IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PAMELA D. STARK,	§	
	§	Case No.: _____
Appellant,	§	
	§	Case No.: W2021-01288-COA-R3-CV
v.	§	
	§	Shelby County Circuit Court
JOE EDWARD STARK,	§	Case No.: CT-002958-18
	§	
Appellee.	§	

APPLICATION OF APPELLANT PAMELA STARK (FLEMING) FOR PERMISSION TO APPEAL

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III. INTRODUCTION

This case is about a domestic violence victim who risks being jailed—again—for truthfully telling a newspaper that a government official assaulted her. "Ordinarily if a court issues an injunction, the parties enjoined must obey it, even if they believe the statute on which the injunction was based is unconstitutional. This is called the Collateral Bar Rule." *See Tennessee Dep't of Health v. Boyle*, No. M2001-01738-COA-R3-CV, 2002 WL 31840685, at *8 (Tenn. Ct. App. Dec. 19, 2002) (citing *Howat v. Kansas*, 258 U.S. 181 (1922)). "This rule, however, does not apply to civil contempt" under Tennessee law. *Id.* The central question presented by this appeal is whether Tennessee law also recognizes an exception to the collateral bar rule in *criminal* contempt cases when a defendant's conviction is based on a transparently unconstitutional prior restraint that enjoins protected speech.

Because "[t]he collateral bar rule is at odds with the doctrine of prior restraint[,]" *see* Christine Hasiotis, *Constitutional Law-Transparently Invalid Order Exception to the Collateral Bar Rule Under the First Amendment in the Federal Courts-in Re Providence Journal Company*, 809 F.2d 63 (1st Cir. 1986), 21 SUFFOLK U. L. REV. 265, 277 n.1 (1987), "numerous courts have held that a party should not be held in contempt for violating an order that violates the First Amendment." *See Crucians in Focus, Inc. v. VI 4D, LLLP*, 57 V.I. 529, 538 (2012). Based on guidance from *Walker v. City of Birmingham*, 388 U.S. 307, 315, 87 S. Ct. 1824, 1829 (1967)—in which the U.S. Supreme Court emphasized that "this is not a case where the injunction was transparently invalid or

had only a frivolous pretense to validity[,]" *see id.*—a host of jurisdictions have also embraced "the longstanding rule that one imprisoned for disregarding a court order restraining speech may challenge the underlying restraint as void[.]" *See Ex parte Tucci*, 859 S.W.2d 1, 2 (Tex. 1993); *City of Seattle v. May*, 171 Wash. 2d 847, 852, n.4, 256 P.3d 1161 (2011) ("In the context of orders amounting to prior restraints on speech, we have also recognized an exception for orders that are 'patently invalid.'") (citing *State ex rel. Superior Court v. Sperry*, 79 Wash.2d 69, 74, 483 P.2d 608 (1971); *State v. Coe*, 101 Wash.2d 364, 372, 679 P.2d 353 (1984)); *People v. Gonzalez*, 12 Cal. 4th 804, 818, 910 P.2d 1366 (1996) ("out of a concern to protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court."); *Wood v. Goodson*, 253 Ark. 196, 203, 485 S.W.2d 213 (1972) (vacating contempt conviction arising from unconstitutional prior restraint because "a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void and may be collaterally impeached."); *Phoenix Newspapers, Inc. v. Superior Ct. In & For Maricopa Cnty.*, 101 Ariz. 257, 259–60, 418 P.2d 594 (1966) ("If, however, the act complained of as contemptuous is the violation of an order, decree, or judgment, and the contemnor can show that the order, decree, or judgment of the court was without

jurisdiction or void for some other reason, he may not be held in contempt. . . ."); *State v. Erpelding*, 292 Neb. 351, 368, 874 N.W.2d 265 (2015) ("We recognize an exception to the collateral bar rule may exist where a defendant's constitutional rights are at risk[.]"); *Reynolds v. Alabama Dep't of Transp.*, No. 85-CV-665-MHT, 2012 WL 13014728, at *3 (M.D. Ala. June 25, 2012) ("There are four recognized exceptions to the collateral bar rule in the eleventh circuit. . . . [I]f the challenged order requires an 'irretrievable surrender [of a] constitutional guarantee' then the order may be violated without contempt consequences.") (quoting *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991) ("There are situations, however, where the collateral bar rule is inapplicable. . . . the order must not require an irretrievable surrender of constitutional guarantees.")).

The consequences of failing to adopt an exception to the collateral bar rule in unconstitutional prior restraint cases are severe. "Where the collateral bar rule applies, [] a gag order is more chilling than subsequent punishment, and is very likely to stop the speech at least temporarily." *See* Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 553 (1977). As a result, the "'collateral bar' rule has been severely criticized, especially in its frequent application to . . . free speech cases." *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 634–35 (1970). Further, "refusing to hear collateral attacks may, by seeming to sanction judicial lawlessness, work against the societal interest in fostering respect for judicial processes." *Id.* Unless an exception to the collateral bar rule applies, then, unconstitutional prior restraints present citizens with three unacceptable choices—including (as here) the risk of a

criminal conviction and incarceration for "stand[ing] on [one's] right and speak[ing] freely[.]" *Cf. Thomas v. Collins*, 323 U.S. 516, 536, 65 S. Ct. 315 (1945) ("When served with the order he had three choices: (1) To stand on his right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty. He chose the first alternative. We think he was within his rights in doing so.").

With these considerations in mind, this case presents an ideal vehicle to resolve whether Tennessee law embraces an exception to the collateral bar rule when a defendant's contempt conviction is based on an unconstitutional prior restraint. The prior restraint involved here—which enjoined a domestic violence victim from truthfully speaking out about being assaulted by a government official—ranks among the worst First Amendment violations this jurisdiction has seen. The Appellant also contested the constitutionality of the injunction she was charged with violating at every stage of these proceedings, only to have her claim ignored on the ground that the asserted unconstitutionality of the prior restraint to which she was subjected was irrelevant to her case's outcome. *See Stark v. Stark*, No. W2021-01288-COA-R3-CV, 2023 WL 5098594, at *10 (Tenn. Ct. App. Aug. 9, 2023) ("we 'avoid deciding constitutional issues when a case can be resolved on non-constitutional grounds.' Therefore, we do not reach the second issue concerning whether the mandatory temporary injunctions set forth in Tennessee Code Annotated section 36-4-106(d) are unconstitutional.") (internal citation omitted).

As many jurisdictions have recognized, though, the unconstitutionality of a speech injunction is a defense to criminal contempt. *See supra* at 11–13. Thus, this Court should grant review and

remand with instructions to address—on its merits—the Appellant's defense that the prior restraint that she was prosecuted for violating was unconstitutional.

This case also presents a second issue worthy of this Court's review, which is whether courts may expand the actual terms of an injunction to sustain a criminal contempt conviction on the ground that "the circumstances surrounding the issuance of the order" support a more expansive reading. Here, despite noting that the Appellant was specifically restrained "from 'making any other public allegations against [Husband] *on social media (on any platform) or to his employer* which may affect [Husband's] reputation or employment[,]'" *see Stark*, 2023 WL 5098594, at *9 (emphasis added), the Panel expanded the scope of the Appellant's injunction to forbid communications with "a newspaper" as well. *Id.* As justification, the Panel concluded that the Appellant's argument that the injunction she was charged with violating must be limited to its actual terms "strains credulity and invites us to disregard 'the circumstances surrounding the issuance of the [restraining] order.'" *Id.* (alterations in original). Thus, even though communications with "a newspaper" inarguably were not within the scope of the injunction that the Appellant was charged with violating, *see id.*, the Panel held that the Appellant's "choice to use a newspaper as the method of communication with Husband's employer does not insulate her from culpability." *Id.*

Less than two months after the Panel's decision below, another Court of Appeals panel issued a contrary decision, reversing four contempt convictions because the charged conduct—even if tortious—

"did not violate a clear and specific court directive[.]" *See Blankenship CPA Grp., PLLC v. Wallick*, No. M2022-00359-COA-R3-CV, 2023 WL 6420443, at *5 (Tenn. Ct. App. Oct. 3, 2023). That ruling conflicts with the Panel's ruling here. Thus, because two Court of Appeals Panels have issued conflicting ruling about whether an injunction may be expanded beyond its terms to sustain a criminal contempt conviction—and because the rule that an injunction may not lawfully be expanded beyond its terms to sustain a criminal contempt conviction is correct, *see Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 356 (Tenn. 2008) (orders alleged to have been violated must "leave no reasonable basis for doubt regarding their meaning" and "should be interpreted in favor of the person facing the contempt charge.")—this Court should grant review, vacate the Panel's erroneous judgment below, and remand with instructions to vacate the Appellant's remaining contempt conviction and dismiss the charge.

IV. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(1) FILING STATEMENT

Under Tennessee Rule of Appellate Procedure 11(b), the Appellant states that the challenged judgment of the Tennessee Court of Appeals—attached as **Ex. 1**—was entered on August 9, 2023. The Appellant timely petitioned for rehearing, which the Panel denied on August 22, 2023. *See* **Ex. 2**. Thus, this Application having been filed "within 60 days after the denial of the petition or entry of the judgment on rehearing[,]" *see* Tenn. R. App. 11(b), the Appellant's Rule 11 Application is timely filed.

V. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(2) STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

This Application presents two questions for review:

1. May a defendant's criminal contempt conviction be sustained under circumstances when the defendant's assertedly contemptuous behavior falls outside the scope of an injunction's terms?

2. Does Tennessee law recognize an exception to the collateral bar rule in criminal contempt cases when a defendant's conviction is based on a transparently unconstitutional prior restraint that enjoins protected speech?

VI. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(3) STATEMENT OF THE FACTS RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW

Appellant Pamela Stark (now Fleming) is a domestic violence survivor who was assaulted by a Memphis police officer[1]—the Appellee here—who also happens to be her ex-husband. The Parties married in 2013,[2] and Ms. Fleming filed for divorce in 2018.[3]

Upon filing for divorce, the Parties became subject to Tennessee Code Annotated § 36-4-106(d)(1)(C)'s mandatory injunction. The provision—which applies to every divorcing litigant in Tennessee and includes no exception for truthful statements—summarily restrained the Parties "from making disparaging remarks about the other . . . to either party's employer[.]" *Id.*

On January 15, 2019, the Appellee petitioned for a restraining order.[4] The Appellee asserted that, on December 14, 2018, Ms. Fleming made a public Facebook post stating that the Appellee had assaulted her.[5] Ms. Fleming's Facebook post read:

> Anyone who knows me, knows I am a staunch supporter of not only MPD, but law enforcement as a whole. That being said, police officers are only human. Further, they are human beings who are specifically trained to rely on each other for their very life. Thus, it is ridiculous to believe that law enforcement, especially from the same specific force, should investigate a case where there is potential wrong doing and/or legal consequences for one of their own.

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[1] R. (Vol. 1) at 10.
[2] R. at 26.
[3] R. at 271.
[4] R. at 1–9.
[5] R. at 2.

> Being in charge of the investigation, they decide what if anything is done, documented or collected as they investigate one of their own with no one watching over their shoulder.
>
> I speak now as a recent victim of domestic violence at the hands of a Memphis Police Officer. I can attest to exactly how wide "the thin blue line can get." Do not get me wrong, I understand it. Who among us would want to hang one of our own out to dry. This is even more so for the Brotherhood of Blue. However, it is even more devastating. Who do you turn to when those sworn to serve and protect and enforce the law, don't.[6]

The Appellee's motion also complained of a letter that Ms. Fleming wrote to the mayor of Memphis detailing her experience with the Memphis Police Department.[7]

Ms. Fleming responded in opposition to the Appellee's petition for a restraining order, asserting that "the ability to publicly call into question the actions of governmental entity is the very foundation of the United States Constitution and is reiterated within the Tennessee Constitution."[8] Ms. Fleming further asserted that "it is difficult to imagine an action more [repugnant] to Tennessee Domestic Violence Bill of Right[s] th[a]n petitioning the court to issue basically a gag order against a person asserting her rights as a victim of domestic violence."[9]

By order dated February 13, 2019, the trial court granted the Appellee's petition for a restraining order and ordered Ms. Fleming to

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[6] R. at 7.
[7] R. at 27. Another way to describe such a correspondence is a "petition [to] the Government for a redress of grievances." U.S. Const. amend. I.
[8] R. at 12.
[9] *Id.*

remove her Facebook post.[10] The trial court further ordered that Ms. Fleming "shall be further enjoined from making any other public allegations against Petitioner, Joe Stark, on social media (on any platform) or to his employer which may affect Petitioner's reputation or employment."[11] The trial court's injunction—which, like Section 36-4-106(d)(1)(C), made no exception for truthful statements—was expressly based on Section 36-4-106(d)(1)(C)'s mandatory statutory injunction and the authority to expand it conferred by Section 36-4-106(d)(2).[12] *See id.* ("nothing in this subsection (d) shall preclude either party from applying to the court for further temporary orders, an expanded temporary injunction, or modification or revocation of this temporary injunction.").

Standing on her First Amendment rights, Ms. Fleming refused to remove her Facebook post.[13] As a result, the trial court jailed her for direct contempt.[14] To get out of jail, Ms. Fleming relented under protest and removed it.[15] Ms. Fleming then tried to press her claim of unconstitutionality on appeal, but the Court of Appeals declined review on mootness grounds. *See Stark v. Stark*, No. W2019-0650-COA-R3-CV, 2020 WL 507644, at *1 (Tenn. Ct. App. Jan. 31, 2020) ("Because the appellant has purged herself of civil contempt and was released from

[10] R. at 26–28.
[11] R. at 28.
[12] R. at 26–27. The trial court used slightly different wording for Section 36-4-106(d)(2) and labeled it as "(6)." However, the court appears to be referring to Tenn. Code Ann. § 36-4-106(d)(2).
[13] R. at 34.
[14] R. at 35.
[15] R. at 49.

incarceration, we deem the issue moot and dismiss this appeal."). Both this Court and the U.S. Supreme Court then denied review as well. *See* Order Den. Appl. for Permission to Appeal, W2019-00650-SC-R11-CV (Aug. 10, 2020); *Stark v. Stark*, 141 S. Ct. 1687, 209 L. Ed. 2d 465 (2021).

Later, on June 27, 2019, the *Memphis Commercial Appeal* published an article about what happened to Ms. Fleming.[16] Ms. Fleming was interviewed for the piece.[17] Ms. Fleming provided details of her husband's physical abuse and recounted the Memphis Police Department's mishandling of her complaint.[18]

In response to the Commercial Appeal's article, the Appellee petitioned for criminal contempt.[19] The Appellee's contempt charge was based only on the following two discrete allegations:

> 9. On June 27, 2019, an article authored by Phillip Jackson, entitled *"Former prosecutor Memphis police 'destroyed my career' after domestic assault involving officer*" was published in the Commercial Appeal, which features photographs and statements obtained through interviews with Wife, attached hereto as Exhibit 2.
>
> 10. Husband would show that The Commercial Appeal Article constitutes willful, knowing, criminal contempt of this Court's orders.[20]

Thus, rather than being premised upon a claim that Ms. Fleming made a contemptuous statement "on social media (on any platform) or to his employer which may affect Petitioner's reputation or

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[16] R. at 56.
[17] *Id.*
[18] *See generally* R. at 77–82.
[19] R. at 54–82.
[20] R. at 56.

employment[,]"[21] the Appellee's criminal contempt charge was based on Ms. Fleming's "interviews" with "the Commercial Appeal[.]"[22]

The trial court tried Ms. Fleming for criminal contempt on August 10, 2021.[23] During that trial, Ms. Fleming maintained that, under the terms of her injunction, "[s]he wasn't prohibited from speaking to reporters anymore than she was prohibited from speaking to the FBI or filing a federal lawsuit."[24] She also maintained her claim that the speech injunction that she was charged with violating was unconstitutional.[25]

The trial court issued a written ruling on September 30, 2021. As relevant to this Application, the trial court found Ms. Fleming guilty of criminal contempt for participating in the creation of the Commercial Appeal article,[26] reasoning that Ms. Fleming "knew or should have known the obvious potential and intent that the publication of the disparaging comments was going to be received by Mr. Stark's employer, Memphis Police Department[.]"[27] The trial court then sentenced Ms. Fleming to perform 160 hours of community service with the Family Safety Center[28]—a sentence that the Court of Appeals later vacated with instructions to consider a fine or sentence of incarceration instead. *See Stark*, 2023 WL 5098594, at *10. The trial court also ordered Ms.

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[21] R. at 28.
[22] R. at 56.
[23] R. (Vol. 13) at 1.
[24] *Id.* at 85:12–14; *see also* R. at 84:24–85:7.
[25] *Id.* at 64:18–65:6.
[26] R. (Vol. 2) at 271–277.
[27] R. at 276.
[28] *Id.*

Fleming to pay the Appellee's attorney's fees.[29]

On appeal, Ms. Fleming continued to contest the constitutionality of the trial court's prior restraint order as a defense to her contempt charge. The Panel declined to adjudicate her claim, though, deeming it unnecessary to her appeal. *Stark*, 2023 WL 5098594, at *10 ("we 'avoid deciding constitutional issues when a case can be resolved on non-constitutional grounds.' Therefore, we do not reach the second issue concerning whether the mandatory temporary injunctions set forth in Tennessee Code Annotated section 36-4-106(d) are unconstitutional.") (internal citations omitted).

Although Ms. Fleming's contempt conviction was not based on any statement made "on social media (on any platform) or to his employer which may affect Petitioner's reputation or employment[,]"[30] the Panel affirmed Ms. Fleming's conviction. As grounds, the Panel stated:

> The trial court's second finding of criminal contempt against Wife was based on her knowing and intentional participation in the creation of the Commercial Appeal article by submitting to hours of in-person and telephonic communications with the author. Wife agrees that, at the time she was interviewed for the article and at all times relevant, she was subject to the trial court's order enjoining her from "making any other public allegations against [Husband] on social media (on any platform) or to his employer which may affect [Husband's] reputation or employment." Wife does not dispute that the actions of communicating with the Commercial Appeal reporter and giving hours of interview material for the newspaper article were willful. Rather, Wife argues that such actions did not violate the restraining order

[29] *Id.* at 276–77.
[30] R. (Vol. 1) at 28.

> entered by the court because she "neither uttered the public allegations at issue on social media nor to [Husband's] employer." In Wife's view, "[t]o the extend [sic] the allegations were available for his employer to read, they were published by the Commercial Appeal." This argument strains credulity and invites us to disregard "the circumstances surrounding the issuance of the [restraining] order." *Konvalinka*, 249 S.W.3d at 356.
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> * * * *
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> We agree with the trial court's rational inference that Wife knew that the numerous public allegations she made were going to be received by Husband's employer. We also agree that Wife's choice to use a newspaper as the method of communication with Husband's employer does not insulate her from culpability.

Stark, 2023 WL 5098594, at *9.

Ms. Fleming then petitioned for rehearing. **Ex. 3**. Her petition continued to contest the constitutionality of the prior restraint that she was charged with violating and demanded that the Court of Appeals adjudicate her claim. *Id.* at 3–4. The Panel denied Ms. Fleming's Petition for rehearing without doing so, *see* **Ex. 2**, and this Application followed.

VII. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(4) STATEMENT OF THE REASONS SUPPORTING REVIEW

This Court should grant review under Tennessee Rule of Appellate Procedure 11(a). In this extraordinary case, all four Rule 11 factors are present. Thus, review is warranted given:

1. The need to secure uniformity of decision;

2–3. The need to secure settlement of important questions of law and public interest; and

4. The need to exercise this Court's supervisory authority.

1. THE NEED TO SECURE UNIFORMITY OF DECISION.

A. Panels of the Court of Appeals are in conflict over whether courts may expand the terms of an injunction to support a criminal contempt conviction on the ground that "the circumstances surrounding the issuance of the order" support a more expansive reading.

On February 13, 2019, the trial court issued an injunction stating: "The Respondent, Pamela Stark, shall be further enjoined from making any other public allegations against the Petitioner, *on social media (on any platform) or to his employer* which may affect Petitioner's reputation or employment."[31] Thus, the terms of the trial court's injunction were restricted to qualifying allegations made either "[1] on social media (on any platform) or [2] to [the Appellee's] employer[.]"[32] It is undisputed that the Memphis Commercial Appeal—which is [1] a newspaper that [2] did not employ the Appellee—was neither one.

That notwithstanding, the Appellee charged Ms. Fleming with contempt based solely on the following two allegations:

> 9. On June 27, 2019, an article authored by Phillip Jackson, entitled *"Former prosecutor Memphis police 'destroyed my career' after domestic assault involving officer*" was published in the Commercial Appeal, which features photographs and statements obtained through interviews with Wife, attached hereto as Exhibit 2
>
> 10. Husband would show that The Commercial Appeal Article constitutes willful, knowing, criminal contempt of this Court's orders.[33]

[31] R. at 28 (emphasis added).
[32] *Id.*
[33] R. at 56.

Following trial, the trial court sustained these allegations and convicted Ms. Fleming of criminal contempt based on "the Commercial Appeal article[.]"[34] In so doing, the trial court determined:

> 1. That Pamela Diane Stark (Fleming) is guilty of criminal contempt of the Court's mandatory injunction entered upon the filing of the Complaint for Divorce, for knowingly and intentionally participating in the creation of the Commercial Appeal article by submitting to hours of in-person and telephonic communications with the author.
>
> 2. Ms. Stark (Fleming) knew or should have known the obvious potential and intent that the publication of the disparaging comments was going to be received by Mr. Stark's employer, Memphis Police Department[.]
>
> 3. The fact that Ms. Stark (Fleming) was able to utilize the media does insulate her from liability for her participation in the violation of the Mandatory Injunction Order.[35]

Vitally, none of these determinations is a finding that Ms. Fleming "ma[de] any other public allegations against the Petitioner, on social media (on any platform) or to his employer[,]" which is what Ms. Fleming was enjoined from doing.[36] Thus, the conduct for which Ms. Fleming was criminally convicted was not within the terms of the injunction that she was charged with violating.

Unbothered by that defect, the Panel below affirmed the Appellant's conviction. As justification, the Panel reasoned that:

The trial court's second finding of criminal contempt against

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[34] R. at 275–76.
[35] *Id.*
[36] *Id.* at 28.

> Wife was based on her knowing and intentional participation in the creation of the Commercial Appeal article by submitting to hours of in-person and telephonic communications with the author. Wife agrees that, at the time she was interviewed for the article and at all times relevant, she was subject to the trial court's order enjoining her from "making any other public allegations against [Husband] on social media (on any platform) or to his employer which may affect [Husband's] reputation or employment." Wife does not dispute that the actions of communicating with the Commercial Appeal reporter and giving hours of interview material for the newspaper article were willful. Rather, Wife argues that such actions did not violate the restraining order entered by the court because she "neither uttered the public allegations at issue on social media nor to [Husband's] employer." In Wife's view, "[t]o the extend [sic] the allegations were available for his employer to read, they were published by the Commercial Appeal." **This argument strains credulity and invites us to disregard "the circumstances surrounding the issuance of the [restraining] order."** *Konvalinka*, 249 S.W.3d at 356.

Stark, 2023 WL 5098594, at *9 (emphasis added).

Thus, the Panel below not only held that the argument that an injunction must be construed according to its actual terms in criminal contempt cases is *wrong*; the Panel further held that such an argument "*strains credulity*." *See id.* (emphasis added).

On October 3, 2023—less than two months after the Panel's ruling below—another Court of Appeals Panel adopted a contrary view in *Blankenship CPA Grp. PLLC*, 2023 WL 6420443. The case concerned a man—Stephen Wallick—who was enjoined from "'making any threats towards or acts of extortion or harassment against [a Firm] or any of its principals, employees, or agents including, but not limited to, verbal or

written threats or coming on the property of any of [the Firm's] offices.'" *Id.* at *4. Mr. Wallick was charged with—and convicted of—five counts of criminal contempt for violating that injunction. *Id.* at *3.

Upon review, the Court of Appeals reversed four of Mr. Wallick's convictions because the charged conduct was not within the scope of the injunction that he was charged with violating. *Id.* at *5. The *Blankenship* court reasoned that the terms of the injunction were "clear and specific[,]" and that based on those terms, the injunction "does not enjoin all acts of harassment. It only prohibits acts of harassment directed toward or against the Firm and the others specifically listed." *Id.* at *4. Thus, based on the clarity and specificity of the injunction's actual terms, the Court of Appeals ruled that four of Mr. Wallick's convictions could not stand. *See id.* at *5 ("Counts II and V were based on Mr. Wallick's missives to Firm clients. . . . Nothing in the temporary injunction or the agreed order prohibited Mr. Wallick from contacting the Firm's clients or even disparaging the Firm to those clients."); *id.* ("In Count III, Mr. Wallick was charged with criminal contempt for posting a link to the article on his Facebook page. This conduct, whether the article was defamatory or not, did not violate a clear and specific directive in the injunction. As we stated previously, the temporary injunction did not enjoin Mr. Wallick from making defamatory or disparaging statements about the Firm. It prohibited him from committing 'acts of harassment against the Firm or any of its principals, employees or agents.' Nothing in the injunction prohibited Mr. Wallick from posting this link on his personal Facebook page."); *id.* ("Count IV concerned Mr. Wallick's email

to the Nashville attorney. At best, the attorney could be categorized as a friend of the Firm. He forwarded the email to his law partner, Mr. Blankenship's brother. Again, the injunction did not prohibit Mr. Wallick from sharing the article with an unrelated third party."). The Court of Appeals further explained:

> To be clear, Mr. Wallick may be liable for his conduct on some other basis. But the question on appeal is whether he willfully disobeyed a court order. The injunction did not clearly and unambiguously prohibit the conduct that formed the basis for Counts II-V. Because Mr. Wallick did not violate a clear and specific court directive when he posted the link on his Facebook page and circulated the article or a link to the article to Firm clients and a Nashville attorney, the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. So we reverse the criminal contempt holdings on Counts II-V.

Id. at *5.

The Panel's holding below and the Court of Appeals' contrary holding in *Blankenship CPA Grp., PLLC* conflict with one another, and they take fundamentally different approaches to the same question. The former holds that "the circumstances surrounding the issuance" of an injunction may operate to expand its terms and that any conclusion to the contrary is incredulous. *See Stark*, 2023 WL 5098594, at *9. By contrast, the latter holds that—whether some conduct is undesirable or even tortious—conduct that does "not violate a clear and specific court directive" cannot be contemptuous. *Blankenship CPA Grp., PLLC*, 2023 WL 6420443, at *5.

Only this Court can resolve the conflict between these competing approaches. It is also fair to say that it already has. *See Konvalinka*, 249

S.W.3d at 356 (orders alleged to have been violated must "leave no reasonable basis for doubt regarding their meaning" and "should be interpreted in favor of the person facing the contempt charge."). Nor is this Court alone in requiring that contempt charges be based on a violation of an injunction's actual terms. *See, e.g., Nutrisystems.Com, Inc. v. Easthaven, Ltd.*, No. CIV. A. 00-4835, 2001 WL 484068, at *2 (E.D. Pa. Mar. 30, 2001) ("It may well be that the defendants have violated the spirit of the injunctive Order, but unless the actual terms of the Order are violated, an adjudication [of] contempt would be improper."); *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 70, 85 (D.D.C. 2003) ("the Court will strictly adhere to the literal terms of the Order in determining whether contempt is appropriate"); *Shuler v. Raton Waterworks Co.*, 247 F. 634, 638–39 (8th Cir. 1917) ("If the defendants were to be found guilty of contempt, such finding should, under the circumstances of this case, have been based upon a violation of the literal terms of the injunction."); *Food Fair Stores, Inc. v. Square Deal Mkt. Co.*, 116 F. Supp. 617, 618 (D.D.C 1953) ("I find there has been no willful[] violation by the plaintiff of the literal terms of the injunction, and I will deny the motion to adjudicate plaintiff in contempt."); *Swan v. Swan*, 803 So. 2d 372, 376 (La. App. 2 Cir. 2001) ("Based on the record before us, we cannot say that the evidence presented was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Susan Swan willfully disobeyed a lawful order of the court. In fact, Susan Swan complied with the literal terms of the judgment in that she did not leave her son alone with her husband as her 13 year-old stepson and 11 year-old step-

daughter were also present."); *Bd. of Supervisors v. Superior Ct.*, 33 Cal. App. 4th 1724, 1737, 39 Cal. Rptr. 2d 906, 913 (1995) ("we nevertheless strictly construe the contempt ruling and proceedings to determine whether the actual terms of the consent decree, i.e., its provisions regarding the population cap, were willfully disobeyed by the Board."); *Concordia Partners, LLC v. Pick*, No. 2:14-CV-009-GZS, 2015 WL 1206515, at *2, n.2 (D. Me. Mar. 17, 2015) ("Assuming without deciding that this email, along with the other evidence submitted by Plaintiff, shows that it is more likely true than not true that Defendants are not complying with the spirit of the Preliminary Injunction, such a showing does not meet the standard for a motion for contempt, which requires clear and convincing evidence that Defendants have violated the letter of the Preliminary Injunction."); *Tinicum Twp. v. Nowicki,* No. 2114 C.D. 2014, 2016 WL 1276158, at *10, n.9 (Pa. Commw. Ct. Mar. 31, 2016) ("violating the spirit of an order is not grounds for contempt.").

Though not cited by the Panel below—and though implicitly overruled by *Konvalinka*—part of the dissonance may arise from this Court's out-of-date holding in *Davidson Cnty. v. Randall*, 201 Tenn. 444, 449, 300 S.W.2d 618, 621 (1957). There, this Court held that "while [an] injunction must be implicitly obeyed, it is the spirit and not the strict letter of the mandate to which obedience is exacted[.]" *Id.* (cleaned up). That holding, however, is not compatible either with modern contempt law, *see supra* at 31–32, or with *Konvalinka*'s more recent holding that orders must "leave no reasonable basis for doubt regarding their meaning" to support a contempt conviction and "should be interpreted in

favor of the person facing the contempt charge." *Konvalinka*, 249 S.W.3d at 356. As reflected by *Blankenship CPA Grp., PLLC*, 2023 WL 6420443, at *5 (holding that "a clear and specific court directive" is required to sustain a contempt conviction), Court of Appeals Panels also follow *Konvalinka*, even though this Court's contrary holding in *Davidson Cnty. v. Randall* has not yet been formally overruled.

For all of these reasons, this Court should grant review of the first question presented in this Application—whether a criminal contempt conviction may be affirmed under circumstances when a defendant's charged behavior falls outside the scope of an injunction's terms—to secure uniformity of decision.

B. Whether an exception to the collateral bar rule exists under circumstances when an injunction is unconstitutional is uncertain.

The Court of Appeals has explained that: "*Ordinarily* if a court issues an injunction, the parties enjoined must obey it, even if they believe the statute on which the injunction was based is unconstitutional." *Tennessee Dep't of Health*, 2002 WL 31840685, at *8 (emphasis added) (citing *Howat*, 258 U.S. 181). "This rule, however, does not apply to civil contempt" under Tennessee law. *Id.* The full catalogue of exceptions to the "ordinarily" applicable collateral bar rule, *see id.*—and the exceptions to the collateral bar rule that apply in criminal contempt cases—have yet to be defined, though.

This Court has often granted review when a question presented has not been decided in Tennessee and has split courts in other jurisdictions. *See, e.g., State v. Albright*, 564 S.W.3d 809, 823 (Tenn. 2018); *Sullivan v.*

Baptist Mem'l Hosp., 995 S.W.2d 569, 573 (Tenn. 1999); *House v. State*, 911 S.W.2d 705, 713 (Tenn. 1995). The question presented here—whether Tennessee law recognizes an exception to the collateral bar rule in criminal contempt cases when a defendant's conviction is based on a transparently unconstitutional prior restraint that enjoins protected speech—qualifies. *See, e.g., Reynolds*, 2012 WL 13014728, at *3 ("There are four recognized exceptions to the collateral bar rule in the eleventh circuit."); *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 726 (9th Cir. 1989) ("There are, of course, exceptions to the collateral bar rule. Federal courts have recognized at least three."); *In re Providence J. Co.*, 820 F.2d 1342 (1st Cir.1986), *modified on reh'g en banc*, 820 F.2d 1354, 1355 (1st Cir.1987), *cert. dismissed sub nom., United States v. Providence Journal Co.*, 485 U.S. 693, 108 S.Ct. 1502, 99 L.Ed.2d 785 (1988) (recognizing a limited exception to the general rule that a party may not violate a court order and later raise the issue of its unconstitutionality collaterally as a defense in a criminal contempt proceeding, but only if the alleged contemnor has made "a good faith effort to seek emergency relief from the appellate court."); *Gonzalez*, 12 Cal. 4th at 818–19 ("out of a concern to protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court. . . . [O]ur rule is

'considerably more consistent with the exercise of First Amendment freedoms' than that of other jurisdictions that have adopted the so-called collateral bar rule barring collateral attack on injunctive orders."); *Truesdell v. State*, 129 Nev. 194, 199, 304 P.3d 396, 399 (2013) ("Many jurisdictions follow the collateral bar rule, which precludes a party from collaterally attacking a protection order in a later proceeding for violating the order, even to question the constitutionality of the statute that authorized the protection order.") (collecting cases).

There is also good reason to believe that Tennessee law recognizes an unconstitutional prior restraint exception to the collateral bar rule in criminal contempt cases—an exception that (if credited) would preclude the Appellant's conviction here. Five reasons support that conclusion.

First, the closest analogous case adjudicated by the Court of Appeals—a civil contempt case involving a prior restraint—applied the prior restraint exception to the collateral bar rule. *See Gider v. Hubbell*, No. M2016-00838-COA-R3-JV, 2017 WL 1536475, at *4–5 (Tenn. Ct. App. Apr. 27, 2017) (allowing litigant to contest the constitutionality of a prior restraint after being charged with civil contempt for violating it). That decision also favorably cited a portion of an opinion from the Supreme Court of West Virginia that adopted the prior restraint exception to the collateral bar rule. *See id.* (citing *E. Associated Coal Corp. v. Doe*, 159 W. Va. 200, 201, 220 S.E.2d 672, 675 (1975) ("The rule that unconstitutional court orders must nevertheless be obeyed until set aside presupposes that the court issuing the injunction enjoys both jurisdiction over the persons and colorable jurisdiction over the subject matter; that adequate and effective remedies are available for orderly

and prompt review of the challenged rulings; **and, that the court order and subsequent conduct does not require an irretrievable surrender of constitutional guarantees.**") (emphasis added)). Thus, existing Court of Appeals authority strongly suggests that the prior restraint exception to the collateral bar rule applies in Tennessee.

Second, to sustain a contempt conviction, Tennessee law holds that an order must be "lawful." *Konvalinka*, 249 S.W.3d at 355. Under Tennessee law, unconstitutional actions are also treated as having been taken *without* authority, and an unconstitutional statute is considered *void*. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 850 (Tenn. 2008) ("[A]n officer acting pursuant to an unconstitutional statute does not act under the authority of the state[.] . . . [T]he power of the State is limited by the state and federal constitutions."); *State v. King*, No. 01C01-9608-CR-00343, 1997 WL 576490, at *2 (Tenn. Crim. App. Sept. 18, 1997) ("In this jurisdiction, an unconstitutional statute or an amendment to a constitutional statute is void ab initio-from the date of its enactment."); *State v. Woodard*, No. E2016-00676-CCA-R3-CD, 2017 WL 2590216, at *9 (Tenn. Crim. App. June 15, 2017) ("as our supreme court has repeatedly recognized, a criminal statute that is unconstitutional on its face is 'void from the date of its enactment' and cannot, therefore, provide the basis for a 'valid conviction.'") (cleaned up) (collecting cases). Unconstitutional orders cannot be considered "lawful" for contempt purposes as a result. *Id.* Thus, the unconstitutional prior restraint exception to the collateral bar rule comports with Tennessee's view that unconstitutional orders are beyond a court's lawful authority and void.

Third, this Court has characterized freedom of expression as "arguably an absolute right" and observed that "[t]he prohibition against the prior restraint of publication serves to protect the sanctity of this right." *See State v. Marshall*, 859 S.W.2d 289, 293 (Tenn. 1993) ("'Thus we see that under our Constitutions there are two distinct elements to the right to freedom of expression. The first, arguably an absolute right, guarantees to each citizen the freedom to make public whatever he may choose. The prohibition against the prior restraint of publication serves to protect the sanctity of this right.'" (quoting *Long v. 130 Mkt. St. Gift & Novelty of Johnstown*, 294 Pa. Super. 383, 399 440 A.2d 517, 525 (1982)). Given this view, it would be surprising if citizens who are subjected to unconstitutional prior restraints were flatly forbidden from contesting their constitutionality in a contempt proceeding.

Fourth, Tennessee's Constitution famously rejects "the doctrine of non-resistance." *See* Tenn. Const. art. I, § 2 ("That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."). Requiring citizens who face transparently unconstitutional prior restraints to obey them—rather than permitting them to contest their underlying legality in a later proceeding—would *embrace* the doctrine of non-resistance against arbitrary power and oppression and punish those who fail to submit to such oppression with criminal consequences, though. As a result, it is hard to imagine how applying the collateral bar rule in cases involving transparently unconstitutional prior restraints could comport with Tenn.

Const. art. I, § 2.

Fifth, unlike other jurisdictions, Tennessee law does not permit appeals of interlocutory injunctions—including speech-based prior restraints—as a matter of right. *Compare* Tenn. R. App. P. 3, 9, 10, *with* 28 U.S.C. § 1292(a). Thus, at minimum, citizens who are subjected to unconstitutional prior restraints must expend significant resources—and incur corresponding delay—seeking permission to appeal them. If compliance with an unconstitutional prior restraint on pain of contempt is required during that period, though, then unlawfully restrained citizens will suffer irreparable harm. *See 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)). Thus, recognizing an exception to the collateral bar rule that enables unconstitutionally restrained speakers to speak with the assurance that they may contest the constitutionality of a prior restraint if they are subjected to a later contempt proceeding is necessary to safeguard citizens from irreparable injuries. *See id.*

For all of these reasons, Tennessee law strongly suggests that litigants may contest the constitutionality of a prior restraint in a later criminal contempt proceeding. Even so, Tennessee law has not definitively settled whether an exception to the collateral bar rule exists in unconstitutional prior restraint cases or under other circumstances when an injunction is transparently unconstitutional. As a result, this Court should grant review of the second question presented to secure uniformity of decision.

2–3. THE NEED TO SECURE SETTLEMENT OF IMPORTANT QUESTIONS OF LAW AND PUBLIC INTEREST.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803, 49 L. Ed. 2d 683 (1976). Indeed, the "chief purpose" of the First Amendment is to "prevent previous restraints upon publication[.]" *Twitter, Inc. v. Sessions*, 263 F. Supp. 3d 803, 809 (N.D. Cal. 2017) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)). Thus, "[a]ny 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, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (1963) (collecting cases); *see also Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 697 (6th Cir. 2020) ("'Prior restraints are presumptively invalid . . . .'") (cleaned up).

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." *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 226–27 (6th Cir. 1996). Prior restraints against speech do not merely harm speakers, either; they also harm listening members of the public in equal measure. *See, e.g., McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) ("An injunction against speech harms not just the speakers but also the listeners"); *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247, 22 L. Ed. 2d 542 (1969) ("It is now well established

that the Constitution protects the right to receive information and ideas."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756, 96 S. Ct. 1817, 1823, 48 L. Ed. 2d 346 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.").

Given the importance of these considerations—speakers' rights to speak without fear of contempt and listeners' corresponding rights to hear what speakers have to say—many jurisdictions have adopted an exception to the collateral bar rule when a speaker has been subjected to an unconstitutional prior restraint.[37] Such decisions are also well-rooted

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[37] *See, e.g., Ex parte Tucci*, 859 S.W.2d at 2 ("[O]ne imprisoned for disregarding a court order restraining speech may challenge the underlying restraint as void[.]"); *Gonzalez*, 12 Cal. 4th at 818, 910 P.2d at 1375 ("[O]ut of a concern to protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court. That is, the defendant in a contempt proceeding in this state may challenge the validity of an injunction, the violation of which is the basis for the contempt prosecution, even if no such claim was made when the injunction issued."); *In re Berry*, 68 Cal. 2d 137, 147, 436 P.2d 273, 280 (1968) ("'In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt . . . and that the 'jurisdiction' in question extends beyond mere subject matter or personal jurisdiction to that concept described by us in *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, at page 291, 109 P.2d 942, at page 948, 132 A.L.R. 715: 'Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by

constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of Stare decisis, are in excess of jurisdiction, * * *.'"); *Wood*, 253 Ark. at 203, 485 S.W.2d at 217 (vacating contempt conviction arising from unconstitutional prior restraint on the basis that "a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void and may be collaterally impeached."); *Phoenix Newspapers, Inc.*, 101 Ariz. at 260, 418 P.2d at 595–97 ("If, however, the act complained of as contemptuous is the violation of an order, decree, or judgment, and the contemnor can show that the order, decree, or judgment of the court was without jurisdiction or void for some other reason, he may not be held in contempt. . . .We conclude, therefore, that the court could not, in advance of publication, limit the right of petitioners to print the news and inform the public of that which had transpired in open court in the course of a judicial hearing. The order prohibiting publication and discussion in this case is violative of Article 2, s 6 of the Arizona Constitution and is void."); *State ex rel. Superior Ct. of Snohomish Cnty. v. Sperry*, 79 Wash. 2d 69, 74, 483 P.2d 608, 611 (1971), *holding modified by State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984) ("The rule of *Walker* is inapposite here. There the order was not patently invalid, as compared to the order challenged here which is void on its face, as later in this opinion explained. We have held in a number of cases that a void order or decree, as distinguished from one that is merely erroneous, may be attacked in a collateral proceeding.") (collecting cases); *City of Seattle v. May*, 171 Wash. 2d 847, 852, n.4, 256 P.3d 1161, 1163, n.4 (2011) ("In the context of orders amounting to prior restraints on speech, we have also recognized an exception for orders that are "patently invalid." (citing *State ex rel. Superior Court v. Sperry*, 79 Wash.2d 69, 74, 483 P.2d 608 (1971); *State v. Coe*, 101 Wash.2d 364, 372, 679 P.2d 353 (1984)); *Erpelding*, 292 Neb. at 368, 874 N.W.2d at 280 ("We recognize an exception to the collateral bar rule may exist where a defendant's constitutional rights are at risk[.]"); *Reynolds*, 2012 WL 13014728, at *3 ("There are four recognized exceptions to the collateral bar rule in the eleventh circuit. First, if the court lacks personal or subject matter jurisdiction over the parties or issues before it, then 'its orders may be violated with impunity.' *In re Novak*, 932 F.2d at 1402. Second, if there are inadequate or ineffective opportunities for review of a challenged order then the order may be

in the "transparently invalid" exception suggested by *Walker*, 388 U.S. at 315 (emphasizing that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity."). Based on *Walker*'s distinction between the injunction presented there and "transparently invalid" injunctions, in contexts broader than prior restraints, many jurisdictions have also read *Walker* as establishing an exception to the collateral bar rule whenever an injunction is "transparently invalid." *See, e.g., Dever v. Kelly*, 348 F. App'x 107, 112 (6th Cir. 2009) ("it is well established that a party may ignore an

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ignored. *Id.* Third, if the challenged order requires an 'irretrievable surrender [of a] constitutional guarantee' then the order may be violated without contempt consequences. *Id.* Finally, the circuit has recognized that the collateral bar rule does not apply when there is a 'transparently invalid or patently frivolous order.' *Id.*"); *In re Novak*, 932 F.2d at 1401–02 ("[T]he order must not require an irretrievable surrender of constitutional guarantees. *See Maness*, 419 U.S. at 460, 95 S.Ct. at 592; *Dickinson*, s.7 In such a case, the only way to preserve a challenge to the validity of the order and repair the error is to violate the order and contest its validity on appeal from the district court's judgment of criminal contempt. Finally, court orders that are transparently invalid or patently frivolous need not be obeyed. *Id.* at 509; *In re Providence Journal Co.*, 820 F.2d 1342, 1347 (1st Cir.1986), modified, 820 F.2d 1354 (1st Cir.1987) (en banc; per curiam), cert. dismissed for lack of jurisdiction, 485 U.S. 693, 108 S.Ct. 1502, 99 L.Ed.2d 785 (1988). This exception is based, as is the first for jurisdictional defects, on the notion that 'the right of the citizen to be free of clearly improper exercises of judicial authority' demands respect." *Id.*); *Jeffries v. State*, 724 So. 2d 897, 899 (Miss. 1998) ("Finally, the state concedes that such an order must not necessarily be contested with an attack on the order itself but may be contested by disobedience." (citing *In re Providence J. Co.*, 820 F.2d 1342, 1344 (1st Cir.1986)); *In re Providence J. Co.*, 820 F.2d at 1352 ("When, as here, the court order is a transparently invalid prior restraint on pure speech, the delay and expense of an appeal is unnecessary.").

injunction if it is 'transparently invalid or had only a frivolous pretense to validity.'") (cleaned up); *United States v. Mourad*, 289 F.3d 174, 178 (1st Cir. 2002) ("if an order is 'transparently invalid,' a party may challenge the order's validity or constitutionality as a defense in a criminal contempt proceeding."); *United States v. Terry*, 802 F. Supp. 1094, 1101 (S.D.N.Y. 1992) ("This general rule does have an exception when the underlying order is 'transparently invalid.'") (citing *Walker*, 388 U.S. at 315) (internal quotations omitted)).

The sheer number of judicial decisions addressing the question presented here, *see supra* at note 37, evidences the importance of the issue by itself. Myriad commentators have considered the issue important enough to address as well. *See, e.g.,* Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 553 (1977) ("Where the collateral bar rule applies, then, a gag order is more chilling than subsequent punishment, and is very likely to stop the speech at least temporarily."); Richard Labunski, *A First Amendment Exception to the "Collateral Bar" Rule: Protecting Freedom of Expression and the Legitimacy of Courts*, 22 PEPP. L. REV. 405, 463 (1995) ("Whether challenge to the order comes from direct or collateral appeal does not make a substantial difference in the ability of courts to function, yet it may determine whether First Amendment rights are unfairly forfeited, especially when there is little time before a deadline for the expressive activity."); *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 634–35 (1970) (collecting authority for the proposition that the "'collateral bar' rule has been severely criticized, especially in its frequent application to

labor and free speech cases[,]" and observing that "refusing to hear collateral attacks may, by seeming to sanction judicial lawlessness, work against the societal interest in fostering respect for judicial processes."); Hal Scott Shapiro, *The Collateral Bar Rule-Transparently Invalid: A Theoretical and Historical Perspective*, 24 COLUM. J.L. & SOC. PROBS. 561, 590 (1991) ("[S]ome rights cannot be temporarily delayed or even relinquished at all without irretrievable loss.").

Of note, an exception to the collateral bar rule may also be required as a matter of *federal* constitutional law in prior restraint cases. The U.S. Supreme Court has held that some exceptions to the collateral bar rule are compelled as a federal constitutional matter. *See Maness v. Meyers*, 419 U.S. 449, 468, 95 S. Ct. 584, 596, 42 L. Ed. 2d 574 (1975) (invalidating state criminal contempt conviction because "an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony."). The U.S. Supreme Court has also strongly implied—if not outright determined—that unconstitutional prior restraints cannot give rise to valid contempt convictions, and that citizens who are subject to unconstitutional prior restraints are "within [their] rights" to "stand on [their] right and speak freely[.]" *See Thomas*, 323 U.S. at 536–43 (reversing state contempt conviction borne of unconstitutional prior restraint). As the U.S. Supreme Court explained in one such case:

> The restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the

> card. Thomas knew this and faced the alternatives it presented. When served with the order he had three choices: (1) To stand on his right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty. He chose the first alternative. **We think he was within his rights in doing so.**

Id. at 536 (emphasis added).

This Court "should continue to play a substantial role in the elaboration of federal constitutional principles" by resolving the important question presented. *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 637 (1981). This Court has also emphasized "the importance of correctly resolving constitutional issues," *Keen v. State*, 398 S.W.3d 594, 607 (Tenn. 2012) (quotations omitted), and the Panel's analysis below—which determined that Ms. Fleming's constitutional defense was irrelevant to her appeal when, in fact, it was central to it—is not correct. Because this Application appears to be the first to present the question of whether Tennessee law recognizes an unconstitutional prior restraint exception to the collateral bar rule—and because this Court often "grant[s] [an] application to address [an] issue of first impression[,]" particularly in cases involving important constitutional questions—this Court should grant review to secure settlement of important questions of law and public interest. *See Douglas v. State*, 921 S.W.2d 180, 183 (Tenn. 1996); *see also State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) ("[T]he constitutionality of the statute presents an issue of first impression and provides the opportunity to resolve an important question of law[.]").

The disturbing situation that played out here—wielding the State

of Tennessee's criminal authority against a domestic violence victim who truthfully spoke out about her abuse by a government official—also risks repeating itself if it has not already. Tennessee Code Annotated § 36-4-106(d)(1)(C)'s mandatory statutory injunction—which prohibits "disparaging remarks about the other to or in the presence of any children of the parties or to either party's employer"—applies in every Tennessee divorce case. *See* Tenn. Code Ann. § 36-4-106. Such a prior restraint is hopelessly unconstitutional, even if restricted to children.[38]

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[38] *See, e.g.*, *Shak v. Shak*, 484 Mass. 658, 663, 144 N.E.3d 274, 279 (2020) ("as important as it is to protect a child from the emotional and psychological harm that might follow from one parent's use of vulgar or disparaging words about the other, merely reciting that interest is not enough to satisfy the heavy burden of justifying a prior restraint."); *Israel v. Israel*, 189 N.E.3d 170, 180 (Ind. Ct. App.), *reh'g denied* (July 13, 2022), *transfer denied*, 199 N.E.3d 789 (Ind. 2022) ("we agree with Father that the non-disparagement clause in this case goes far beyond furthering that compelling interest [of protecting the minor child] to the extent it prohibits the parents from "making disparaging comments" about the other in the presence of 'anyone' even when Child is *not* present."); *K.C. v. S.J.*, 71 Misc. 3d 1213(A), at *3, 143 N.Y.S.3d 860 (N.Y. Sup. Ct. 2021) ("This Court determined in the related decision that Plaintiff was not entitled to a prior restraint prohibiting Defendant from posting pictures of their son or information relating to this matrimonial proceeding on the internet. The Court also determined that Plaintiff failed to meet her heavy burden that the imposition of such a restraint is justified to restrict Defendant's First Amendment rights.") (collecting cases); *In re Marriage of Candiotti*, 34 Cal. App. 4th 718, 725, 40 Cal. Rptr. 2d 299, 303 (1995) ("While a court's power is broad, it is not plenary. The court may properly issue orders bearing upon parents' relationships with their children and with each other. But the order here went further, actually impinging on a parent's right to speak about another adult, outside the presence of the children. Such an order, under these circumstances, constitutes undue prior restraint of speech."); *In re*

That Section 36-4-106(d)(1)(C) makes no exception for truthful statements compounds the problem. *See Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 102, 99 S. Ct. 2667, 2670, 61 L. Ed. 2d 399 (1979) ("Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.").

Worst of all, if the Panel's reasoning below holds, then any domestic violence victim who is party to a divorce action—and there are thousands annually—will be restrained from truthfully speaking out about the physical abuse she has endured and risks incarceration for doing so if her allegations happen to reach a spouse's employer. *See Stark*, 2023 WL 5098594, at *9 ("We agree with the trial court's rational inference that Wife knew that the numerous public allegations she made were going to be received by Husband's employer."). Where—as here—a divorcing litigant is married to a member of local law enforcement, it also is not clear that she may *ever* lawfully report abuse through normal channels without risking contempt. This simply cannot be.

For all of these reasons, this Court should grant review "to secure settlement of important questions of law" and "to secure settlement of questions of public interest[.]" *See* Tenn. R. App. P. 11(a)(2). Separate from any other consideration, the fact that Ms. Fleming was unconstitutionally restrained from speaking truthfully about a matter of

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Marriage of Meredith, 148 Wash. App. 887, 896, 201 P.3d 1056, 1060–61 (2009) ("Although we disagree with Meredith's vitriolic and incendiary language, we agree that the family court's order is an unconstitutional prior restraint on Meredith's federal First Amendment rights to free speech and to petition the government for a redress of grievances.").

immense public importance settles the matter. *See Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) ("Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.' (citing *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (in turn quoting *Connick v. Myers,* 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Garrison v. Louisiana*, 379 U.S. 64, 77, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964))).

The other question presented here—whether a criminal contempt conviction may be sustained when a defendant's assertedly contemptuous behavior is not within an injunction's actual terms—presents a similarly weighty constitutional issue. "'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.'" *State v. Pickett*, 211 S.W.3d 696, 704 (Tenn. 2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972)). This Court has also explained that "[t]he primary purpose of the vagueness doctrine is to ensure that our statutes provide fair warning as to the nature of forbidden conduct so that individuals are not 'held criminally responsible for conduct which [they] could not reasonably understand to be proscribed.'" *State v. Crank*, 468 S.W.3d 15, 22–23 (Tenn. 2015) (quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954)).

This case presents the mirror image of that concern. Here, the restraining order to which Ms. Fleming was subjected *was* clearly

defined, and it narrowly specified that she "shall be further enjoined from making any other public allegations against Petitioner, Joe Stark, on social media (on any platform) or to his employer which may affect Petitioner's reputation or employment."[39] After she made statements that were *not* "on social media (on any platform)" and were *not* "to [the Appellee's] employer," though, Ms. Fleming still found herself charged with and convicted of criminal contempt. The Court of Appeals saw no problem with that outcome, either, reasoning "that [Ms. Fleming] knew that the numerous public allegations she made were going to be received by Husband's employer" and that her "choice to use a newspaper as the method of communication with Husband's employer does not insulate her from culpability." *Stark*, 2023 WL 5098594, at *9.

This reasoning offends fundamental notions of due process and fair warning. Words have meaning. Thus, when an order specifies—in granular terms—exactly what communication that is prohibited, one may reasonably assume that other, non-prohibited forms of communication are permissible, because the "expression of one thing implies the exclusion of others[.]" *See Rich v. Tennessee Bd. of Med. Examiners*, 350 S.W.3d 919, 927 (Tenn. 2011).

At minimum, the Panel's approach mocks this Court's requirement that an "order alleged to have been violated must be clear, specific, and unambiguous." *Konvalinka*, 249 S.W.3d at 354. Put simply: no matter how clear, specific, and unambiguous an order's terms, the Panel held that contempt convictions may be sustained based on conduct that falls

[39] R. at 28.

beyond them. That makes little sense. It is also dramatically out of step with modern contempt law. *See supra* at 31–32. It means that litigants who are subject to court orders are never safe, either, since they risk contempt for behavior that an underlying order does not clearly prohibit. Thus, given "the importance of correctly resolving constitutional issues," *Keen*, 398 S.W.3d at 607 (quotations omitted), this Court should grant review of the additional question presented by this Application to ensure that basic due process guarantees designed to "provide fair warning as to the nature of forbidden conduct" are respected. *Crank*, 468 S.W.3d at 22.

4. THE NEED FOR THE EXERCISE OF THE SUPREME COURT'S SUPERVISORY AUTHORITY.

At every stage of her contempt proceedings, Ms. Fleming contested the constitutionality of the prior restraint order that underlies her criminal conviction.[40] The Panel refused to adjudicate her constitutional challenge, deeming the issue irrelevant to her appeal. *See Stark*, 2023 WL 5098594, at *10 ("we 'avoid deciding constitutional issues when a case can be resolved on non-constitutional grounds.' Therefore, we do not reach the second issue concerning whether the mandatory temporary injunctions set forth in Tennessee Code Annotated section 36-4-106(d) are unconstitutional.") (internal citations omitted). As detailed above, though, the unconstitutionality of the prior restraint that Ms. Fleming was convicted of violating is an exception to the collateral bar rule, and

[40] *See, e.g.,* R. at 10–13; *id.* at 44–46; *id.* at 174–79. These citations do not include her additional efforts to challenge the constitutionality of the order on appeal to the Court of Appeals, this Court, and the U.S. Supreme Court.

it provides a defense to contempt under Tennessee law. *See supra* at 35–48.

This chronology demands exercise of this Court's supervisory authority. Courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *See Cohens v. Virginia*, 19 U.S. 264, 404, 5 L. Ed. 257 (1821). Thus, when litigants have presented claims that are within a court's jurisdiction to consider, courts have an affirmative "duty" and "obligation" to adjudicate them. *See id.; cf. Willcox v. Consol. Gas Co. of New York*, 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L. Ed. 382 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction[.]"); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). As a result, if Ms. Fleming is correct that the constitutionality of a prior restraint order may be contested in a contempt proceeding as an exception to the collateral bar rule, then she is entitled—as a matter of right—to have her claim of unconstitutionality adjudicated. *Id.*

With this context in mind, lower courts' refusal to adjudicate Ms. Fleming's defense of unconstitutionality here was a grievous wrong that this Court should remedy. The defense precludes her criminal conviction and will protect her from the real risk of actual incarceration. To date, though, every court to which Ms. Fleming has presented her valid defense

has refused to consider it.[41] Given these circumstances, this Court should exercise its supervisory authority; grant review; and reverse with instructions to adjudicate Ms. Fleming's defense of unconstitutionality on its merits.

VIII. CONCLUSION

This case is a black eye for Tennessee's judiciary. Its courts have jailed a victim of domestic violence, convicted her of a criminal offense, and now threaten to jail her—again—*for truthfully telling a reporter that a government official assaulted her*. If the First Amendment has any force, these outrageous circumstances cannot be tolerated. *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech.").

This Court alone has the power to remedy the unacceptable circumstances presented here. It should do so by reversing—summarily or otherwise—the Appellant's contempt conviction on the ground that her conduct was not even within the terms of the order that she was charged with violating. Alternatively, it should do so by holding that a claim that a prior restraint is transparently unconstitutional may be raised as a defense in a criminal contempt proceeding as an exception to the collateral bar rule. For either reason—or for both—Ms. Fleming's Rule 11 Application for permission to appeal should be **GRANTED**.

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[41] In the trial court, the Appellant raised a host of constitutional objections to the order she was charged with violating. R. at 174–79. The trial court did not meaningfully address them, though it purported to deny her challenge on its merits. R. at 269–70.

Respectfully submitted,

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IX. CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02 and Tennessee Rule of Appellate Procedure 11(a), this brief contains 11,425 words pursuant to § 3.02(a)(1)(a) excluding excepted sections, as calculated by Microsoft Word; it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3); and the argument in this Application does not exceed 50 pages.

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

I hereby certify that on this 18th day of October, 2023, a copy of the foregoing was served via the Court's electronic filing system upon:

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