

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE**

LYNNE S. CHERRY, <i>et al.</i> ,	§	
	§	
<i>Plaintiffs-Appellees,</i>	§	
	§	
<i>v.</i>	§	M2022-00218-COA-R10-CV
	§	
DEL FRISCO'S GRILLE OF	§	Williamson County Circuit Court
TENNESSEE, LLC, <i>et al.</i> ,	§	Case No.: 2019-361
	§	
<i>Defendants-Appellants.</i>	§	

**RESTRAINED NON-PARTY MARY GRACE ANDERSON'S
PETITION FOR WRIT OF CERTIORARI TO VACATE THE
WILLIAMSON COUNTY CIRCUIT COURT'S
UNCONSTITUTIONAL AND VOID PRIOR RESTRAINT**

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Date: February 23, 2022

I. INTRODUCTION

This Petition concerns a categorically unconstitutional, ex-parte prior restraint against protected speech. Compounding the illegality, the Circuit Court for Williamson County issued the offending prior restraint against a non-party over whom the Circuit Court lacked any plausible jurisdiction. A copy of the challenged order—a *Mandatory Injunction and Temporary Restraining Order* that compels non-party “Mary Grace Anderson [to] immediately remove, delete, and otherwise take down any and all statements made regarding the Plaintiffs’ [sic], Plaintiffs [sic] counsel, and the law firm of Schell and Oglesby LLC”—is attached to this Petition as **Exhibit #1**. *See id.* at 1–2, ¶ 3.

For the reasons detailed below, the Circuit Court’s ex parte prior restraint against Ms. Anderson is facially unconstitutional, overbroad, and void for lack of jurisdiction. Further, as a non-party to this action, Ms. Anderson has no other plain, speedy, or adequate remedy available to dissolve the Circuit Court’s patently illegal order other than a writ of certiorari. *See* Tenn. Code Ann. § 27-8-101. Accordingly, this Court should:

1. Grant Ms. Anderson’s petition for a writ of certiorari;
2. Vacate and dissolve—as both unconstitutional and void for lack of jurisdiction—the Circuit Court’s Feb. 19, 2022 *Mandatory Injunction and Temporary Restraining Order* against her;
3. Order that the scheduled March 3, 2022 hearing contemplated by that order be cancelled pending resolution of this Petition; and
4. Reassign this case to a different judge upon remand.

II. FACTS

On February 19, 2022, non-party Mary Grace Anderson received the following e-mail from attorney Elizabeth Russell, who represents the Plaintiffs in this action:

From: Elizabeth Russell <erussell@franklin.legal>
Date: February 19, 2022 at 1:59:33 PM CST
To: graciie121@gmail.com
Subject: Restraining Order

Ms. Anderson:

See the attached injunction and restraining order. **You are ordered to immediately remove / delete any statements, reviews, or comments regarding my clients, me, and my law firm.** You are restrained from any further related conduct.

Failure to comply with this court order could result in further sanctions subject to the Court's discretion.

You will be served by private process server and you are ordered to appear in court on **March 3, 2022 at 9:00am.**

If you have questions I suggest you hire a lawyer.

Elizabeth A. Russell
Partner, Attorney at Law

See **Exhibit #2**.

Appended to Plaintiffs' counsel's missive were: (1) the Williamson County Circuit Court's February 19, 2022 *Mandatory Injunction and Temporary Restraining Order*, see **Exhibit #1**, and (2) the Plaintiffs' *Ex Parte Emergency Rule 65 Motion for Mandatory Injunctive Relief* [sic] and *Temporary Restraining Order*, see **Exhibit #3**, upon which the February 19, 2022 injunction and temporary restraining order was based.

As relevant to Ms. Anderson, the ex parte order requires that “Mary Grace Anderson immediately remove, delete, and otherwise take down any and all statements made regarding the Plaintiffs’ [sic], Plaintiffs [sic] counsel, and the law firm of Schell and Oglesby LLC *Id.* at 1–2, ¶ 3. The order apparently arises from Plaintiffs’ counsel’s upset about the following negative Google review that Ms. Anderson posted about her, which was appended to Plaintiffs’ “Emergency Motion” as Exhibit #16:

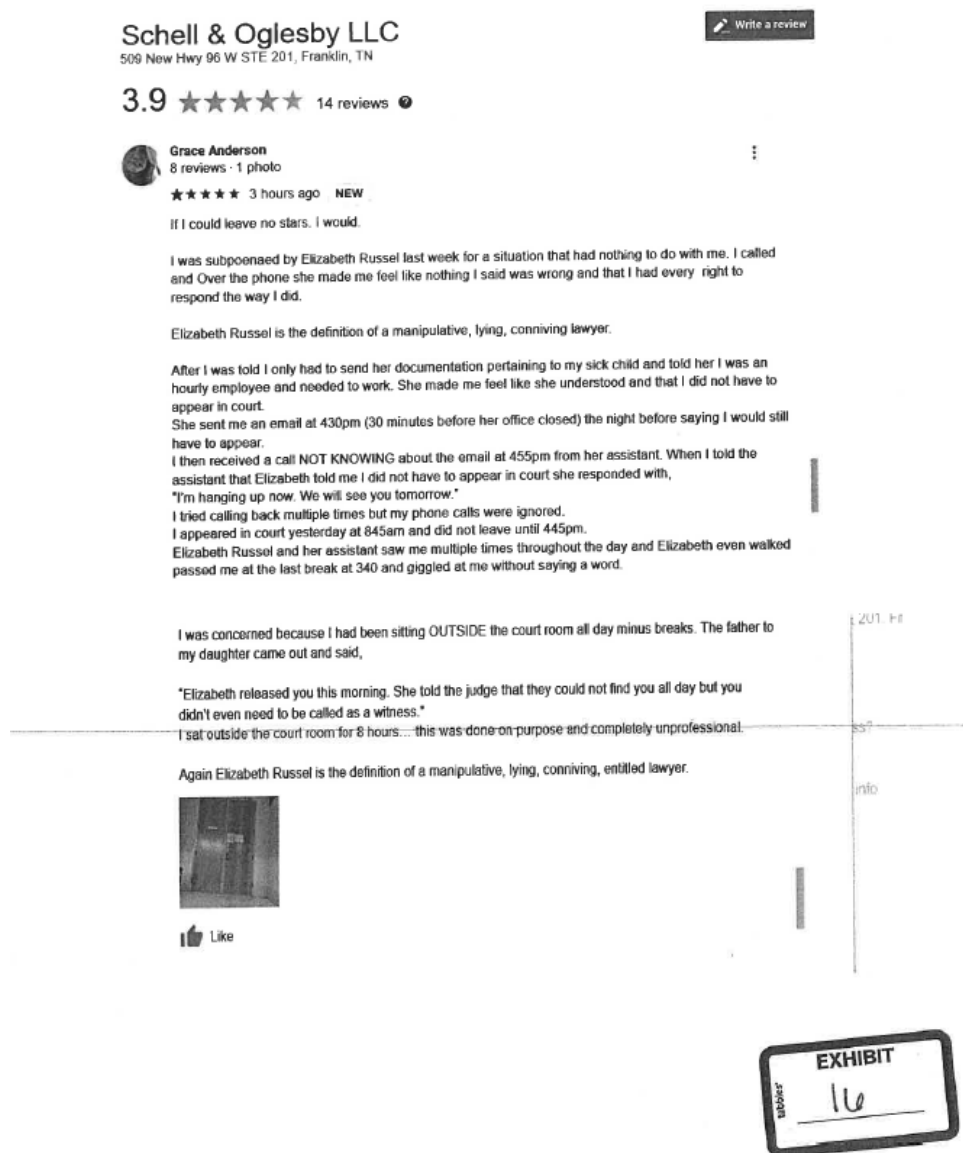


Exhibit #3 at 46 (Ex. 16); *id.* at 8–9 (complaining about Google review).

III. LEGAL STANDARD

Pursuant to Tenn. Code Ann. § 27-8-101:

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

Id.

Here, Ms. Anderson has been subjected to an ex parte prior restraint enjoining and compelling her to remove her constitutionally protected speech, *see* **Ex. 1**—an order that is patently illegal on its face. The order also arises out of a case in which Ms. Anderson has no role as a party and is not subject to the Williamson County Circuit Court’s jurisdiction at all, rendering the order in excess of the jurisdiction that the Circuit Court has been conferred. Further, as a non-party and non-intervenor, the appellate rights afforded by the Tennessee Rules of Appellate Procedure—which apply to “parties” and intervenors, *see* Tenn. R. App. P. 3(i)—have no application to Ms. Anderson. As a result, a writ of certiorari is proper. *See* Tenn. Code Ann. § 27-8-101; Tenn. Code Ann. § 27-8-102(a)(2) (“Certiorari lies: . . . (2) Where no appeal is given[.]”).

IV. ISSUES PRESENTED AND STANDARD OF REVIEW

This Petition presents two straightforward questions of law for this Court’s review.

First, this Petition seeks resolution of whether the Williamson County Circuit Court’s ex parte prior restraint censoring and forbidding

Ms. Anderson’s constitutionally speech abridges the First Amendment. This Court’s review of that narrow question presents an atypical de novo standard of review. *See P&G v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (“the standard of review is different. The decision to grant or deny an injunction is reviewed for abuse of discretion. [] We review First Amendment questions de novo.”) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)).

Second, this Petition seeks resolution of whether the Circuit Court’s ex parte injunction against Ms. Anderson—a non-party who is not under subpoena—is void for lack of jurisdiction. This Court’s review of that question is de novo as well. *See State v. L.W.*, 350 S.W.3d 911, 915 (Tenn. 2011) (“A determination of jurisdiction is a question of law, which we review de novo with no presumption of correctness.”) (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn.2000)).

V. ARGUMENT

A. THE WILLIAMSON COUNTY CIRCUIT COURT’S EX-PARTE PRIOR RESTRAINT AGAINST MS. ANDERSON VIOLATES THE FIRST AMENDMENT.

“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases). “Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints.” *Alexander v. United*

States, 509 U.S. 544, 550 (1993).

To impose a prior restraint against pure speech, a “publication must threaten an interest more fundamental than the First Amendment itself. Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial.” *P&G*, 78 F.3d at 226–27. A negative Google review of a thin-skinned lawyer falls at least marginally below the publication of the Pentagon Papers in terms of evaluating these interests. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). *See also L. Offs. of David Freydin, P.C. v. Chamara*, 24 F.4th 1122 (7th Cir. 2022) (holding that negative reviews about lawyer were inactionable).

Indeed, far from threatening any constitutional interest, Ms. Anderson’s Google review is an obvious *exercise* of the rights protected by the Constitution. *See, e.g., Nandigam Neurology, PLC v. Beavers*, No. M2020-00553-COA-R3-CV, 2021 WL 2494935, at *13 (Tenn. Ct. App. June 18, 2021) (affirming that posting a negative Yelp! Review “was an exercise of Defendant’s right of free speech”). Further, even if the innocuous Google review at issue were capable of being construed as defamatory (it is not), defamation could never be enjoined on a preliminary basis anyway. *See Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 311 (Ky. 2010) (holding that preliminary injunctions may never issue in defamation cases, and noting that “while the rule may temporarily delay relief for those ultimately found to be innocent victims of slander and libel, it prevents the unwarranted suppression of speech of those who are ultimately shown to have committed no defamation, and

thereby protects important constitutional values.”); *List Indus. Inc. v. List*, No. 2:17-CV-2159 JCM (CWH), 2017 WL 3749593, at *3 (D. Nev. Aug. 30, 2017) (“[A] preliminary injunction poses a danger that permanent injunctive relief does not: that potentially protected speech will be enjoined prior to an adjudication on the merits of the speaker’s or publisher’s First Amendment claims.”) (cleaned up); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 347 (Cal. 2007), *as modified* (Apr. 26, 2007) (same) (citing *DVD Copy Control Assn., Inc. v. Bunner*, 75 P.3d 1 (Cal. 2003) (conc. opn. of Moreno, J.)). Further, where—as here—issues of public concern pertaining to the judicial process are involved, even a post-adjudication injunction may be constitutionally impermissible. *See Sindi v. El-Moslimany*, 896 F.3d 1, 33 (1st Cir. 2018) (noting that an “[a]n injunction that prevents in perpetuity the utterance of particular words and phrases after a defamation trial” may still be unconstitutional even after the words and phrases have been found defamatory, because “[b]y its very nature, defamation is an inherently contextual tort,” and “[w]ords that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice.”).

Further still, the scope of the prior restraint imposed by the Williamson County Circuit Court goes far beyond proscribing speech that could plausibly be deemed unprotected. Instead, it also forbids the publication of “any and all” unmistakably non-defamatory, constitutionally-protected “statements made regarding the Plaintiffs’ [sic], Plaintiffs [sic] counsel, and the law firm of Schell and Oglesby LLC

. . . .” See **Exhibit #1**, at 1–2, ¶ 3. The order is overly broad, constitutionally infirm, and must be vacated for that separate reason, too. Cf. *Kauffman v. Forsythe*, No. E2019-02196-COA-R3-CV, 2021 WL 2102910, at *6 (Tenn. Ct. App. May 25, 2021) (“And the court’s order was not limited to defamatory comments. It enjoined the parties from making any public comments about each other. The order was overly broad and infringed on constitutionally protected speech. So we vacate the restraining order.”).

Prior restraints against speech do not just harm speakers, either. They also abridge *the public’s* right to hear what a speaker has to say—in this case, statements about how a lawyer has behaved and wielded the judicial subpoena power. See, e.g., *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (“Where a willing speaker exists, “the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.”); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) (“To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection.”). For that reason and others, “[a] court’s equitable power to grant injunctions should be used sparingly, especially when the activity enjoined is not illegal, . . . and when it is broader than necessary to achieve its purposes.” *Kersey v. Wilson*, No. M2005-02106-COA-R3-CV, 2006 WL 3952899, at *8 (Tenn. Ct. App. Dec. 29, 2006) (citing *Earls v. Earls*, 42 S.W.3d 877 (Tenn. Ct. App. 2000); *Terry v. Terry*, M1999-01630-COA-R3-CV, 2000 WL 863135 (Tenn. Ct. App. June 29,

2000) (*perm. app. denied* Jan. 8, 2001)).

For all of these reasons, prior restraints like the Williamson County Circuit Court's are categorically unconstitutional. As such, by issuing such the challenged prior restraint forbidding constitutionally protected speech, the Circuit Court "is acting illegally," and Ms. Anderson has "no other plain, speedy, or adequate remedy" to remedy that illegality. *See* Tenn. Code Ann. § 27-8-101. Accordingly, an immediate writ of certiorari vacating and dissolving the order should issue to prevent an extended adjudication that would itself inflict irreparable injury. *See, e.g., Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). *See also Young v. Giles Cnty. Bd. of Educ.*, 181 F. Supp. 3d 459, 465 (M.D. Tenn. 2015) ("Under case law applicable to free speech claims, the loss of First Amendment freedoms, for even minimal periods of time, is presumed to constitute irreparable harm." (quotation omitted)).

B. THE CIRCUIT COURT'S EX-PARTE PRIOR RESTRAINT IS VOID FOR LACK OF JURISDICTION OVER MS. ANDERSON.

"A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties." *Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346, 355 (Tenn.

2008) (collecting cases). By contrast, “an order entered without either subject matter jurisdiction or jurisdiction over the parties is void” *Id.*

Here, because Ms. Anderson is not a party to this action whose only role in it was as a non-party witness, the Circuit Court had no conceivable jurisdiction to order her to do anything. As the style of this case and the Circuit Court’s own *Mandatory Injunction and Temporary Restraining Order* reflect, Ms. Anderson is not a party to this case, which is between Plaintiffs “Lynne S. Cherry and Brenton A. Cherry,” on the one hand, and Defendants “Del Frisco’s Grille of Tennessee, LLC and Del Friscos Restaurant Group, Inc.,” on the other. See **Exhibit #1**, at 1. Thus, the Circuit Court has no jurisdiction over Ms. Anderson arising from any summons or claim.

Instead, Ms. Anderson’s only role in this case was as a tangential non-party witness. Accordingly, the full extent of the Circuit Court’s jurisdiction over her arose from a subpoena. As the Plaintiffs’ own ex parte Motion repeatedly reflects, though, Ms. Anderson “was released from the subpoena” See **Exhibit #3** at 6–7, ¶ 23 (“Sometimes after 1:00pm, counsel for Plaintiffs determined that, based on the testimony which had been received by the Court, that she could release Ms. Anderson from her subpoenaed appearance. After confirming with Defendants’ counsel that they did not require Ms. Anderson’s testimony and that they agreed she could be released, Plaintiffs’ counsel instructed her associated [sic], Megan McGill, to find Ms. Anderson and let her know that she was released from the subpoena and that she could leave the courthouse.”). See also *id.* at ¶ 24 (“Ms. Anderson . . . was released from

her subpoenaed appearance”); *id.* at ¶ 25 (“Ms. Anderson . . . had been released from her subpoena”). Thus, the Circuit Court had—and has—no ongoing jurisdiction over her whatsoever.

Given these circumstances, the Circuit Court has no jurisdiction—none—over Ms. Anderson at all, and any order issued against her is necessarily void. The purported authority underlying the Circuit Court’s unconstitutional ex parte prior restraint arises from Tennessee Rule of Civil Procedure 65.04. *See id.* **Exhibit #3** at 1 (seeking relief “pursuant to Rule 65 of the Tennessee Rules of Civil Procedure”), *id.* at 9 (seeking relief pursuant to “Tenn. R. Civ. P. 65.04”). However, Tennessee Rule of Civil Procedure 65.04 is not a freestanding source of authority that enables trial courts to enjoin anyone on earth. Instead, Tenn. R. Civ. P. 65.04 permits relief only against a “party,” which Ms. Anderson decidedly is not. *See* Tenn. R. Civ. P. 65.04(1) (“No temporary injunction shall be issued without notice to the **adverse party**.”) (emphasis added); Tenn. R. Civ. P. 65.04(2) (“A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated **by an adverse party** and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions **of the adverse party** will tend to render such final judgment ineffectual.”) (emphases added); Tenn. R. Civ. P. 65.04(5) (“A temporary injunction becomes effective and binding **on the party** enjoined when the order is entered. It shall remain in force until modified or dissolved on motion or until a permanent injunction is

granted or denied.”) (emphasis added).

Under these circumstances, the Circuit Court’s *ex parte* prior restraint is void for lack of any jurisdiction—either subject matter or personal—over Ms. Anderson at all. Ms. Anderson’s Petition for a writ of certiorari should be granted; the offending order entered against her should be vacated and dissolved; and this Court should order that the scheduled March 3, 2022 hearing be cancelled pending resolution of this Petition as a consequence.

C. THIS COURT SHOULD ORDER THAT THIS CASE BE REASSIGNED UPON REMAND.

This Court “may . . . order reassignment of a case to a different judge in the exercise of the court’s inherent power to administer the system of appeals and remand.” *Culbertson v. Culbertson*, 455 S.W.3d 107, 157 (Tenn. Ct. App. 2014) (cleaned up). Reassignment may be warranted where it “is advisable to maintain the appearance of justice[.]” *Rudd v. Rudd*, No. W2011-01007-COA-R3CV, 2011 WL 6777030, at *7 (Tenn. Ct. App. Dec. 22, 2011). It is also warranted in “the rare case” where a judge steadfastly adheres to an erroneous view or “will not follow the requisite standards and procedures in rendering a decision” *Biggs v. Town of Nolensville*, No. M2021-00397-COA-R3-CV, 2022 WL 41117, at *6 (Tenn. Ct. App. Jan. 5, 2022) (quoting *Rudd*, 2011 WL 6777030, at *7).

Here, the extraordinary breadth and scope of the Williamson County Circuit Court’s illegal *ex parte* prior restraint against Ms. Anderson’s constitutionally protected speech merits reassignment. Issuing a speech-based prior restraint enjoining—and affirmatively

compelling the subject of the order to remove—such plainly protected speech is so unfathomably unconstitutional that the appearance of justice alone requires reassignment upon remand. That the unconstitutional prior restraint was issued against a non-party over whom the Circuit Court lacked any plausible jurisdiction makes the order all the more unbelievable. Reassignment to a different judge upon remand is warranted as a consequence.

VI. STATEMENT OF THE RELIEF SOUGHT

This Court should:

1. Grant Ms. Anderson’s petition for a writ of certiorari;
2. Vacate and dissolve—as both unconstitutional and void for lack of jurisdiction—the Circuit Court’s Feb. 19, 2022 *Mandatory Injunction and Temporary Restraining Order*;
3. Order that the scheduled March 3, 2022 hearing contemplated by that order be cancelled pending resolution of this Petition; and
4. Reassign this case to a different judge upon remand.

VII. APPENDIX OF EXHIBITS

The non-party Petitioner has appended the following three exhibits to this Petition:

1. The Williamson County Circuit Court’s Feb. 19, 2022 *Mandatory Injunction and Temporary Restraining Order* (**Exhibit #1**);
2. The Feb. 19, 2022 email transmitted by Plaintiffs’ counsel to non-party Petitioner Anderson (**Exhibit #2**); and
3. The Plaintiffs’ *Ex Parte Emergency Rule 65 Motion for*

Mandatory Injunctive Relief and Temporary Restraining Order, inclusive of sixteen (16) exhibits appended to that Motion (**Exhibit #3**).

VIII. CONCLUSION

For the foregoing reasons, restrained non-party Mary Grace Anderson's petition for a writ of certiorari to vacate the Williamson County Circuit Court's unconstitutional and void prior restraint should be granted.

Respectfully submitted,

By: /s/ Daniel A. Horwitz
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2022, a copy of the foregoing was sent via the Court's electronic filing system, via UPS mail, and/or via email to the following parties or their counsel:

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By: /s/ Daniel A. Horwitz
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TENN. CODE ANN. § 27-8-106 STATEMENT

Pursuant to Tenn. R. Civ. P. 72, I declare upon personal knowledge under penalty of perjury before the Judges of this Court that this Petition's allegations are true and correct, and that this is the first application for the writ.

/s/ Mary Grace Anderson

Date: February 23, 2022