

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

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

1. 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 allow those witnesses to be present at an execution from the moment the condemned enters the execution chamber to the moment the condemned is pronounced dead?
2. Did the trial court properly find that there is a qualified First Amendment right of access to witness execution proceedings and that Defendants have not carried their burden to overcome that presumption of access?
3. Because the Court can affirm on any grounds, does Article I, Section 19 of the Tennessee Constitution provide a right of access to witness executions that independently supports the trial court’s temporary injunction order?
4. Did the trial court properly exercise its authority to address the merits of Plaintiffs’ motion for temporary injunction, which sought to enforce Plaintiffs’ constitutional and statutory rights to observe execution proceedings and did not seek to modify a pending execution order from this Court?

INTRODUCTION

“The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion) (citation omitted). Recognizing that principle, in 1994, the Tennessee legislature entitled representatives of the press “to be present at the carrying out of the death sentence.” Tenn. Code Ann. § 40-23-116(a) (“Section 40-23-116”). But the Tennessee Department of Correction’s (“TDOC”) lethal injection and electrocution protocols (collectively, the “Execution Protocols”) contravene that mandate, requiring that the blinds between the execution chamber and witness room remain closed as the condemned enters the chamber, as the condemned is prepared for execution, as the physician examines the condemned following the administration of lethal injection or electrical current, and as the physician declares the condemned dead. As a result, media witnesses are prevented from observing critical components of the execution process, like insertion of IV lines for lethal injection executions.

TDOC’s restrictions are contrary not only to statute but also to the rights of access guaranteed by the First Amendment of the U.S. Constitution and Article I, Section 19 of the Tennessee Constitution (“Article I, Section 19”), and the trial court rightfully enjoined them. The trial court’s modest and straightforward order requires TDOC to open witness-room curtains before the condemned enters the execution chamber and keep them open until after the physician has made the

declaration of death. To accommodate TDOC's asserted concerns about the anonymity of its staff, the order requires that execution team members wear coveralls concealing their uniform, name badge, and hair, and be offered face masks to wear if they choose.

This Court should affirm. To start, the trial court correctly found that Section 40-23-116(a) provides media witnesses with a “statutory right to be present, not for a portion of the carrying out of the death sentence, but for the entire event.” R.XIX, 2450. Defendants’ contrary view—that the “carrying out of the death sentence” entails only the precise moment the condemned dies—finds no basis in law. The statute’s plain meaning, purpose, and legislative history, as well as persuasive precedent from another state’s highest court, all confirm that Section 40-23-116(a) entitles media witnesses to be present for and observe the entirety of the execution proceeding.

The trial court also correctly held that there is a First Amendment right of access to witness executions. That right derives from the line of cases culminating in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”), in which the U.S. Supreme Court recognized a qualified constitutional right to access government proceedings where those proceedings have “historically been open to the press and general public” and where “public access plays a significant positive role in the functioning of the particular process in question.” *Id.* at 8. The trial court rightly found that applying this test confirms a presumptive First Amendment right to access executions, which have long been open to the public, and of which “meaningful and full observation . . . allows the public to assess whether the state carries out

death sentences in a lawful and humane manner and ensures that the execution process remains subject to democratic oversight.” R.XIX, 2445. The trial court also rightly found that Defendants had not met their heavy burden to overcome that right, and ordered Defendants to implement appropriate, “minimal changes” to the Execution Protocols to ameliorate their asserted anonymity concerns. *Id.* at 2454.

Though the trial court abstained from deciding the question, Article I, Section 19 provides yet another basis to affirm the injunction. The plain language of that provision, along with precedent from this Court, confirms that the Tennessee Constitution confers a distinct right of access to witness executions that TDOC has also not overcome.

Finally, this Court’s decision in *Black v. Strada*, 721 S.W.3d 223 (Tenn. 2025), did not divest the trial court of its jurisdiction to issue the temporary injunction. An order requiring that witness-room curtains be opened earlier and closed later, and that execution team members wear different attire, has no bearing on the method or timing of an execution and in no way “modifies” any “unconditional execution order” of this Court. *Id.* at 228. *Black* simply does not apply.

The trial court properly exercised its jurisdiction and discretion to grant the requested temporary injunction, vindicating Section 40-23-116(a), the First Amendment of the U.S. Constitution, and Article I, Section 19 of the Tennessee Constitution. Accordingly, this Court should affirm.

STATEMENT OF THE CASE AND FACTS

A. Historical Background.

“In early America, as in England, public hangings were the most common method of execution.” Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. Rich. L. Rev. 693, 696 (2015). Throughout the nineteenth century, states began moving “from executing prisoners in public to executions carried out in prisons or jails before selected official witnesses.” Margaret Vandiver & Michel Coconis, “*Sentenced to the Punishment of Death*”: *Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. Mem. L. Rev. 861, 875 (2001). This “occurred at different times in different states, with the South and southern border states maintaining the old tradition of public executions longer than the rest of the country.” *Id.* During this shift, executions were not removed entirely from public view. Instead, many states adopted statutes either permitting “reputable citizens” (often including members of the press) to attend executions as official witnesses, R.IV, 463–64 (describing statutes passed between 1835 and 1901); R.IX, 1109–60 (collecting statutes), or specifically requiring members of the press to attend, R.IV, 464–65 (describing statutes passed between 1885 and 2009); R.IX, 1161–1232 (collecting statutes). These “official witnesses act[ed] as representatives for the public at large.” *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002).

Tennessee, for its part, conducted executions by public hanging before large crowds, sometimes numbering in the thousands, until 1883.

R.II, 165 (article estimating that “ten to twelve thousand people were present” at 1879 Nashville hanging). In 1883, Tennessee passed a law requiring executions to be held in jail yards—rather than public gallows—thereby limiting the number of witnesses who could attend. *Id.* at 167–69 (1883 Tenn. Acts 139–40, Ch. CXII, § 1). The law permitted sheriffs to designate “other persons . . . not exceeding six in number” to attend as representatives of the public. *Id.* at 169. In 1909, Tennessee passed a law requiring that executions take place at the state penitentiary in Nashville in the presence of those witnesses “selected by the Warden of the State penitentiary as may be necessary to properly carry out the execution of the death sentence.” *Id.* at 179–82.

In 1994, the General Assembly amended this law to ensure seven members of the press “be present at the carrying out of the death sentence.” 1994 Tenn. Pub. Acts, Ch. 675, § 1 (codified at Tenn. Code Ann. § 40-23-116(a)). That provision was added during a 40-year hiatus on executions in Tennessee that lasted from 1960 until 2000. Vandiver & Coconis, *supra*, at 887.

One of the sponsors of the 1994 bill summarized its purpose:

Whether you’re for capital punishment or not, when the State exercises that very awesome power . . . it’s imperative that we have the media there to witness it, not just to promulgate and to spread the news that it’s being done as a deterrent, but to also make sure that the State exercises that awesome power with the highest level of decorum and that it’s carried out appropriately.

R.II, 201–02 (Statement of Sen. C. Coulter Gilbert on S.B. 2287, 98th Gen. Assemb. (Tenn. Mar. 9, 1994)). Accordingly, at each modern-day execution in Tennessee—and every execution Tennessee has ever conducted by lethal injection—members of the press have been present to witness and document, on the public’s behalf, the State’s exercise of its most “awesome power.” *Id.*; see R.I, 9–10 (collecting coverage of executions in Tennessee since 2000); R.II, 207–30 (same).

B. The Execution Protocols.

TDOC has two different execution protocols, for lethal injection and electrocution executions, both of which bar witnesses from observing critical components of the execution, limiting their window to observe the proceeding to a mere 10- to 15-minute period.

TDOC’s Lethal Injection Protocol provides that blinds between the witness room and execution chamber are to be opened only after the entry and preparation of the condemned in the execution chamber, R.I, 50, and closed before the entry of the examining physician, *id.* at 51. Thus, press witnesses are barred from observing, among other things, the entry of the condemned into the execution chamber; the preparation of the condemned in the chamber, including the securing of the condemned to the gurney and insertion of intravenous (“IV”) lines; and the physician’s examination of the condemned and pronouncement of death. R.I, 47–51; R.III, 340–41; R.IV, 442–44.

TDOC’s Electrocution Protocol provides that blinds between the witness room and execution chamber are to be opened only after the entry and preparation of the condemned and closed before the entry of the

examining physician. R.II, 140. Thus, press witnesses are barred from observing, among other things, the entry of the condemned into the execution chamber; the preparation of the condemned in the chamber, including the securing of the condemned to the electric chair and the placement of saturated ankle sponges; and the physician’s examination of the condemned and pronouncement of death. R.II, 138–41; R.III, 341; R.IV, 444.

C. Factual and Procedural Background.

On October 28, 2025, Plaintiffs the Associated Press, Gannett Co., Inc., Nashville Public Media, Inc., Nashville Public Radio, Scripps Media, Inc., Six Rivers Media, LLC, and TEGNA Inc. (collectively, the “Press Coalition”), filed this action alleging that the Execution Protocols violate their (i) statutory right to be “present at the carrying out of the death sentence” under Section 40-23-116(a), (ii) right to access government proceedings under the First Amendment, and (iii) right to access government proceedings under Article I, Section 19. R.I, 1–29. The Complaint seeks, among other things, declaratory relief and an injunction requiring Kenneth Nelsen, Warden of Riverbend Maximum Security Institution, and Frank Strada, Commissioner of TDOC (collectively, “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.” *Id.* at 27–28. 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.” R.III, 348.

Ten journalists employed by members of the Press Coalition filed declarations detailing their experiences covering executions in Tennessee and describing how the Execution Protocols hinder their ability to report on these proceedings. R.III, 350–67; R.IV, 382–435. For example, Catherine Sweeney recounted her difficulty covering the August 5, 2025, execution of Byron Black. R.IV, 384–89. Sweeney recalled that blinds between the witness room and execution chamber were closed as Black entered the chamber and was prepared for execution, including “when TDOC insert[ed] the IV into the inmate or start[ed] the saline solution, which is a vital and often the hardest step in the execution process.” *Id.* at 386. While Sweeney could “hear noises coming from the execution chamber” indicating Black “was in pain,” *id.*, she had to rely on after-the-fact accounts from Black’s legal team, “rather than [her] own observations,” to report that “the medical team had issues inserting the IV,” *id.* at 389. Steve Cavendish similarly recounted that although Black’s legal team alleged there was “a puddle of blood on his right side,” reporters had “no way to verify” that information. *Id.* at 397.

Kimberlee Kruesi recalled similar difficulties covering the execution of Leroy Hall, where “a small puff of white smoke” was noticeable during the administration of electric shocks. R.III, 364–65. She recalled wondering “why was there smoke? Did that have anything to do with how they prepared him?” *Id.* at 365.

Defendants opposed the motion for a temporary injunction, R.X, 1244–74, and filed a declaration by Warden Nelsen in support of their

opposition, *id.* at 1276–85. Warden Nelsen asserted, among other things, that the restrictions on witnesses’ ability to observe executions were necessary to “ensure that the identities of all persons and entities participating in the execution process remain confidential.” *Id.* at 1279.

Defendants accurately summarized the remaining procedural history.

D. The Carruthers Execution Attempt.

On May 21, 2026, while the trial court’s order was stayed, TDOC unsuccessfully attempted to execute Tony Carruthers. *Gov. Lee Grants Temporary Reprieve for Tony Von Carruthers*, Tenn. Off. of Governor (May 21, 2026), <https://www.tn.gov/governor/news/2026/5/21/gov--lee-grants-temporary-reprieve-for-tony-von-carruthers.html>. According to TDOC, “[m]edical personnel quickly established a primary IV line; however, the team was unable to immediately establish a backup line pursuant to the lethal injection execution protocol,” and the team “could not find another suitable vein. The team attempted to insert a central line pursuant to the protocol, but the procedure was unsuccessful. The execution was then called off.” *Id.*

Carruthers’s attorney told reporters that “state executioners spent more than an hour trying to successfully insert the secondary IV line—according to protocol—including attempts on his left arm, feet, hand and jugular vein before attempting a central line in his upper chest” and, finally, “his right shoulder.” Mikeie H. Reiland et al., *Tony Carruthers’ Execution Delayed After Doctor Unable to Administer IV*, Nashville Banner (May 21, 2026), <https://nashvillebanner.com/2026/05/21/tony->

[carruthers-execution-lethal-injection-issues/](#). During that time, media witnesses were held in the witness room “[w]ith the lights off and the curtain closed.” *Id.* While they could hear “[s]ome of the activity in the execution chamber,” they “could not see the extended struggle to establish IV lines.” *Id.*

Carruthers’s attorneys filed an emergency motion in this Court to stay his execution, representing that TDOC’s “[r]epeated attempts to obtain access at alternate IV sites ha[d] been unsuccessful.” Emergency Mot. for Stay of Execution, *State v. Carruthers*, No. W1997-00097-SC-DDT-DD (Tenn. May 21, 2026). The Governor issued a one-year reprieve. *See Notice, State v. Carruthers*, No. W1997-00097-SC-DDT-DD (Tenn. May 21, 2026).

STANDARD OF REVIEW

The Press Coalition agrees that the standard of review for the Chancery Court’s grant of temporary injunction is abuse of discretion. Defs.’ Br. at 23. “The abuse of discretion standard of review envisions a less rigorous review of the lower court’s decision and a decreased likelihood that the decision will be reversed on appeal. It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. Thus, it does not permit reviewing courts to second-guess the court below, or to substitute their discretion for the lower court’s.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citations omitted).

To avoid result-oriented decisions or seemingly irreconcilable precedents, reviewing courts should review a lower court’s discretionary decision to

determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions. When called upon to review a lower court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness.

Id. at 524–25 (citations omitted). The standard of review is the same in extraordinary appeals as it is for an appeal as of right. *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712 (Tenn. 2012).

The State erroneously cites *Gilbert v. Wessels*, 458 S.W.3d 895, 898 (Tenn. 2014), for the proposition that under Rule 10, “this Court may also vacate a lower court’s ruling that ‘is without legal authority.’” Defs.’ Br. at 24. *Gilbert* holds only that Rule 10 *review* may be proper when the order to be reviewed “is without legal authority,” and has no bearing on the standard of review of the order once Rule 10 review is granted. *Gilbert*, 458 S.W.3d at 898.

Moreover, the Court can affirm the trial court’s decision on any grounds. *See Cont’l Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986).

ARGUMENT

I. The Court should affirm the temporary injunction.

A. The trial court correctly held that Plaintiffs were likely to succeed on the merits of their statutory claim that the Execution Protocols violate Section 40-23-116(a).

The trial court's ruling that the Execution Protocols violate the requirements of Section 40-23-116(a) was not an abuse of discretion. The trial court rightly concluded that this statute entitles official press witnesses to be present for the entirety of the execution proceeding, from the moment the condemned enters the execution chamber until the moment the condemned is pronounced dead, and it reached this conclusion by properly applying well-established rules of statutory construction, persuasive precedent, and common sense. R.XIX, 2445–55. Reversal is thus unwarranted.

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). Courts must give words “their natural and ordinary meaning in the context in which they appear and in light of the statute’s general purpose.” *Ellithorpe v. Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015) (citation omitted).

This is precisely what the trial court did. Section 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 correctly 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.” R.XIX, 2450. Thus, the “natural and ordinary meaning,” *Ellithorpe*, 479 S.W.3d at 827 (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,” R.XIX, 2450.

In contrast, Defendants take the extreme position that Section 40-23-116(a) merely confers a right to view “the moment of death itself.” Defs.’ Br. at 40. The trial court rightly rejected that argument. R.XIX, 2450–54. Contrary to Defendants’ insistence, the plain language of the statute confirms that it was intended to ensure access to the entirety of the execution proceeding. “Present,” as Defendants acknowledge, means “being at hand or in attendance.” Defs.’ Br. at 40. “Carry out” means “[t]o put into practice or effect.” *Carry Out*, Am. Heritage Dictionary (3d ed. 1992), <https://archive.org/details/the-american-heritage-dictionary-of-the-english-language-third-edition-1st-august-1992/page/n1233/mode/2up>. The process of “carrying out” the death sentence, or putting it “into practice or effect,” encompasses not just the moment of death, as Defendants argue, but also the entry and preparation of the condemned in the execution chamber, the administration of lethal injection or electrical current, the physician’s subsequent examination of the condemned, and, ultimately, the declaration of death. Each of these moments is a critical stage of the process of putting the death sentence “into practice or effect.” *See id.*; *see also* Tenn. Code Ann. § 40-23-116(a).

Defendants, however, cherry-pick the third-listed definition of “carry out” in the American Heritage Dictionary (“[t]o bring to a conclusion”) and only one of several definitions from the current Merriam-Webster Online Dictionary (“to bring to a successful issue: complete, accomplish”), ignoring other definitions from the same dictionaries. *See Carry Out*, Am. Heritage Dictionary, *supra* (also defining “carry out” as “[t]o put into practice or effect” and “[t]o follow or obey”); *Carry Out*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/carrying%20out> (last updated July 22, 2026) (also defining “carry out” as “to put into execution” and “to continue to an end or stopping point”). But even the two definitions Defendants single out confirm that the statute guarantees access to more than just the moment of death: “To bring to a conclusion” and “to bring to a successful issue” are verb phrases describing a *process* leading to a conclusion, not just the conclusion itself. *Id.* Had the General Assembly wanted to permit access only to the final moments of the execution, it was surely capable of saying so.

The trial court’s reading is also consistent with the “purpose, objective and spirit” of the statute. *See Dorrier*, 537 S.W.2d at 892. The plain intent of Section 40-23-116(a) is to ensure a measure of transparency for the exercise of the most significant power a state wields. As a remedial provision “conducive to the public good,” *Loftin v. Langsdon*, 813 S.W.2d 475, 479 (Tenn. Ct. App. 1991), Section 40-23-116(a) should be “liberally construed in furtherance of [this] purpose,” *Dailey v. State*, 470 S.W.2d 608, 610 (Tenn. 1971). Defendants ask this

Court to do precisely the opposite, construing Section 40-23-116(a) not to promote openness but, rather, to grant them unfettered discretion to close almost the entirety of the execution proceeding. This interpretation would permit TDOC to keep witness-room curtains closed even after the administration of lethal injection or electrical current—and even as the condemned prisoner dies—so long as witnesses are able to see what officials deem “the moment of death itself.” Defs.’ Br. at 40.

Contrary to Defendants’ claims, the statutory context does not compel such a remarkable departure from the text itself. Defendants point first to the portion of the statute that provides that executions are to be “carried out within an enclosure to be prepared for that purpose in strict seclusion and privacy.” *Id.* (quoting Tenn. Code Ann. § 40-23-116(a)). But this language does not negate the portion of the statute that provides that press witnesses are to be “present” as the executions are carried out, and it certainly does not grant the State license to determine which portions of the proceedings those witnesses get to see. 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.” R.XIX, 2451 (emphasis added).

Defendants’ suggestion that the trial court’s interpretation of Section 40-23-116(a) runs counter to Tennessee’s public-records law is equally unfounded. *See* Defs.’ Br. at 40–41. As discussed at length *infra*, Argument, Section I.B.3, the trial court’s order more than adequately addresses Defendants’ asserted confidentiality concerns by requiring execution team members to wear identity-shielding PPE. R.XIX, 2456–57. Plaintiffs do not, as Defendants suggest, seek access to the names or

identities of execution team members, let alone “to view anything and everything that is remotely connected to an execution,” Defs.’ Br. at 40, and the trial court certainly did not grant such relief.

Nor did the trial court err by looking at the legislative history of Section 40-23-116(a). *Contra* Defs.’ Br. at 42. Consideration of legislative history is appropriate where, as here, that history “buttresses the plain language of the statute.” *Waters v. Farr*, 291 S.W.3d 873, 895 (Tenn. 2009). As the trial court correctly noted, the history of Section 40-23-116(a) confirms that the General Assembly enacted the provision to ensure that media witnesses be present as the State exercises its most “awesome power,” “not just to promulgate and to spread the news that it’s being done as a deterrent, but to also make sure that the State exercises that . . . power with the highest level of decorum and that it’s carried out appropriately.” R.XIX, 2451 (citation omitted). Press witnesses can only fulfill their critical function of ensuring that executions are “carried out appropriately” if allowed to observe the entirety of the process, from the moment the condemned enters the chamber until the moment the condemned is pronounced dead. *Id.*

The Oregon Supreme Court’s decision in *Oregon Newspaper Publishers Association v. Oregon Department of Corrections*, 988 P.2d 359, 360–63 (Or. 1999), is likewise instructive, and the trial court did not err in considering it. *Contra* Defs.’ Br. at 42–43. That case addressed a strikingly similar statute, which permitted designated witnesses to “be present at the execution.” 988 P.2d at 361 (citation omitted). The court found the statute had been violated by an agency rule permitting witnesses to view only “the moments during which the lethal injection is

administered and causes death.” *Id.* at 363. “The execution,” the court explained, “is the process of putting the prisoner to death,” and thus “those actions that are linked inextricably with the administration of the fatal drugs are part of the execution.” *Id.* at 363–64. Defendants try to distinguish this case by pointing out that “Tennessee’s law does not use the word ‘execution,’ opting instead for ‘carrying out of the death sentence,’” Defs.’ Br. at 43, but they do not even attempt to explain why this distinction matters. If anything, “carrying out of the death sentence” is even clearer than “execution” in signaling a right to be “present” for the entirety of the proceeding.

Ultimately, Defendants’ theory on this appeal is that the trial court should have disregarded the statute’s plain meaning, purpose, and legislative history, as well as highly persuasive precedent from another state’s highest court, in favor of TDOC’s preferred interpretation. *See* Defs.’ Br. at 41–42 (arguing trial court failed to give “TDOC’s interpretation . . . appropriate weight” (citation omitted)). But as the trial court correctly noted, the statutes allowing TDOC to promulgate rules to facilitate lethal injection or electrocution, *see* Tenn. Code Ann. § 40-23-114(c), and the selection of press witnesses, *see* Tenn. Code Ann. § 40-23-116(c)(3), 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,” R.XIX, 2452. Absent such language, and “[n]otwithstanding the courts’ respect for administrative expertise, an agency’s interpretation of its controlling statutes remains a question of law subject to *de novo* review.” *Pickard v.*

Tenn. Water Quality Control Bd., 424 S.W.3d 511, 523 (Tenn. 2013); see also *H & R Block E. Tax Servs., Inc. v. Dep’t of Com. & Ins.*, 267 S.W.3d 848, 854 (Tenn. Ct. App. 2008) (explaining that “neither ‘deference’ nor ‘controlling weight’ should be afforded to an agency interpretation” of a statute).

By entitling selected, neutral press witnesses to be present at the carrying out of the death sentence, the General Assembly sought to ensure transparency and oversight in Tennessee’s execution process. The trial court properly interpreted and applied Section 40-23-116(a) in accordance with this legislative mandate, and its decision should be affirmed.

B. The trial court correctly concluded that the Press Coalition was likely to succeed on the merits of its First Amendment challenge.

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

In a series of decisions in the 1980s, the United States Supreme Court recognized a qualified First Amendment right of access to criminal proceedings, including criminal trials, *Richmond Newspapers*, 448 U.S. at 580 (plurality opinion); minor witness testimony in criminal trials, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–07 (1982); voir dire in criminal cases, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505–10 (1984) (“*Press-Enterprise I*”); and criminal preliminary hearings, *Press-Enterprise II*, 478 U.S. at 10. In the last of those decisions—*Press-Enterprise II*—the Supreme Court laid out a framework for evaluating whether the qualified First Amendment right of access attaches without

making “the label [the Court] give[s] the event, *i.e.*, ‘trial’ or otherwise” dispositive. 478 U.S. at 7. Accordingly, the Supreme Court instructed courts to consider two “complementary considerations” when deciding if a qualified right of access attaches to a particular government proceeding: (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.” *Id.* at 8. The trial court correctly applied the experience and logic factors to evaluate Plaintiffs’ First Amendment claim. Defendants’ arguments to the contrary are without merit.

Defendants first argue that the *Press-Enterprise II* factors do not apply outside the “specific context of criminal court proceedings,” because that is the only context the Supreme Court has specifically addressed. Defs.’ Br. at 25. Defendants are wrong. As this Court has recognized, “[t]he fact that the United States Supreme Court has not yet addressed the precise question before us provides scant justification to shirk our duty to ‘say what the law is.’” *State v. Booker*, 656 S.W.3d 49, 54 (Tenn. 2022) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). And even though the *Press-Enterprise II* test arose in the context of criminal proceedings, the factors have been used by courts to determine whether there is a right of access to a broad range of government proceedings (and records from those proceedings), in both the civil and criminal judicial contexts and in the context of non-judicial government proceedings, including municipal administrative proceedings (*N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298–300 (2d Cir. 2012)), student

disciplinary proceedings at a public university (*United States v. Miami Univ.*, 294 F.3d 797, 821–23 (6th Cir. 2002)), special interest deportation proceedings (*N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 208–09 (3d Cir. 2002)), administrative deportation proceedings (*Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694–96 (6th Cir. 2002)), municipal planning commission meetings (*Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180–81 (3d Cir. 1999)), Bureau of Land Management “horse roundup” events (*Leigh v. Salazar*, 677 F.3d 892, 898–900 (9th Cir. 2012)), and state environmental agency records (*Cap. Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (en banc)).

This makes sense. The “experience” and “logic” factors simply enable a court to determine whether a First Amendment right attaches to a particular proceeding, but use of that test does not pre-ordain the result.

Crucially, courts have applied the *Press-Enterprise II* factors to determine whether there is a right of access to witness execution proceedings. In *California First Amendment Coalition v. Woodford*, the Ninth Circuit applied the experience and logic factors to find “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.” 299 F.3d. 868, 877 (9th Cir. 2002). In *Associated Press v. Otter*, the court applied the same analysis to the execution process in Idaho and reversed the denial of a preliminary injunction challenging the state’s protocols that limited

access. 682 F.3d 821, 826 (9th Cir. 2012). In *First Amendment Coalition of Arizona, Inc. v. Ryan*, the same framework was used to determine that the public has a constitutional right to hear the entire execution process. 938 F.3d 1069, 1075 (9th Cir. 2019). And in *Philadelphia Inquirer v. Wetzel*, a federal court in Pennsylvania applied the experience and logic framework to find a qualified right of access to see and hear the entire execution process. 906 F. Supp. 2d 362, 368 (M.D. Pa. 2012).

Despite those authorities, Defendants insist that a “general rule” derived from the plurality decision in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), controls here, Defs.’ Br. at 25–26, rather than the later majority decision in *Press-Enterprise II*. Again, Defendants are wrong. Even setting aside its questionable precedential force, *Houchins* involved the question of “whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television.” 438 U.S. at 3 (plurality opinion). The Court concluded it did not, because the First Amendment does not guarantee access to “all sources of information within government control.” *Id.* at 9. Here, Plaintiffs do not assert a right of access to “all sources of information within government control,” *contra id.*, but to a “particular process,” *Press-Enterprise II*, 478 U.S. at 8, namely, executions. The *Press-Enterprise II* framework provides the test to determine whether a First Amendment right of access applies to that “particular process.” *Houchins* is thus inapposite.

In fact, *Press-Enterprise II* addressed the concerns the *Houchins* plurality had regarding a lack of “guidelines” or “standards governing disclosure of or access to information” at the time, which would leave “hundreds of judges ... at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems ‘desirable’ or ‘expedient.’” 438 U.S. at 14. In *Press-Enterprise II*, the Supreme Court set forth clear “guidelines,” which have now been applied by courts in countless cases, which further casts doubt on the continued applicability of *Houchins* to cases like this one.

To the extent Defendants object to application of the *Press-Enterprise II* test because executions take place within a prison, *see* Defs.’ Br. at 27–28, none of the cases Defendants rely on (*Houchins*, *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)) require such a result. *Pell* and *Saxbe* involved challenges to policies restricting interviews with prisoners, not requests to access and observe government proceedings held within prisons. Contrary to Defendants’ view, that distinction absolutely *does* make a constitutional difference, *contra* Defs.’ Br. at 28, precisely because—as the Sixth Circuit has explained—although the *Houchins* plurality declined to recognize a “*general* right of access to government information, the line of cases from *Richmond Newspapers* to *Press-Enterprise II* recognize that there is in fact a *limited* constitutional right to *some* government information and also provide a test of general applicability for making that determination.” *Detroit Free Press*, 303 F.3d at 700.

That test applies whether the proceeding takes place in a courtroom, a town hall, or a prison facility. Accordingly, the Fifth Circuit recently applied *Press-Enterprise II* to evaluate a claimed right of access to bail proceedings, even though those proceedings were held remotely and partly within a jail. *Tex. Trib. v. Caldwell Cnty.*, 121 F.4th 520, 528–29 (5th Cir. 2024); accord *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (evaluating objection to closure of bail proceedings under *Press-Enterprise II* even though “magistrates do not always make the bail determination in open court,” and that these decisions are sometimes made “at the police station, or during telephonic communications with the jail”).

Justice Burger’s observation in the plurality opinion in *Richmond Newspapers* that penal institutions “are not ‘open’ or public places” does not decide the issue. 448 U.S. at 576 n.11. The same observation could be made of courthouses, which are not open to the public at all times for all purposes. But under *Press-Enterprise II*, it is not just the “place” that matters, but “whether the place *and process* have historically been open to the press and general public.” *Press-Enterprise II*, 478 U.S. at 8 (emphasis added). Where experience and logic weigh in favor of a right of access, the location of the proceeding is of limited relevance.

In attempting to paint the Ninth Circuit’s *Woodford* decision as an outlier, Defendants rely on the Eighth Circuit’s ruling in *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015), and the Sixth Circuit’s decision in *Phillips v. DeWine*, 841 F.3d 405 (6th Cir. 2016). But neither case involved a request for access to execution proceedings. *Zink* involved a

discovery request for “information regarding the source of the drug to be used in their executions” in a case brought by death row inmates challenging Missouri’s lethal injection protocol. 783 F.3d at 1111. Defendants incorrectly asserted that *Zink* rejected application of the *Press-Enterprise II* test to execution proceedings. Defs.’ Br. at 30–31. *Zink* did no such thing. 783 F.3d at 1112 (“[U]nlike 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.” (emphasis added)). Similarly, the Sixth Circuit in *Phillips* made clear it had “neither adopted nor rejected the Ninth Circuit’s position” in *Woodford*, because the plaintiffs in that case were not seeking access to execution proceedings but rather to “information related to Ohio executions.” 841 F.3d at 419. This case does not involve a request for information, but for access to witness execution proceedings. *Woodford* is on point here, not *Zink* or *Phillips*.

True, the Seventh Circuit recently expressed doubt as to whether the *Press-Enterprise II* framework applies to execution proceedings, because, in its view, an execution “occurs outside the adjudicative process, after the factfinder has determined guilt and the trial court has imposed a sentence and terminated the case.” *Associated Press v. Neal*, 177 F.4th 862, 865 (7th Cir. 2026). Also true, other federal district courts have adopted similar reasoning. *BH Media Grp., Inc. v. Clarke*, 466 F. Supp. 3d 653, 662–63 (E.D. Va. 2020), *vacated and remanded*, 851 F. App’x 368 (4th Cir. 2021); *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318,

1324 (W.D. Okla. 2014). But that reasoning is fatally flawed, and the trial court here rightly rejected it.

“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.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). In fact, the dissent in *Press-Enterprise II* thought the experience and logic test would apply more broadly to other types of government proceedings. 478 U.S. at 28 (Stevens, J. dissenting) (“By abjuring strict reliance on history and emphasizing the broad value of openness, the Court tacitly recognizes the importance of public access to government proceedings generally.”). Indeed, the *Press-Enterprise II* majority did not instruct courts to ask whether a government process is judicial, pre- or post-judgment, or adjudicative in evaluating the First Amendment issues. To the contrary, it instructed courts *not to* consider the “label we give the event” dispositive, and instead to ask whether “the place and process have historically been open to the press and general public” and whether “public access plays a significant positive role in the functioning of the particular process in question.” *Id.* at 7–8. The trial court’s conclusion that the *Press-Enterprise II* framework applies to execution proceedings was in accord with the breadth of the Supreme Court’s holding.

But even accepting, for the sake of argument, Defendants’ incorrect view that the *Press-Enterprise II* test only applies to “adjudicatory criminal proceedings,” Defs.’ Br. at 30, it is far from clear that execution proceedings fall on the wrong side of the line. *McCaleb v. Long*, 152 F.4th

728 (6th Cir. 2025), is of little utility to resolving this question. There, the court declined to apply the *Press-Enterprise II* test to proceedings of the Tennessee Judicial Advisory Commission because those meetings were “advisory, not adjudicatory.” *Id.* at 730. Setting aside the fact that *McCaleb* is at odds with other Sixth Circuit cases, *see Detroit Free Press*, 303 F.3d at 700 (recognizing *Press-Enterprise II* is “a test of general applicability”); *In re Search of Fair Fin.*, 692 F.3d 424, 429 (6th Cir. 2012) (“Notwithstanding its origin in criminal proceedings, courts have also applied the ‘experience and logic’ test to determine whether a First Amendment right of access exists in a wide variety of other contexts.”), the only guidance *McCaleb* offers in classifying a proceeding as either “advisory” or “adjudicatory” is to consider whether a particular proceeding is “adversarial” or has any “real operative effect.” 152 F.4th at 733 (citation omitted). Executions in Tennessee, of course, *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 an extraordinary and non-reversible operative effect.

While Defendants may prefer the formalism that a criminal adjudication is concluded at the time of sentencing, the practical reality in Tennessee is that criminal proceedings are far from finished until after the execution itself has concluded. *See supra*, Statement of the Case and Facts, Section D. And even in an ordinary case, though executions are performed by TDOC, executions occur in the context of adjudicatory procedures. Tenn. Sup. Ct. R. 12(4)(A) (requiring the State to file motion

to set execution date with this Court); Tenn. Sup. Ct. R. 12(4)(E) (“[T]he Court shall set the date of execution[.]”).

Thus, as the trial court rightly observed, executions are “unique” in that they “do not fall squarely within the criminal judicial system, nor are they like a routine prison visit or interview with an incarcerated individual.” R.XIX, 2438. Executions cannot be disentangled from the criminal justice process, and instead “represent the final and most consequential stage” of that process. *Id.* at 2444. Applying *Press-Enterprise II* in these circumstances represents nothing more than faithful adherence to Supreme Court precedent. This Court should accordingly affirm.

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” weigh in favor of finding a First Amendment right to access execution proceedings, given that executions “were historically open to the public” and 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.” R.XIX, 2442, 2445. In arguing otherwise, Defendants offer little more than disagreement with the trial court’s assessment of the record before it. But Defendants offer no compelling arguments that the trial court abused its discretion by reaching an “illogical or unreasonable decision” as required to justify reversal. *Newsom v. Tenn. Republican Party*, 647 S.W.3d 382, 385 (Tenn. 2022) (citation omitted). As such, the Court

should affirm the trial court’s findings and hold that there is a qualified right of access to execution proceedings.

i. The extensive historical record before the trial court demonstrated a tradition of permitting the public and the press to observe executions throughout the United States.

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 Supreme Court has instructed that 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) (emphasis in original) (citation omitted).

A review of the history of access to executions throughout this country confirms that the trial court’s analysis of the experience test was correct. As Defendants concede, “[a]t the time of the Founding, all executions were public.” Defs.’ Br. at 14. Defendants also concede that when states began shifting executions from the public gallows to local jails and, later, to state prisons, many provided for the selection of official witnesses and of members of the press to attend on the public’s behalf. *Id.* at 15 (admitting “[m]any of those statutes provided for the attendance of ‘selected official witnesses’” (citation omitted)). That much is made clear by the record before the trial court, which includes historical laws from no less than 16 states passed between 1833 and 1912 permitting reputable citizen witnesses to attend executions on the public’s behalf

when they moved out of the public square. R.IV, 463–64 (describing statutes); R.IX, 1109–60 (collecting statutes). It also included historical laws from no less than 16 states—four of which had previously adopted citizen witness statutes—passed from 1885 to 2009 that selected members of the press to attend executions on the public’s behalf. R.IV, 464–65 (describing statutes); R.IX, 1161–1232 (collecting statutes). And the record also included modern-day authorities confirming that, consistent with that historical practice, twenty-five of the twenty-seven states that maintain the death penalty today (including Tennessee) provide for some degree of public access to executions, either by official witness statutes or press witness statutes and implementing regulations. R.IV, 465–66 (collecting statutes and implementing regulations). So does the federal government. *Id.* at 466 (citing 28 C.F.R. § 26.4(c)(4)(i)–(ii)). In other words, the historical record confirms that executions have never been entirely private, but instead, went from being fully public to using surrogates for the public to address the concerns raised in the nineteenth century with fully public executions.¹ *See* Defs.’ Br. at 15 (arguing public executions became “festivals of disorder” (citation omitted)).

¹ Defendants assert executions were privatized in response to “unruly, disrespectful, drunken, and dangerous” crowds. Defs.’ Br. at 15 (quoting Vandiver & Coconis, *supra*, at 875). While those concerns may have motivated privatization in part, one scholar has remarked that “a closer look reveals important complexities in the history of public executions in the South,” as distinguished from the history of public executions in the North. Michael A. Trotti, *The Scaffold’s Revival: Race and Public Execution in the South*, 45 J. Soc. Hist. 195, 195 (2011). In particular, “huge crowds gathered for public executions provided a challenge not only to public order in general, but also to white authority,

While Tennessee did not formally designate media witnesses until 1994, *see* 1994 Tenn. Pub. Acts, Ch. 675, § 1, executions in Tennessee were open to the general public until 1883, were open to official witnesses from 1883 to 1909, and have been open to members of the press since 1994. Thus, for 145 of the 230 years that Tennessee has been a state, executions have either been fully public, or representatives of the public have been allowed to attend on the public’s behalf. And for thirty-four of the years between 1909 and 1994, no executions took place in Tennessee. Tenn. Dep’t of Corr., Capital Punishment Chronology, at 1–2, <https://www.tn.gov/content/dam/tn/correction/documents/download/CapitalPunishmentChronology.pdf> (last accessed Aug. 4, 2026) (discussing pause in executions between 1960 and 2000). Crucially, for the past three decades in Tennessee, members of the press have been present, including for every execution that has ever taken place by lethal injection. *See id.* (noting Tennessee made “lethal injection the method of execution” in 1998 and conducted first execution by lethal injection in 2000); *see also* R.I, 9–10 (collecting coverage of executions in Tennessee since 2000); R.II, 207–30 (same).

These historical authorities confirm that although executions were moved out of the town square, “[t]he people retained a ‘right of visitation’ which enabled them to satisfy themselves that justice was in fact being done,” just as they did with criminal trials. *Richmond Newspapers*, 448 U.S. at 572 (plurality opinion).

for the theater of the gallows was not controlled by whites alone.” *Id.* Thus, the elimination of public hangings was complex, and reflected a “conflicted combination of humanistic civility and racism.” *Id.* at 196.

Against that backdrop, Defendants’ argument that the trial court “erred by finding the early history of public hangings dispositive,” Defs.’ Br. at 33, is nonsensical. The trial court did no such thing. Instead, the trial court concluded, based on the record before it, 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.” R.XIX, 2444.

In an effort to evade that straightforward conclusion, Defendants insist that these statutes were “not uniform,” Defs.’ Br. at 34, but the 1889 Minnesota law on which they rely allowed six witnesses to attend, lasted only until 1911, and was “frequently ignored” even when it was in effect, including permitting journalists to attend at times. John D. Bessler, *The “Midnight Assassination Law” and Minnesota’s Anti-Death Penalty Movement, 1849-1911*, 22 Wm. Mitchell L. Rev. 577, 581, 648 (1996). Accordingly, it hardly represents a significant departure from the historical consensus canvassed above. In any event, uniformity is not what the experience test requires. Rather, courts look to the experience “throughout the United States.” *El Vocero de Puerto Rico*, 508 U.S. at 150.

Defendants also assert that “[t]he public’s right to access is not measured by looking at special privileges granted to the press,” Defs.’ Br. at 34, but in so doing, Defendants entirely ignore the fact that both official witnesses and press witnesses have been permitted to attend “as representatives for the public at large.” *Woodford*, 299 F.3d at 876. As the plurality itself in *Richmond Newspapers* recognized, “[w]hile media representatives enjoy the same right of access as the public, they often

are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.” 448 U.S. at 573. That the overwhelming majority of states have selected members of the press for preferential seating confirms the media’s function “as surrogates for the public” at execution proceedings. *See id.* at 572–73.

Defendants also suggest that the experience prong cannot be satisfied unless there is an “unbroken, uncontradicted history” similar to that of criminal trials. Defs.’ Br. at 33 (quoting *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion)). But courts applying *Press-Enterprise II* have recognized that they “need not postulate a span as extensive as that in civil and criminal trials,” but should instead be guided by the “unique history and function” of the proceeding in question. *First Amend. Coal. v. Jud. Inquiry & Rev. Bd.*, 784 F.2d 467, 472 (3d Cir. 1986); *accord Detroit Free Press*, 303 F.3d at 700 (rejecting need for “significantly long showing that the proceedings at issue were historically open, such as a common law tradition”); *Tex. Trib.*, 121 F.4th at 529 (recognizing that even though “bail hearings do not enjoy the ‘unbroken, uncontradicted history’ that other criminal pretrial proceedings do,” evidence showing “at least some level of openness” was enough, particularly where “the trend towards open bail hearings has only grown in the modern era”). If Defendants were right, then even criminal trials would fail the *Press-Enterprise II* test, since modern-day criminal trials are “a far cry from the ‘town meeting trial’ of ancient English practice.” *Press-Enterprise II*, 478 U.S. at 8. The Supreme Court nevertheless recognized that our “modern procedural protections have their origin in the ancient common-

law principle which provided, not for closed proceedings, but rather for rules of conduct for those who attend trials.” *Id.* The same is true for executions—even though modern-day executions look different than the public hangings of the past, their procedures and accommodations for witnesses have roots in longstanding historic practice.

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 and social mores have evolved to conclude that “executions were historically open to the public,” from the time of public hangings to the modern day. R.XIX, 2442–44. Defendants offer no basis for disturbing the trial court’s evaluation of that history, as it is consistent not only with persuasive precedent, *Woodford*, 299 F.3d at 875–76; *Phila. Inquirer*, 906 F. Supp. 2d at 371, but also with the historical record. The trial court did not abuse its discretion in holding that the experience prong from *Press-Enterprise II* is satisfied.

ii. Public and press access to execution proceedings plays a significant role in the functioning of those proceedings.

The trial court also correctly analyzed the “logic” prong of the *Press-Enterprise II* test to conclude that “meaningful and full observation of executions allows the public to assess whether the state carries out death sentences in a lawful and humane manner and ensures that the execution process remains subject to democratic oversight.” R.XIX, 2445. 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, public access to executions—including not only the isolated moments when the condemned is injected with drugs or electrocuted, 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.

To start, public access to executions serves both of the “two principal social purposes” of the death penalty: “retribution and deterrence of capital crimes by prospective offenders.” *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion). As for retribution, access to executions, like access to criminal trials, provides “an outlet for community concern, hostility, and emotion” and enables the public “to satisfy themselves that justice [is] in fact being done.” *Richmond Newspapers*, 448 U.S. at 571–72 (plurality opinion); *accord Woodford*, 299 F.3d at 877 (“[P]ublic observation of executions fosters the same sense of catharsis that public observation of criminal trials fosters.”). On deterrence, public and press access to executions serves to “spread the news that it’s being done as a deterrent.” R.II, 201–02 (Statement of Sen. C. Coulter Gilbert on S.B. 2287).

Moreover, access to executions ensures they are carried out with the “highest level of decorum,” *id.*, and are competently and humanely administered consistent with the Eighth Amendment. *See First Amend. Coal. of Ariz.*, 938 F.3d at 1076 (access to entirety of execution “will help the public determine whether executions in Arizona are being carried out

in a humane and lawful manner”); *Phila. Inquirer*, 906 F. Supp. 2d at 371 (noting access to entirety of execution ensures “procedures comport with evolving constitutional standards,” consistent with Supreme Court precedent concerning the Eighth Amendment’s prohibition on cruel and unusual punishment). That interest is served, in particular, by access to the preparation stages of executions to be conducted by lethal injections. As the Ninth Circuit has observed, “[t]o determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the ‘initial procedures,’ which are invasive, possibly painful and may give rise to serious complications.” *Woodford*, 299 F.3d at 876.

To their credit, Defendants concede that some degree of public access to executions promotes “transparency, public confidence in the administration of capital punishment, and deterrence,” but argue that the promotion of those values should not matter at all, because in their view, executions serve only to “implement a final judgment of a court, not to serve as public commentary or to generate a record for advocacy.” Defs.’ Br. at 36. *Richmond Newspapers* counsels against that kind of crabbed approach. Although criminal trials primarily function to determine the guilt or innocence of the accused, the plurality in *Richmond Newspapers* did not suggest that was the only value public access could serve in order to contribute to the positive functioning of those proceedings. Instead, the Court recognized that promoting the “assurance that the proceedings were conducted fairly to all concerned,” 448 U.S. at 569, as well as providing “an outlet for community concern, hostility, and emotion,” *id.* at 571, were all legitimate values that public

access to trial proceedings served. Those same values are also served by public access to executions.

Defendants also repackage their dissatisfaction with the trial court's analysis of the historical record before it into an argument that "executions in the United States have functioned without public access for nearly two centuries." Defs.' Br. at 35. 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 and enhanced democratic participation in how executions are to be carried out. For example, the record reveals that witness accounts of a prolonged execution by gas chamber in 1992 in Arizona contributed to that state's adoption of lethal injection as its execution method. R.IV, 470–71 (citing Bob Baker & Laura Laughlin, *Arizona Executes Killer; State Gripped by Grisly Accounts*, L.A. Times (Apr. 7, 1992), <https://perma.cc/M6VA-YYMN>; *Gruesome Death in Gas Chamber Pushes Arizona Toward Injections*, N.Y. Times (Apr. 25, 1992), <https://perma.cc/CP4H-ETP5>).

Defendants also feign ignorance as to how the trial court's injunction, by enabling witnesses to view preparatory acts and the pronouncement of death during the execution process in particular, will enhance the functioning of the execution. Defs.' Br. at 36. Whether a proceeding has historically been open to the public and whether public access contributes to its positive functioning is evaluated categorically, rather than by chopping the proceeding into its parts. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1086 (9th Cir. 2014) (experience and logic test evaluates "the class of proceedings as a whole,

not the particular proceedings” to which access is being sought); *see also Detroit Free Press*, 303 F.3d at 700–05 (evaluating deportation proceedings as a category). In any event, the answers to both of the hypothetical questions Defendants raise lie in the record that was before the trial court. Access to witness the condemned’s entrance to the execution chamber will allow the press to provide the public with more thorough and accurate information about the State’s compliance with its own protocols, as well as with Eighth Amendment standards. In particular, observing “the condemned inmate brought into the chamber and seeing their demeanor at that point, for example, would give [media witnesses] much more information about how the drugs affect” a condemned inmate once the administration begins. R.IV, 397; *accord id.* at 404 (agreeing that “an understanding of his general demeanor when [the condemned] entered the room” would be “incredibly valuable information”).

Moreover, access to the portions of the execution where the condemned is prepared is critical, because without it, reporters “just see the inmate strapped down, but we don’t know if he put up a fight and we don’t know how long he’s been sitting there. A lot could go wrong, and [reporters] would not see it.” R.III, 366. Moreover, “the insertion process can be rife with complications” during lethal injection executions in particular. *Id.* at 357. For instance, at the execution of Byron Black, media witnesses were forced to rely on allegations by Black’s “legal team rather than [their] own observations or reporting” that “during that process, the medical team had issues inserting the IV into his vein.” R.IV, 389. In particular, Black’s legal team alleged there was “a puddle of blood

on his right side,” but reporters had “no way to verify” that information. *Id.* at 397. And at Carruthers’s execution this May, media witnesses were held in the witness room “[w]ith the lights off and the curtain closed,” and they “could not see the extended struggle to establish IV lines.” Reiland et al., *supra*. They accordingly had no access to the proceeding that resulted in the issuance of a reprieve overriding this Court’s order setting the date for his execution.

Access to the portion of the execution where the physician examines the condemned and pronounces death likewise enables the public “to satisfy themselves that justice [is] in fact being done.” *See Richmond Newspapers*, 448 U.S. at 572 (plurality opinion). Without such access, the public has no confirmation that the condemned is actually deceased. And while Defendants suggest that hearing this portion of the execution should be enough, access to executions encompasses not only the right to “hear the sounds of the entire execution proceeding,” *First Amend. Coal. of Ariz.*, 938 F.3d at 1073, but the right to observe them contemporaneously. Without both, media witnesses are left with little more than “a voice over the intercom announc[ing] that [the condemned is] dead.” R.III, 356. That disjointed voice is not enough for witnesses to even “know if they bring in a doctor to examine the body,” *id.* at 366, much less whether the sentence has been competently and humanely administered.

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 the facts that were before it. Defendants have

not shown—and cannot show—that the trial court’s opinion represents an “illogical or unreasonable decision,” or a “clearly erroneous assessment of the evidence,” *Newsom*, 647 S.W.3d at 385 (citation omitted), and their effort to displace the trial court’s analysis should be rejected.

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.’ Br. at 34. 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 v. Georgia*, 467 U.S. 39, 48 (1984).

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. R.XIX, 2454–55. While acknowledging that Tennessee has a policy of protecting the anonymity of execution team members, the court rightly found that “[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.” R.XIX, 2455. Thus, the trial court’s injunction readily accommodates Defendants’ anonymity concerns by allowing staff to wear disposable coverall suits to cover their regular work uniform, including a head covering, and to wear masks, should they so choose. *Id.* at 2457–58.

Defendants’ objection that these procedures are “untested” is unfounded. *Contra* Defs.’ Br. at 38. Other courts have long recognized that surgical garb is a ready alternative to closure of execution proceedings, even where states have asserted anonymity concerns indistinguishable from the ones Defendants raise here. *See, e.g., Woodford*, 299 F.3d at 884–85 (agreeing an “individual wearing a surgical cap, mask and gloves—which, when worn together, cover the forehead, nose, cheeks, mouth and hands—cannot be identified with any meaningful degree of specificity”); *Phila. Inquirer*, 906 F. Supp. 2d at 374 (recognizing execution team could “take affirmative steps to keep the identities of the lethal injection team members confidential”); *Associated Press v. Tewalt*, 780 F. Supp. 3d 1052, 1072 (D. Idaho 2025) (“Identity protecting surgical gear . . . would fully accommodate Defendant’s concerns about maintaining the anonymity of medical team members.”).

Defendants identify no instance in which execution participants’ identities have been “expose[d]” in the jurisdictions in which these procedures have long applied, much less any instance in which one has

suffered “harassment” or “retaliation” by anti-death penalty advocates. *Contra* Defs.’ Br. at 38. Nor do Defendants identify any instance in which an execution team member has been identified by the media in Tennessee,² even though some members of the execution team are currently visible to media witnesses under TDOC’s existing protocol *without* the PPE protections ordered by the trial court, *see* R.III, 363 (recounting guards were “inside the chamber,” with their faces fully visible to witnesses because “they were not wearing face coverings”), and some participants have gone so far as to announce their names to witnesses in the past, *see* R.IV, 388 (recounting physician “announced himself and provided his name”). Against that backdrop, Defendants’ bare assertions that such a risk exists are not sufficient to carry their burden of showing 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 closure suffice to protect their asserted interests in confidentiality. *Waller*, 467 U.S. at 48.

² Instead, Defendants cite, in a footnote, a press conference that followed the execution of Harold Nichols. Defs.’ Br. at 10 n.1. At that news conference, a reporter for the *Tennessean* responded to a question about who was in the room with Nichols by providing anonymous details that 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), https://www.youtube.com/watch?v=CNsg5_HqeHo, at 26:30–27:14.

Perhaps recognizing that they cannot meet their burden under *Press-Enterprise II*, Defendants attempt to avoid applying it altogether by arguing 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, so TDOC’s protocol should be evaluated as a “time, place, and manner” restriction. Defs.’ Br. at 37. 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* R.X, 1264–66 (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). Defendants cannot seriously claim the trial court committed an abuse of discretion in not *sua sponte* considering an argument that Defendants failed to raise.

In any event, Defendants’ “time, place, and manner” theory is meritless. As Defendants concede, strict scrutiny “applies when ‘the State attempts to *deny* the right to access,’ such as by excluding the press from the courtroom entirely.” Defs.’ Br. at 37 (emphasis added by Defendants) (quoting *Globe Newspaper Co.*, 457 U.S. at 606–07). Closing the blinds during portions of the execution *does* deny access to those portions of the proceeding in the same way that closing a door does. Moreover, those portions are integral to—indeed, “inextricably intertwined” with—the very process of the execution. *Woodford*, 299 F.3d

at 877. In this regard, Defendants are “deny[ing] the right of access” to critical portions of the execution proceeding. *Globe Newspaper Co.*, 457 U.S. at 606–07. That denial of access is subject to strict scrutiny.

But even applying the intermediate-scrutiny test for content-neutral “time, place, and manner” restrictions, Tennessee’s Execution Protocols still fail to pass constitutional muster because they burden Plaintiffs’ right of access far more than is necessary to accommodate the State’s anonymity concerns, and do not leave open ample alternative channels of communication. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that to pass intermediate scrutiny, a restriction must be “narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information” (citations omitted)).

TDOC’s restrictions lack the requisite degree of fit to pass intermediate—let alone strict—scrutiny, because they are both underinclusive and overinclusive. To start, TDOC’s restrictions are underinclusive because they do not materially advance the “security of the institution and . . . the safety of the staff members and their families.” Defs.’ Br. at 38 (quoting *West v. Schofield*, 460 S.W.3d 113, 123 (Tenn. 2015)). As in *Woodford*, TDOC’s current protocol “contains loopholes that undermine its rationality and the credibility of defendants’ concerns for anonymity.” *See* 299 F.3d at 881. There are portions of the execution process under TDOC’s current protocol during which members of the execution team are visible to media witnesses. *See* R.III, 363. And there is nothing to prevent the defense counsel witness or spiritual advisor

from describing or identifying execution team members; the same is true of a condemned who TDOC fails to execute, like Carruthers.

TDOC's restrictions are also overinclusive. Although the narrow tailoring required to pass intermediate scrutiny does not require the least restrictive means, the means chosen must not be "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. In other words, "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799. As the Sixth Circuit has recognized, this ordinarily requires the government to 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)). TDOC 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 Defendants have not demonstrated that this reasonable alternative would fail to fully achieve their interests.

Moreover, under TDOC's current protocols, there are no independent observers for the entry of the condemned, the preparation of the condemned, including insertion of IV lines in lethal injection proceedings, or the physician's examination. Accordingly, TDOC's restrictions fail to leave open "ample alternative channels" of access for those portions of the execution proceeding. *Ward*, 491 U.S. at 791 (citations omitted).

TDOC's official public statements are hardly an alternative source of information about execution proceedings. "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979). Moreover, "[t]he ability to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of access," *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004); thus, even transcripts are "not a substitute for concurrent access, and vice versa." *Id.* (quoting *United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994)). And TDOC's post-execution press releases are not transcripts, and often do not reflect difficulties with the execution process itself. For example, TDOC's official statement following the execution of Byron Black made no mention of any issues with the insertion of the IV, *see* R.VIII, 1107, even though Black's attorney alleged that "medical personnel had trouble finding the veins in both of his arms, leading to a puddle of blood on his right side." R.III, 295. As that gap in the reporting and TDOC's own recounting illustrates, "[p]rison officials simply do not have the same incentives to describe fully the potential shortcomings of lethal injection executions. . . . [A] prison official's perception of the execution process may be vastly different—and markedly less critical—than that of the public." *Woodford*, 299 F.3d at 884.

The condemned's advocates—the attorney and spiritual advisor—are also not alternative sources because they are not neutral. For example, the ACLU, which represents Carruthers, described the failed attempt to execute him as "a botched and torturous attempt." Press

Release, Am. C.L. Union, *Statement on Tennessee’s Torturous Execution Attempt of Tony Carruthers* (May 21, 2026), <https://www.aclu.org/press-releases/statement-on-tennessees-torturous-execution-attempt-of-tony-carruthers>. But media witnesses—who were held in the witness room “[w]ith the lights off and the curtain closed” where they “could not see the extended struggle to establish IV lines,” Reiland et al., *supra*—had no way to verify or independently report on how the attempt unfolded. Just as the press and the public “cannot be made to rely solely upon the sufferance of government to supply it with information,” *Smith*, 443 U.S. at 104, they cannot be made to rely on interested witnesses or advocates involved in execution proceedings to provide a neutral account of those proceedings.

Because Defendants fail to satisfy even the less rigorous intermediate-scrutiny standard, their attempt to seek refuge in that framework falls flat. And *a fortiori*, restrictions that do not pass intermediate scrutiny could not possibly pass the more rigorous strict-scrutiny test for overcoming the First Amendment right of access to execution proceedings.

C. In the alternative, the Press Coalition is likely to succeed on the merits of its Tennessee Constitution claim.

Because the trial court can be affirmed on any ground, *Cont'l Cas. Co.*, 720 S.W.2d at 50, the Court should also find that Article I, Section 19 affords the Press Coalition a separate right to attend executions, including the portions the trial court provided access to, and that the State has not and cannot overcome that right of access.

The first sentence of Article I, Section 19 provides “[t]hat the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.”³ Consistent with its plain language, this Court has interpreted this provision, along with the second sentence, as providing for the “freedom of the press, *open government* and freedom of speech.” *Dorrier*, 537 S.W.2d at 892 (emphasis added). Notably, Article I, Section 19’s use of the word “proceedings” is not limited to any one branch, but instead explicitly applies to all three branches of state government.

In fact, this Court has explained that Article I, Section 19 “is a substantially stronger provision than that contained in the First

³ The 1796 Tennessee Constitution included a similar provision in the first sentence of Section 19 of the Declaration of Rights: “That the printing Presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or of any branch or officer of Government; and no law shall ever be made to restrain the right thereof.” Tenn. Const. art. XI, § 19 (1796). The phrase “who undertakes” was first omitted in the 1870 Tennessee Constitution. Tenn. Const. art. I, § 19 (1870).

Amendment”⁴ and that “[t]his mandate of Tennessee’s Constitution requires that any infringement upon the ‘free communication of thoughts’ and any stumbling block to the complete freedom of the press ‘to examine (and publish) the proceedings ... of any branch or officer of the government’ is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.” *Press, Inc. v. Verran*, 569 S.W.2d 435, 441–42 (Tenn. 1978). In other words, if an execution is the type of proceeding covered by Article I, Section 19’s requirements, restrictions on access to executions are presumptively unconstitutional.

The proper test for construing constitutional provisions is “to determine the original public meaning.” *McNabb v. Harrison*, 710 S.W.3d 653, 658 (Tenn. 2025). Determining the original public meaning “requires courts to determine, using the evidence available, ‘how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.’” *Id.* (citation omitted). The first step of discerning the original public meaning involves “reading the plain language and giving terms ‘their ordinary and inherent meaning.’” *Id.* (citation omitted). The ordinary and inherent meaning

⁴ While this statement was made in the context of a libel case, the differences in language between the First Amendment and Article I, Section 19 support the latter being a substantially stronger provision regarding open government as well. See *Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 243 (Tenn. 2014) (“[The] Court will not interpret a state constitutional provision differently than a similar federal constitutional provision unless there are sufficient textual or historical differences, or other grounds for doing so.”).

may be determined by consulting contemporaneous dictionaries. *Id.* at 658–59. But, “[c]ourts are to construe constitutional provisions as written without reading any ambiguities into them” and they “will be taken literally unless the language is ambiguous.” *Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014).

Samuel Johnson’s Dictionary from 1773 defines “proceeding” in two ways, both of which support a right of access to executions. “Proceeding” is first defined as “[p]rogress from one thing to another; series of conduct; transaction.” *Proceeding*, Samuel Johnson, A Dictionary of the English Language (1773), <https://perma.cc/GZE6-KWEC>. The first 1773 Johnson Dictionary definition is consistent with the 1828 Webster Dictionary, which defines “proceeding” in part as “a measure or step taken in business; transaction; in the plural, a course of measures or conduct.” *Proceeding*, Noah Webster, American Dictionary of the English Language (1828), <https://perma.cc/EZ4P-5RPB>. These common and less technical usages should be the applicable ones and would require that the conduct or transaction of government business be open to examination. There is no ambiguity when these definitions are applied. And an execution is uniquely conducted by government.

But even the more technical definition in the 1773 Johnson Dictionary—“[l]egal procedure; as, such are the proceedings at law,” *Proceeding*, Samuel Johnson, *supra* (emphasis removed)—would apply to executions.⁵ The 1773 Johnson Dictionary defines an execution as

⁵ The alternative definition of the 1828 Webster Dictionary appears to be limited to the judicial branch: “[i]n law, the course of steps or measures in the prosecution of an action is denominated proceedings.”

“[c]apital punishment; death inflicted by forms of law.” *Execution*, Samuel Johnson, A Dictionary of the English Language (1773), <https://perma.cc/HB83-ADG9>. Executions in Tennessee are without a doubt controlled by detailed legal procedures from all three branches of government. Tenn. Code Ann. § 40-23-116; Tenn. Sup. Ct. R. 12; R.I, 30 – R.II, 163.

Including executions within the definition of “proceedings” contemplated by the drafters of Article 1, Section 19 is further supported by the “presumption of consistent use by the drafters”—that is, in interpreting a particular term, courts “presume[] that a word or phrase bears the same meaning throughout the text.” *McNabb*, 710 S.W.3d at 663 (citations omitted). The term “proceedings” is used in Article I, Section 35; Article II, Sections 12 and 21; Article III, Section 17; and Article XI, Section 2 of the Tennessee Constitution. Each of these uses describe the conduct and transaction of government business. For example, Article II, Section 12 provides that “[e]ach House may determine the rules of its proceedings,” and Article II, Section 21 requires that “[e]ach House shall keep a journal of its proceedings.” In the Executive branch, Article III, Section 17 provides that “[a] Secretary of State ... shall keep a fair register of all the official acts and proceedings of the Governor.” Article XI, Section 2 refers to “proceedings in Courts of Justice.” And, Article I, Section 35, which went into effect in 1998, provides crime victims with certain rights, including “[t]he right to be

Proceeding, Noah Webster, *supra*. But even if this definition was not limited to the judicial branch, it still would support application broadly to government conduct and transactions, including executions.

present at all proceedings where the defendant has the right to be present” and “[t]he right to be informed of all proceedings.” The consistent thread through each of these provisions is that “proceedings” should be interpreted broadly to encompass the conduct and transaction of government business in all three branches of the government; the term plainly is not limited to criminal judicial proceedings.

Before the trial court, the State relied on *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001), while ignoring *Dorrier*’s statement that Article I, Section 19 includes a right to open government, 537 S.W.2d at 892. R.X, 1266–69. Instead of looking to *Dorrier* to interpret Article I, Section 19, *Mayhew* relies on a Pennsylvania decision, *Respublica v. Dennie*, 4 Yeates 267 (Pa. 1805), but that case concerned the jury’s role in a criminal libel case, not whether there is an open government component to Pennsylvania’s constitutional free speech and press provision.

To take Defendants’ interpretation of Article I, Section 19 would rewrite the provision to say “the printing press shall be free to *publish* about the *public* actions of government.” But Article I, Section 19 is not so limited. To be able to “examine” a particular proceeding, you must have access to it. Otherwise, one would only be able to examine the publicly announced results of or actions taken at a proceeding, which may or may not be open to the public itself. That would turn the language used in Article I, Section 19 on its head and read into the provision words that are not there.

Because Article I, Section 19 provides *at least* as much protection as the First Amendment, the Court should apply the strict-scrutiny test from *Press-Enterprise II*. 478 U.S. at 9. As discussed above, under the First Amendment, the State has not met—and cannot meet—this stringent test to constitutionally justify prohibiting the Press Coalition from observing future execution proceedings from the moment the condemned enters the room until the doctor pronounces them dead.

“State constitutions embody fundamental values and articulate the citizens’ common aspirations for constitutional governance and the rule of law.” *Smith v. BlueCross BlueShield of Tenn.*, 710 S.W.3d 686, 694 (Tenn. 2025) (citation omitted). Article I, Section 19 provides at least the same—if not stronger—protection as the First Amendment, given the specific reference to government “proceedings” in that provision. Accordingly, this Court should affirm the trial court’s decision on the independent ground that the Press Coalition is likely to succeed on the merits of its claim that Defendants’ Execution Protocols violate Article I, Section 19.

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

Defendants’ argument that the trial court’s injunction is barred by this Court’s decision in *Black v. Strada*, 721 S.W.3d 223 (Tenn. 2025), likewise fails. “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*.” 721 S.W.3d at 228 (emphasis added). The trial court’s order here was not issued “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 State “informed the trial court that they were unable to deactivate the ICD on the day of the execution,” the trial 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 the injunction “effectively modifie[d]” Mr. Black’s unconditional execution order for two reasons. First, it 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.” *Id.* Second, the injunction “effectively and practically operated as a stay” of Mr. Black’s execution because the State had 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 *Black* decision has no application here. 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” by ordering changes to the method or timing of the execution. *Id.* The temporary injunction here does not “condition” enforcement of this Court’s execution orders on changes to the method or timing of the execution, in a manner that would “effectively modif[y]” this Court’s orders. *Id.*

The trial court’s order requires only three things, none of which has any bearing on the method or timing of any execution: (i) The execution team must wear different attire; (ii) the curtains between the execution chamber and the witness room must be open longer; and (iii) witnesses must arrive at the execution site earlier. R.XIX, 2456–60. The injunction does not require the State to adopt additional or different medical procedures on the day of the executions, nor does it operate as a “stay” of any upcoming execution. *Id.* Defendants have not argued—and cannot argue—that they are unable to comply with this eminently straightforward and feasible order by the next-scheduled execution.

This Court’s recent amendment of Tenn. Sup. Ct. R. 12(4)(E)—which Plaintiffs understand to incorporate *Black*’s holding—further confirms that *Black* is inapplicable. The amendment incorporates *Black*’s holding by clarifying 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). Because Rule 12(4)(E) governs the process by which *a prisoner* may seek to stay or delay an execution, the Press Coalition 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, a holding contrary to the Tennessee Constitution’s guarantee that “all courts shall be open” and “every man, for an injury done him[,] . . . shall have remedy by due course of law.” Tenn. Const. art. I, § 17. But this is not what Rule 12(4)(E) and *Black* say, and the Court should therefore decline Defendants’ invitation to shield such a critical government proceeding from any form of judicial scrutiny.

Finally, even if the Court were to conclude that *Black* applies (which, again, it should not), that would only affect the injunction’s application to executions that had already been set at the time of the trial court’s order.⁶ See *Black*, 721 S.W.3d at 228 (noting that the “narrow issue” decided was the trial court’s authority to modify an existing “unconditional execution order”). Nothing in *Black* would prohibit the trial court from deciding issues for executions that have *not* yet been set

⁶ At the time the trial court issued the injunction, this Court had only set four future executions. 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).

and, thus, are not subject to any “unconditional execution order” from the Court. *Id.*

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 trial courts from hearing *any* third-party challenge to *any* aspect of the State’s Execution Protocols any time an order for any execution has been issued. Such a reading is unsupported by the text of the opinion. The trial court here acted well within its authority and, accordingly, reversal is unwarranted.

CONCLUSION

Because the trial court properly found that the Press Coalition had a likelihood of success on the merits of two of its three claims and it had the authority to enter the requested temporary injunction, the Press Coalition respectfully requests that the Court affirm the trial court’s order.

Dated: August 5, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 5, 2026, a true and correct copy of the foregoing was served through the Court's e-filing system on:

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**CERTIFICATES OF FORMATTING AND REDACTION
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 14,760 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.

The undersigned further certifies that this filing complies with the omission and redaction requirements of Tenn. R. App. P. 20B.

Dated: August 5, 2026

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