would fail to achieve its interests. Thus, Defendants’ effort to seek refuge in the intermediate scrutiny framework falls flat.

B. The trial court correctly held that Plaintiffs were likely to succeed on the merits of their statutory claim.

The trial court's ruling that the Execution Protocols are contrary to the requirements in Tenn. Code Ann. § 40-23-116(a) was also not an abuse of discretion, let alone a "plain and palpable" one. *McKim*, 215 S.W.3d at 791. Rather, the trial court reached this conclusion by applying well-established rules of statutory construction, persuasive precedent, and common sense, App'x at 362–71, and extraordinary review is unwarranted.

Tenn. Code Ann. § 40-23-116(a) provides that "seven (7) members of the" press are "entitled to be present at the carrying out of the death sentence." In finding that the Execution Protocols violate this statutory mandate, the trial court reasonably noted that "[t]he Legislature did not differentiate between the events that the official witnesses were to be present for and those which were to be shrouded by a veil of secrecy at the department's choosing." App'x at 367. "Instead, when drafting this statute, they granted the official witnesses the statutory right to be present, not for a portion of the carrying out of the death sentence, but for the entire event." *Id.* The State may disagree with this conclusion based on its preferred interpretation, but that does not make the trial court's ruling an abuse of discretion, let alone a "plain and palpable" one. *McKim*, 215 S.W.3d at 791.

Nonetheless, Defendants attempt to relitigate this point by arguing that Tenn. Code Ann. § 40-23-116(a) confers a right to view only "the moment of death itself." Defs. Appl. at 36. But that interpretation finds no support in the law or in common sense, and the trial court rightly rejected it. App'x at 367. In construing statutes, Tennessee courts "seek to ascertain the intention of the Legislature as it is expressed in the

words of the statute and should look to the entire Act and give consideration to the purpose, objective and spirit behind the legislation.” *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976). 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.

To avoid this reasonable conclusion, Defendants insist that the phrase “carry out” encompasses only the moment of death. Defs. Appl. at 36. In cherry-picking the third-listed definition in the American Heritage Dictionary (“[t]o bring to a conclusion”) and only one of several definitions from Merriam-Webster Online Dictionary (“to bring to a successful issue: complete, accomplish”), *see id.*, Defendants arbitrarily emphasize the latter part of the definitions on which they rely to suggest that “carrying out” somehow includes only the “conclusion” and the “accomplish[ment]” of the sentence while excluding anything that “bring[s]” that result about. And they ignore other definitions from the same dictionaries, such as “[t]o put into practice or effect,” *Carry Out*, Am. Heritage Dictionary (5th ed. 2022), <https://ahdictionary.com/word/search.html?q=carry>, and “to put into execution” or “to continue to an end or stopping point,” *Carry Out*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/carrying%20out> (last updated Mar. 23, 2026). It was not a plain and

palpable abuse of discretion for the trial court to examine these competing definitions and reach the conclusion that it did.⁹

As a side note, there is no basis to read the statute's inclusion of the language "strict seclusion" as Defendants suggest and it certainly does not prevent official witnesses from being present for the carrying out of some portions of the execution while excluding them from other portions. Tenn. Code Ann. § 40-23-116(a); *see* Defs. Appl. at 36. As the trial court correctly noted, "[t]he entire execution process is to be conducted in strict seclusion inside of the jail, *but for* the presence of the official witnesses." App'x at 368 (emphasis added). It is absurd for Defendants to suggest that Plaintiffs are seeking to access "everything that is remotely connected to an execution," *contra* Defs. Appl. at 36, and the trial court did certainly not grant them such relief.

⁹ It is also worth noting that Tenn. Code Ann. § 40-23-116(a)(6) is a remedial provision designed to ensure public scrutiny of execution proceedings. *See Chattanooga-Hamilton Cnty. Hosp. Auth. v. Bradley Cnty.*, 249 S.W.3d 361, 366 (Tenn. 2008) ("Many legislative enactments are remedial in nature, that is, designed to address a particular objective or purpose or to provide a degree of protection."); *Voss v. Shelter Mut. Ins. Co.*, 958 S.W.2d 342, 345 (Tenn. Ct. App. 1997) (finding Tennessee's whistleblower protection statute to be remedial "in that it introduces regulations conducive to the public good"); *Loftin v. Langsdon*, 813 S.W.2d 475, 479 (Tenn. Ct. App. 1991) ("Statutes which introduce regulations conducive to the public good are remedial statutes."). Accordingly, Tenn. Code Ann. § 40-23-116(a) must be "liberally construed in furtherance of [this] purpose." *Dailey v. State*, 470 S.W.2d 608, 610 (Tenn. 1971); *see also Metro. Air Rsch. Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992) (explaining that because Tennessee's Open Meetings Act is remedial it should "be construed broadly to promote openness and accountability in government").

Finally, both the legislative history and the decision in *Oregon Newspaper Publishers Association v. Oregon Department of Corrections*, 988 P.2d 359, 360–63 (Or. 1999), are instructive here. Though Defendants argue to the contrary, the trial court found that the legislative history “further confirms the importance of an open process to the official witnesses,” consistent with its interpretation of the plain language of the statute, App’x at 368; *see also Waters v. Farr*, 291 S.W.3d 873, 895 (Tenn. 2009) (“Finally, the legislative history buttresses the plain language of the statute by indicating that the General Assembly intended to create a civil sanction.”). And, although Defendants conspicuously omit from their Application any mention of *Oregon Newspaper Publishers Association*, that decision from the Oregon Supreme Court is instructive because it addressed a statute strikingly similar to Tennessee’s and further supports the trial court’s analysis. App’x at 370 (discussing Oregon Supreme Court’s interpretation of Or. Rev. Stat. § 137.473); 988 P.2d at 363–64 (“those actions that are linked inextricably with the administration of the fatal drugs are part of the execution,” and statutory language “requires that the execution, not just the dying, be observed by the witnesses”).

Defendants would have the trial court disregard the plain meaning of the statute, the legislative history of the statute at issue, and relevant precedent from another state’s highest court, in favor of TDOC’s proffered reading of the law. *See* Defs. Appl. at 37 (arguing “TDOC’s interpretation” was entitled to “appropriate weight” (citation omitted)). But as the trial court rightly concluded, the statutes allowing TDOC to promulgate rules to facilitate lethal injection or electrocution, and to

promulgate rules to facilitate the selection of official press witnesses, are “void of any language granting the Department of Corrections the authority to delineate what portions of the execution event are to be closed or opened to the official witnesses.” App’x at 369. Defendants simply disagree with the trial court’s conclusion on the meaning and application of Tenn. Code Ann. § 40-23-116(a), but this is not a basis for extraordinary appeal.

III. The trial court had the authority to issue the injunction.

A. *Black* is entirely inapplicable.

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 trial court’s order here was not “in the context of an impending execution,” and it does not “effectively modif[y]” any of this Court’s execution orders. *See id.* *Black* simply does not apply.

In *Black*, condemned prisoner Byron Black and eight other death-row inmates challenged the constitutionality of Tennessee’s “single-drug lethal injection protocol.” *Id.* at 225. With the trial on their claims set for months after his already-scheduled execution date, Mr. Black filed—just weeks before his scheduled execution—a separate motion seeking a temporary injunction requiring the State to deactivate his implanted cardioverter-defibrillator (“ICD”) “via a particular method immediately before, or simultaneously with, the execution.” *Id.* Although the

defendants “informed the trial court that they were unable to deactivate the ICD on the day of the execution,” the chancery court nonetheless granted an injunction directing the State to transport Mr. Black to the hospital for deactivation of the ICD the morning of the execution. *Id.* at 228.

This Court concluded that that particular injunction “effectively modifie[d]” Mr. Black’s unconditional execution order because (1) 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 (2) the injunction “effectively and practically operated as a stay” of Mr. Black’s execution. *Id.* The State prevailed because it presented credible evidence that it would be unable to deactivate the ICD on the day of the execution as the trial court had ordered. *Id.*

The injunction here does not “modif[y]” any outstanding execution orders and has no bearing on the way in which the State chooses to effectuate any scheduled execution. It does not require the State to adopt additional or different medical procedures on the day of the execution; it simply requires the State to provide the execution team specific attire and keep the witness-room blinds open while conducting the execution by whatever method it chooses. App’x at 373–76. Defendants have not argued—and cannot argue—that they are unable to comply with the trial court’s eminently straightforward and feasible order by the next-scheduled execution.

Defendants further insist that the injunction violates *Black* by “conditioning executions on expanded media viewing access,” Defs. Appl. at 39–42, but this Court made plainly clear that the “narrow issue” it decided in *Black* was the trial court’s authority to “modif[y] this Court’s unconditional execution order.” 721 S.W.3d at 228. Thus, the question is whether the temporary injunction here “conditions” enforcement of this Court’s execution orders on changes to the method or timing of the execution, such that the injunction “effectively modifies” this Court’s orders. *Id.* The injunction here does no such thing.

In arguing that *Black* divests the trial court of its authority to decide Plaintiffs’ temporary injunction motion or claims writ large, Defendants push a grossly inflated reading of the decision—one that would prevent lower courts from hearing *any* challenge to *any* aspect of the State’s Execution Protocols any time an order for an execution has been issued. Such a reading is unsupported by the text of the opinion and defies common sense. The trial court here acted well within its authority and, accordingly, extraordinary appeal is unwarranted.

B. This Court’s recent amendment of Rule 12(4)(E) confirms that *Black* is inapplicable.

Less than five months after this Court issued its opinion in *Black*, it amended Rule 12(4)(E)—which governs execution dates, stays, and reprieves—to clarify 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). Plaintiffs read this amendment to make clear that *Black* bars only those claims

that would alter the “method” or “timing” of an execution. Tenn. Sup. Ct. R. 12(4)(E); *see also Black*, 721 S.W.3d at 228 (citing Tenn. Sup. Ct. R. 12(4) for the principle that “[a]ny modification of an execution order of this Court must come from this Court”).

The temporary injunction here has no bearing on the “method” or “timing” of any execution. The trial court’s order requires only three things: (1) that the execution team wear different attire, (2) that the curtains between the execution chamber and the witness room be open longer, and (3) that witnesses arrive at the execution site earlier. App’x at 373–76. TDOC can still execute any condemned on any date set by this Court at the time of TDOC’s choosing, using lethal injection or electrocution as the method. Nothing in the trial court’s order affects those aspects of the execution and, thus, nothing in the order implicates either Rule 12(4)(E) or *Black*.

Moreover, because Rule 12(4)(E) governs the process by which *a prisoner* may seek to stay or delay an execution, Plaintiffs would lack standing to bring a Rule 12(4)(E) motion. Tenn. Sup. Ct. R. 12(4)(E) (providing that “the Court will not grant a stay or delay of an execution date pending resolution of collateral litigation in state court unless *the prisoner* can prove a likelihood of success on the merits in that litigation” (emphasis added)). Thus, construing *Black* and Rule 12(4)(E) to govern any challenge to any aspect of the State’s Execution Protocols would effectively preclude Plaintiffs from seeking any relief in *any* forum.¹⁰ But

¹⁰ Such a holding would likely violate the Tennessee Constitution. Tenn. Const. art. I, § 17 (“That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall

this is not what Rule 12(4)(E) or *Black* say, and this Court should decline Defendants’ invitation to shield such a critical government proceeding from any form of judicial scrutiny.

C. Neither *Black* nor Rule 12(4)(E) has any effect on executions not yet set.

As explained *supra*, Sections III.A–B, the Press Coalition does not read *Black* and Rule 12(4)(E) to impose any limitation on the trial court’s authority to issue this temporary injunction. But even assuming they did apply here, neither authority prohibits trial courts from deciding issues for executions that have *not* yet been set and, thus, are not subject to any “unconditional execution order” from this Court. *Contra Black*, 721 S.W.3d at 228.

Rule 12(4)(E) specifically provides that its limitation on collateral state-court litigation affecting the method or timing of an execution only applies “[a]fter a date of execution is set.” At the time the trial court issued its injunction, this Court had only set four future executions.¹¹ Therefore, even if this Court were to find that the trial court was somehow precluded from entering the injunction for those already-

have remedy by due course of law, and right and justice administered without sale, denial, or delay.”).

¹¹ Order, *State v. Carruthers*, No. W1997-00097-SC-DDT-DD (Tenn. Sept. 30, 2025) (setting execution for May 21, 2026); Order, *State v. Hines*, No. M2025-00221-SC-DPE-DD (Tenn. Sept. 30, 2025) (setting execution for August 13, 2026); Order, *State v. Pike*, No. M2020-01156-SC-DPE-DD (Tenn. Sept. 30, 2025) (setting execution for September 30, 2026); Order, *State v. Sutton*, No. E1997-00196-SC-DDT-DD (Tenn. Sept. 30, 2025) (setting execution for December 3, 2026).

scheduled executions (which, again, it should not), this should not limit the injunction’s application to executions that have yet to be set by this Court.

The same logic applies to *Black*. The “narrow issue” there was the trial court’s authority to grant mandatory injunctive relief that would modify an existing “unconditional execution order” from this Court. 721 S.W.3d at 228. Again, even if this Court concludes that *Black* barred application of the temporary injunction’s modest changes to the protocols for already-scheduled executions (and it should not), this should not affect its application to *unset* executions.

Accepting the State’s logic that *Black* and, by extension, Rule 12(4)(E) bar *any* changes to the Execution Protocols whenever there is a pending execution order from this Court would yield absurd results. It would, for instance, mean that even TDOC could not change its *own* Execution Protocols when such an order exists, because surely TDOC would not have the power to do something the trial court could not do. And it would also suggest that any minor deviations from those Protocols—such as Defendants’ admitted “custom” of allowing spiritual advisors to remain in the execution chamber when the Protocols instruct them to exit, Defs. Appl. at 13 n.2—would amount to a “modif[ication]” of this Court’s unconditional execution orders in violation of *Black* and Rule 12(4)(E). *Black*, 721 S.W.3d at 228. This cannot be what *Black* and Rule 12(4)(E) mean—and the trial court’s modest and entirely feasible temporary injunction cannot be the kind of lower-court relief that those authorities bar.

CONCLUSION

For all the reasons set forth herein, the Court should deny Defendants' request for Rule 10 review of the trial court's well-reasoned temporary injunction decision.

Dated: March 27, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the word-count limit set forth in Tenn. R. App. P. 30(e). Based on the word-count function of Microsoft Word, the total word count for all printed text in the body of the brief exclusive of the material omitted under Tenn. R. App. P. 30(e) is 9,956 words. This brief complies with the requirements of Tenn. Sup. Ct. R. 46, § 3.02(a). The text of the brief is 14-point Century Schoolbook font with 1.5 line spacing and 1-inch margins.

Dated: March 27, 2026

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