IN THE SUPREME COURT OF TENNESSEE

STATE OF TENNESSEE,	§	
	§	
Plaintiff-Appellee,	§	Case No. _____
	§	
v.	§	M2024-00959-CCA-WR-CO
	§	
RANDALL JOHNSON,	§	Davidson County Criminal Court
	§	Case No.: 2021-C-1591
Defendant-Appellee, and	§	
	§	
THE NASHVILLE BANNER,	§	
	§	
Intervenor-Appellant.	§	

INTERVENOR-APPELLANT THE NASHVILLE BANNER'S TENN. R. APP. P. 11(a) APPLICATION FOR PERMISSION TO APPEAL OR, ALTERNATIVELY, TENN. R. APP. P. 10(a) APPLICATION FOR EXTRAORDINARY APPEAL

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III. INTRODUCTION

This appeal is procedurally unusual. Appellant the Nashville Banner is a limited-purpose intervenor seeking access to sealed judicial records of extraordinary public concern that bear on a criminal court judge's potential incompetency. Although the Banner was granted permission to intervene for that limited purpose, the Banner was denied its desired relief on the merits. Afterward, the Banner sought Rule 10 review or, alternatively, a writ of certiorari from the Tennessee Court of Criminal Appeals.

On August 15, 2024, the Court of Criminal Appeals ruled that the Banner was not permitted to seek Rule 10 review. *See* **Ex. 1**, Order, *State v. Johnson*, No. M2024-00959-CCA-WR-CO (Tenn. Crim. App. Aug. 15, 2024)), at 3 ("[S]ubsection (e) of Rule 10 specifically limits the opportunity to seek appellate review in criminal cases to the State and the Defendant."). But Rule 10(e) of the Tennessee Rules of Appellate Procedure does not "specifically limit[]" appellate review in this way, and the Panel's contrary ruling below conflicts with binding Court of Criminal Appeals precedent. *See State v. Montgomery*, 929 S.W.2d 409, 411 (Tenn. Crim. App. 1996) (granting Rule 10 application of intervenor "the Memphis Publishing Company" in criminal case). The Panel's contrary ruling below also conflicts with *this* Court's precedent, *see King v. Jowers*, 12 S.W.3d 410, 411 (Tenn. 1999), which the Court of Criminal Appeals was obliged to follow. Thus, apart from the merits of the Banner's Rule 10 appeal, review under Tennessee Rule of Appellate Procedure 11 is warranted, at minimum, to secure uniformity of decision as to whether Rule 10 review is available to intervenors in criminal cases at all.

Having determined that Rule 10 review was unavailable to the Banner, the Court of Criminal Appeals adjudicated the merits of the Banner's claims under the more deferential certiorari standard instead. In so doing, though, the Court of Criminal Appeals:

1. Applied the wrong standard of review, which is less deferential in sealing cases, *see Doe ex rel. Doe v. Brentwood Acad. Inc.*, 578 S.W.3d 50, 53 (Tenn. Ct. App. 2018) ("In light of the important rights involved, the trial court's decision [to seal] is not accorded the deference that [the abuse of discretion] standard normally brings.") (cleaned up);

2. Materially changed settled sealing precedent requiring "the proponent of the seal" to demonstrate the need for sealing, *In re Est. of Thompson*, 636 S.W.3d 1, 19 n.16 (Tenn. Ct. App. 2021); and

3. Held, contrary to settled precedent, that misapplying controlling legal standards "does not render [a trial court's actions] 'illegal[,]'" **Ex. 1** at 5.

For all of these reasons, review is warranted under Tennessee Rule of Appellate Procedure 11. Alternatively, review is warranted under Tennessee Rule of Appellate Procedure 10. In either case, this Court should grant review and reverse.

IV. FILING STATEMENT

Under Tennessee Rule of Appellate Procedure 11(b), the Appellant states that the judgment of the Court of Criminal Appeals that the Banner seeks leave to appeal was entered on August 15, 2024. **Ex. 1**. No petition to rehear was filed afterward. Thus, this Application having been filed within 30 days of the Tennessee Court of Criminal Appeals' judgment, the Appellant's Rule 10 and Rule 11 Applications are timely filed. *See* Tenn. R. App. P. 10(b) ("An appeal from the denial of an application for extraordinary appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in this rule within 30 days of the filing date of the intermediate appellate court's order."); Tenn. R. App. P. 11(b) ("The application for permission to appeal shall be filed with the clerk of the Supreme Court within 60 days after the entry of the judgment of the Court of Appeals or Court of Criminal Appeals if no timely petition for rehearing is filed, or, if a timely petition for rehearing is filed, within 60 days after the denial of the petition or entry of the judgment on rehearing.").

V. STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

A. RULE 11(b)(2) STATEMENT

1. May intervenors in criminal cases seek review under Tennessee Rule of Appellate Procedure 10?

2. Does the traditional abuse of discretion standard apply when reviewing trial court sealing determinations, or is a trial court's decision to seal accorded less deference on appeal?

3. Must the proponent of a seal demonstrate the need for sealing, or may a trial court *sua sponte* seal records filed by parties for reasons that the trial court announces for the first time in a sealing order?

4. Does misapplying a controlling legal standard render a trial court's decision "illegal" for purposes of certiorari review?

B. RULE 10(c) STATEMENT

1. Did the trial court err by ruling that "the cited documents [regarding Judge Cheryl Blackburn's potential incompetency] should remain under seal"?

VI. STATEMENT OF THE FACTS RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW

A. CASE SUMMARY

This case is about a trial court's unfounded order to seal documents of extraordinary public concern that bear on a judge's potential incompetency. Intervenor the Nashville Banner has reported on—and it wants to continue reporting on—local attorneys' "extraordinary step of challenging the competency of longtime Criminal Court Judge Cheryl Blackburn." **Ex. 2**, *Mot. of the Nashville Banner: (1) to Intervene for the Limited Purpose of Unsealing Sealed Record Documents' and (2) to Unseal Three Sealed Record Documents*, at Ex. 4. Despite the overwhelming public interest in the transparency of three filings that bear on that issue, though, the trial court has kept the documents sealed. *See* **Ex. 3**, Order, *State v. Johnson*, No. 2021-C-1591 (Davidson Cty. Crim. Ct. Jun. 26, 2024), at 9. In doing so, the trial court violated party-presentation rules and misapplied controlling legal standards. The trial court also offered a laundry list of unsupported and inherently nonsensical *sua sponte* justifications for keeping the documents sealed, such as finding that unsealing would "deny involved persons their rights to substantive, procedural, and administrative due process[.]" *Id.*

The Banner then sought relief from the Court of Criminal Appeals. Upon review, the Court of Criminal Appeals held that the Banner was forbidden even from seeking Rule 10 review—relief the Court of Criminal Appeals incorrectly believed was available only to the State and the Defendant. *See* **Ex. 1** at 3. Thus, the Court of Criminal Appeals reviewed the Banner's claims under the certiorari standard instead. In doing so,

however, the Court of Criminal Appeals upended long-settled precedent on a host of other issues. This Application followed.

B. FACTS AND PROCEDURAL HISTORY

1. Trial Court Proceedings

On April 8, 2024, Davidson County Criminal Court Judge Cheryl Blackburn entered an order "recus[ing] herself from further presiding over the above captioned case." **Ex. 2** at Ex. 3. The order offered no explanation for Judge Blackburn's recusal. *Id.* Nor did the court's docket suggest what may have prompted it. *Id.* at Ex. 2.

The Banner—a news organization—then engaged in newsgathering. Though no sealed documents were identified on the Court's docket, *see id.*, the Davidson County Criminal Court Clerk later confirmed to the Nashville Banner that there were actually five sealed filings in the case that the Court's docket did not reflect.[1] *Id.* at Ex. 1.

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[1] Because there is "a qualified First Amendment right of access to docket sheets[,]" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004), concealing the existence of sealed documents by omitting them from a case's docket is completely illegal. The reason why is simple: "[T]he ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." *Id.* Thus, "docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Id.* With this context in mind, providing docket sheets to the public that purport to be complete but, in reality, conceal the existence of sealed documents is a flagrant First Amendment violation. *See id.* Even so, this illicit practice is pervasive in Davidson County's criminal court system. *See generally* Connor Daryani, *Criminal Judges Sealing Files, Leaving No Public Record in Davidson County Courts*, THE NASHVILLE BANNER (Jun. 24, 2024),

The Clerk identified three of the sealed documents—which were filed shortly before Judge Blackburn's recusal order entered—as follows:

> [1.] John Doe's Motion for Disqualification of the Trial Judge and For Continuance
>
> [2.] Affidavit of John Doe In Support of John Doe's Motion for Disqualification and to Continue
>
> [3.] Affidavit of Jane Doe In Support of John Doe's Motion for Disqualification and to Continue

Id.

No motion to seal the above documents had ever been filed, though. *See id.* Nor had the trial court ever entered an order sealing any of the documents. *See id.* For documents to be sealed lawfully, however, Local Rules and binding precedent required both of those things and more. *See* 20th Dist. L.R. 7.02, https://circuitclerk.nashville.gov/local-rules-davidson-county-courts-of-record/ (last visited Sept. 12, 2024) ("All papers, documents, electronic documents and files shall be available for public inspection except as specifically exempted by court order or statute. The motion seeking such an order must contain sufficient facts to overcome the presumption in favor of disclosure."); *State v. Drake*, 701 S.W.2d 604, 607 (Tenn. 1985) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.") (cleaned up).

On April 24, 2024, the Nashville Banner moved to intervene in this

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https://nashvillebanner.com/2024/06/24/sealed-documents-davidson-county/.

case for the limited purpose of unsealing the three documents identified above. *See* **Ex. 2**. The Banner's motion was set for hearing and then heard by Criminal Court Judge Angelita Dalton—who was presiding over the case following Judge Blackburn's recusal—on April 30, 2024. **Ex. 3** at 1. "At the April 30, 2024 hearing, neither the State nor counsel for Mr. Johnson challenged the Nashville Banner's motion[.]" *Id.* at 2. Neither party filed any opposition to the Nashville Banner's motion, either. The trial court then "took the matter under advisement[.]" *Id.* at 2.

Nearly two months then passed without a ruling. As a result—and given the time-sensitive nature of reporting generally and the straightforward, unopposed nature of the relief requested—the Banner filed notice of its intent to seek certiorari review absent a ruling by June 26, 2024. *See* **Ex. 4**, *Notice of the Nashville Banner of Intent to Seek Cert. Review Absent Disposition by June 26, 2024.*

On June 26, 2024, Judge Dalton ruled on the Banner's motion. *See* **Ex. 3**. Judge Dalton's order granted the Banner's motion to intervene but denied the Banner's motion to unseal any of the three documents at issue. *See id.* at 9. Thus, all three documents remain sealed in their entirety.

As justification for her ruling, Judge Dalton determined that it was her "duty" to raise and credit new sealing arguments *sua sponte*, even though they were not raised by sealing proponents themselves. *Id.* at 2 ("Although the parties declined to offer arguments on the record on the hearing date, it is ultimately the duty of this Court to thoroughly consider and balance the respective interests."); *but see In re Est. of Thompson*,

636 S.W.3d at 19 n.16 ("***[T]he proponent of the seal*** must demonstrate that the seal is necessary to preserve a compelling interest.") (emphasis added). Judge Dalton's ruling also expressly "decline[d]" to make any factual findings about the content of the sealed records. *See* **Ex. 3** at 8 ("this Court declines to discuss or confirm any speculation regarding the specific content of the referenced documents"); *but see Drake*, 701 S.W.2d at 607 (requiring "***findings*** specific enough that a reviewing court can determine whether the closure order was properly entered.") (emphasis added) (cleaned up). Finally, as to the legal interests that supported sealing, Judge Dalton recounted a laundry list of them and noted her apparent concern that the Banner would publicize claims in the documents if they were unsealed, stating:

> [T]his Court further finds that the public disclosure of these particular documents, especially at this premature juncture, would likely result in the publication of claims that (a) are currently insufficiently supported, (b) would annoy, embarrass, oppress, or create undue burdens for involved persons, (c) deny involved persons their rights to substantive, procedural, and administrative due process, and (d) delay court proceedings. The Court further finds that any substantiated concerns related to judicial competency may also be addressed through other appropriate avenues, which counsel for the existing parties are sufficiently equipped to pursue if they have not already.

Ex. 3 at 9.

2. Intermediate Appellate Proceedings

After the trial court denied the Banner's motion to unseal, the Banner timely sought review in the Court of Criminal Appeals. *See* **Ex. 5**, *Pet. of the Nashville Banner for Writ of Cert., Or, Alternatively, for*

Extraordinary Appeal Under Tenn. R. App. P. 10(a). The Court of Criminal Appeals then invited responses from "the Defendant and the State." **Ex. 6**, Order, *State v. Johnson*, No. M2024-00959-CCA-WR-CO (Tenn. Crim. App. Jul. 11, 2024).

Only the State responded. *See* **Ex. 7**, *Resp. of the State of Tenn.* The State agreed with the Banner that the Court of Criminal Appeals "should review the sealed documents to determine whether the trial court's order reflects a plain and palpable abuse of discretion." *Id.* at 1. The State did *not* assert that Rule 10 review was unavailable to the Banner. *See generally id.* To the contrary, the State maintained that Rule 10 review *was* available to the Banner, but it asserted (albeit misleadingly[2]) that the standards that govern certiorari review "apply 'with equal force [sic]' to applications for permission to seek an extraordinary appeal under Tenn. R. App. P. 10." *See id.* at 6 (citing *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980)).

The Court of Criminal Appeals then undertook review. *See* **Ex. 1**. In doing so, it held *sua sponte*—and contrary to both the Banner's argument and the State's—that "a Rule 10 appeal is not available to the Petitioner, who is not a party to the underlying criminal proceeding." *Id.*

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[2] The cited case holds that any of the considerations that would support granting certiorari also would merit granting Rule 10 review, not that Rule 10 review is limited by certiorari considerations. *See State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980) ("We think the Johnson rules apply not only to the common law writ of certiorari but with equal vigor to applications made pursuant to Rule 10, Tenn. R. App. P. Whenever any of these conditions exist an Application for an Extraordinary Appeal by permission is appropriate.")) (cleaned up).

at 3. Thus, the Court of Criminal Appeals applied the more deferential certiorari standard instead and denied the Banner relief. In doing so, the Court of Criminal Appeals held that: (1) the typical abuse of discretion standard applied, *id.* at 4; (2) trial courts may offer sealing justifications even if sealing proponents do not, *id.* at 5; and (3) misapplying controlling legal standards does not make a trial court's actions illegal, *id.*

This timely Application followed.

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

This Court should grant review under Tennessee Rule of Appellate Procedure 11(a). Here, review is warranted given the need to secure:

1. Uniformity of decision;
2. Settlement of important questions of law; and
3. Settlement of questions of public interest.

A. THE NEED TO SECURE UNIFORMITY OF DECISION

1. Uniformity is necessary to resolve whether intervenors may obtain Rule 10 review in criminal cases.

Contrary to both the Nashville Banner's position and the State's, the Court of Criminal Appeals held that "a Rule 10 appeal is not available to the Petitioner, who is not a party to the underlying criminal proceeding." **Ex. 1** at 3. As justification for this holding, the Court of Criminal Appeals determined that "subsection (e) of Rule 10 specifically limits the opportunity to seek appellate review in criminal cases to the State and the Defendant." *Id.*

There are significant problems with this analysis, not the least of which is that the Court of Criminal Appeals raised and adjudicated it *sua*

sponte in contravention of party-presentation rules and without allowing the parties to be heard on it. *But see State v. Bristol*, 654 S.W.3d 917, 923–25 (Tenn. 2022). Apart from that error, though, the Court of Criminal Appeals' ruling is wrong, and it conflicts with binding precedent from both this Court and the Court of Criminal Appeals itself.

Beginning with Court of Criminal Appeals precedent: The Court of Criminal Appeals has previously held in a published case that Rule 10 review is available to intervenors. *See Montgomery*, 929 S.W.2d at 411 ("Shortly after the hearing, the Memphis Publishing Company filed an application for extraordinary appeal pursuant to Rule 10, Tenn. R. App. P. This Court granted the application on April 23, 1996.") (cleaned up). *Montgomery*'s reasoning stemmed from the fact that this Court's published rules expressly reflect as much. *See* Tenn. Sup. Ct. Rule 30(e) ("Appellate review of a presiding judge's decision to terminate, suspend, limit, or exclude media coverage shall be in accordance with Rule 10 of the Tennessee Rules of Appellate Procedure.").

To the extent *Montgomery* left any doubt about intervenors' ability to seek Rule 10 review, this Court resolved it in 1999 when it granted such relief. *See King*, 12 S.W.3d at 411 ("MPC thereafter filed an application for permission to appeal pursuant to Tenn. R. App. P. 9 and 10, alternatively. On November 19, 1999, the Court of Appeals denied the application. On November 22, 1999, MPC filed an application for permission to appeal pursuant to Tenn. R. App. 10 or 11, alternatively, in this Court. MPC also sought expedited review of the application. On November 24, 1999, this Court granted the application. We now reverse

and vacate the trial court's order refusing MPC access to voir dire and the transcript of the voir dire proceedings.") (cleaned up). Further, because "'[v]ertical *stare decisis* is absolute, as it must be in a hierarchical system[,]'" the Court of Criminal Appeals panel below was obliged to adhere to this Court's precedent permitting Rule 10 appeals by litigants other than a criminal defendant and the State. *Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n*, No. 24-3051, 2024 WL 4052976, at *4 (6th Cir. Sept. 5, 2024) (quoting *Ramos v. Louisiana*, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring in part)). Because the Panel did not do so, though, the uniformity of decision that existed before the Panel's ruling no longer does. Thus, trial courts now have the impossible task of complying with conflicting lines of precedent.

Rule 10(e) is not to the contrary. *See* Tenn. R. App. P. 10(e) ("Permission to appeal under this rule may be sought by the state and defendant in criminal actions."). Notwithstanding the Court of Criminal Appeals' analysis, Rule 10(e) does not limit the availability of Rule 10 review to the State and a criminal defendant. Instead, it simply makes clear that both the State and a criminal defendant are *permitted* to file a Rule 10 appeal—something that distinguishes Rule 10 from Rule 3(b)–(c), which limits both criminal defendants' and the State's right of appeal to specified circumstances. *See id.*; *cf. State v. Strode*, 232 S.W.3d 1, 10 (Tenn. 2007) (Rule 3(c) "provid[es] for State's appeal as of right in limited circumstances"). Further, when this Court wants to restrict a litigant's right of appeal, it knows how to do so. *See, e.g.*, Tenn. R. App. P. 3(c) ("In criminal actions an appeal as of right by the state lies **only**" under

specified circumstances) (emphasis added).

The Court of Criminal Appeals' determination that "a Rule 10 appeal is not available to the Petitioner" because the Banner "is not a party to the underlying criminal proceeding" also misapprehends the nature of intervention. **Ex. 1** at 3. Because this Court's binding precedent favored intervention under the circumstances presented here, the trial court granted the Banner's motion to intervene. *See* **Ex. 3** at 9 ("the Nashville Banner may intervene in this criminal case for the limited purpose of seeking to unseal documents"). And "intervention is the requisite method for a nonparty to become a party." *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009). Thus, the Banner very much *is* "a party to the underlying criminal proceeding[,]" **Ex. 1** at 3, even if it is a party for a limited purpose only.

For these reasons, this Court should grant review to secure uniformity of decision. After doing so, this Court should reverse because the Court of Criminal Appeals' decision is wrong.

2. Uniformity is necessary to resolve whether the traditional abuse of discretion standard applies in sealing cases.

In *Doe ex rel. Doe v. Brentwood Academy Inc.*, the Tennessee Court of Appeals held that:

> We review the trial court's orders to seal its records under an abuse of discretion standard. *In re NHC-Nashville Fire Litigation*, 293 S.W.3d 547, 560 (Tenn. Ct. App. 2008). **However, " '[i]n light of the important rights involved, the [trial] court's decision is not accorded' the deference that standard normally brings."** *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 306 (6th Cir. 2016). (quoting *In re Knoxville News-Sentinel Co.*,

723 F.2d 470, 476 (6th Cir. 1983)).

Doe ex rel. Doe, 578 S.W.3d at 53 (emphasis added).

The Court of Appeals then reaffirmed that less deferential standard of review in *In re Est. of Thompson*, 636 S.W.3d at 11, which it deemed "important[]" to note. *See id.* ("Importantly, although we review a trial court's order to seal its records for an abuse of discretion, 'in light of the important rights involved, the decision is not accorded' the deference that standard normally brings.") (cleaned up).

In its decision below, the Court of Criminal Appeals did not apply this less deferential standard. *See* **Ex. 1** at 4. Instead, it applied the traditional abuse of discretion standard. *See id.* But the standards are different, and the difference between them is "important[]." *In re Est. of Thompson*, 636 S.W.3d at 11. Thus, given the conflict between the Court of Appeals and the Court of Criminal Appeals on the matter, review is necessary to secure uniformity of decision concerning whether the traditional abuse of discretion standard applies in sealing cases.

3. Uniformity is necessary to resolve whether the proponent of a seal must demonstrate the need for sealing.

During the proceedings below, the trial court openly acknowledged that no party had offered any arguments opposing the Banner's motion to unseal. *See* **Ex. 3** at 2 ("Although the parties declined to offer arguments on the record on the hearing date, it is ultimately the duty of this Court to thoroughly consider and balance the respective interests."). Even so, the trial court assumed "the duty" to do so in their place. *Id.*

Under previously settled Tennessee law, this was seriously

improper. Until the Court of Criminal Appeals' decision below, Tennessee law instructed that "*the proponent of the seal* must demonstrate that the seal is necessary to preserve a compelling interest." *In re Est. of Thompson*, 636 S.W.3d at 19 n.16 (emphasis added); *see also Baugh v. United Parcel Serv., Inc.*, No. M2012-00197-COA-R3CV, 2012 WL 6697384, at *7 (Tenn. Ct. App. Dec. 21, 2012) ("[T]he reasons for sealing judicial records must be 'compelling', with the burden for demonstrating the compelling reason placed *on the party seeking to prevent public access to the records*.") (emphasis added), *reh'g. denied*; *app. for perm. to app. voluntarily dismissed* (Tenn. May 9, 2013). The trial court's own local rules—which the trial court did not follow—similarly required sealing proponents to justify sealing by "motion." *See* 20th Dist. L.R. 7.02, https://circuitclerk.nashville.gov/local-rules-davidson-county-courts-of-record/ (last visited Sept. 12, 2024) ("All papers, documents, electronic documents and files shall be available for public inspection except as specifically exempted by court order or statute. The motion seeking such an order must contain sufficient facts to overcome the presumption in favor of disclosure.").

This orderly process respects the "'strong presumption in favor of openness' regarding court records." *Doe ex rel. Doe*, 578 S.W.3d at 53 (quoting *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016)). It also allows proponents of public access—who have no burden whatsoever, *see In re Est. of Thompson*, 636 S.W.3d at 19 n.16 ("The burden for unsealing a court record does not fall to the party seeking access to the record; rather, the proponent of the seal must

demonstrate that the seal is necessary to preserve a compelling interest.")—to know the arguments supporting sealing that they need to rebut.

Contrary to previously settled precedent, though, *see supra*, the Court of Criminal Appeals held that a sealing proponent's failure to support sealing poses no problem. *See* **Ex. 1** at 5 ("Although neither party to the underlying criminal case requested sealing of the documents, '[c]ourts have inherent power to seal their records when privacy interests outweigh the public's right to know.'"). Thus, the Court of Criminal Appeals held that a court's "inherent power" could be used to shore up a sealing proponent's failure to support sealing. *See id.*

Apart from contravening settled sealing precedent, there are practical reasons why allowing a trial court to raise *sua sponte* sealing arguments in the parties' place makes no sense. The filings at issue here are not judicial orders or other judicially created documents that the parties received from the Court under instructions not to disseminate them. Instead, as in virtually all cases where a litigant proposes sealing a document, the sealed documents were filed by a litigant. *See* **Ex. 2** at Ex. 1. But John Doe—and any party or party's attorney who was presumably served with John Doe's filings—was not under any obligation not to disseminate the documents that John Doe filed, whether to the Banner or anyone else. Thus, in the absence of an argument by "the proponent of the seal" that sealing "is necessary to preserve a compelling interest[,]" *see In re Est. of Thompson*, 636 S.W.3d at 19 n.16, the practical effect of a sealing order is to deny the public access to documents that the parties and others are under no obligation to keep secret and do

not want to.

This would make no sense. The trial court also apparently recognized this problem and addressed it by entering a *separate* non-dissemination order—one that no one requested—that can properly be characterized as a prior restraint. *See* **Ex. 8**, Order, *State v. Johnson*, No. 2021-C-1591 (Davidson Cty. Crim. Ct. Jun. 26, 2024), at 1 ("Counsel for the State and Counsel for the Defendant are hereby **ORDERED to refrain from disseminating the referenced documents to any other person or entity, including the Defendant**."). Of note, that order was not entered until June 26, 2024—meaning that months passed before the parties or their counsel were subject to any non-dissemination restriction. *See id.* Whether anyone else received "the referenced documents" during this period of months, *see id.*—a fact that would make sealing improper categorically[3]—also is unknown and unknowable.

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[3] Because "unsealing a document cannot be undone[,]" courts are forbidden from retrospectively sealing public filings. *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 449 (5th Cir. 2019)). The reason is straightforward: "'Secrecy is a one-way street: Once information is published, it cannot be made secret again.'" *See In re Owens*, 843 F. App'x 677, 678 (6th Cir. 2021) (quoting *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008)); *see also Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) ("[O]nce the parties' confidential information is made publicly available, it cannot be made secret again." (citing *Ameziane v. Obama*, 620 F.3d 1, 5 (D.C. Cir. 2010); *In re Copley Press, Inc.*, 518 F.3d at 1025)).

Put another way: "The law cannot recall information once it is in the public domain." *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992). Thus, "[o]nce the information is disclosed, the 'cat is out of the bag' and [further] review is futile." *Al Odah v. United States*, 559 F.3d

There is a reason why sealing cases do not normally involve questions like this. The reason is that, when documents that a party believes are confidential and wants to keep sealed are filed in court, the law imposes *on that party* the obligation to establish that compelling interests support sealing. But the law does *not* contemplate trial courts *sua sponte* imposing non-dissemination obligations on litigants who do not want to or otherwise will not support a claim of confidentiality regarding their own documents. The Court of Criminal Appeals' contrary order tolerating that approach enjoys no basis in law. *See Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 226–27 (6th Cir. 1996) ("In the case of a prior restraint on pure speech, the hurdle is substantially higher: 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.").

4. Uniformity is necessary to resolve whether misapplying controlling legal standards renders a trial court's decision illegal.

The Court of Criminal Appeals denied the Banner relief on the basis that misapplying controlling legal standards is not "illegal" for purposes of certiorari review. *See* **Ex. 1** at 5 ("The Petitioner asserts Judge Dalton 'misapplied controlling legal standards.' Contrary to the Petitioner's assertion, however, such an alleged misapplication does not render Judge Dalton's actions 'illegal.'"). This Court has long held otherwise, however.

539, 544 (D.C. Cir. 2009).

See, e.g., *Willoughby*, 594 S.W.2d at 392 ("[T]he common law writ [will] lie: . . . [w]here the ruling constitutes a failure to proceed according to the essential requirements of the law."); *State v. Johnson*, 569 S.W.2d 808, 813 (Tenn. 1978); *Putnam Cty. Beer Bd. v. Speck*, 201 S.W.2d 991, 993 (Tenn. 1947); *State v. Womack*, 591 S.W.2d 437, 442 (Tenn. Ct. App. 1979) ("certiorari (applies when) the essential forms of the law have not been observed") (cleaned up); *In re Lucas H.*, 634 S.W.3d 1, 7 (Tenn. Ct. App. 2021) ("certiorari has been deemed appropriate to correct . . . proceedings inconsistent with essential legal requirements"); *State v. Hernandez*, No. M2012-01235-CCA-R3CD, 2013 WL 1858778, at *5 (Tenn. Crim. App. May 2, 2013) ("the writ of certiorari is available 'to correct . . . proceedings inconsistent with essential legal requirements'" (quoting *State v. Lane*, 254 S.W.3d 349, 355 (Tenn. 2008))), *app. denied* (Tenn. Oct. 25, 2013).

Further, all including the Court of Criminal Appeals agree that certiorari is available to remedy plain and palpable abuses of discretion. *See* **Ex. 1** at 4. And Tennessee law has long reflected that "[a] trial court 'abuses its discretion' when it makes an error of law." *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *see also Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) ("An abuse of discretion occurs when a court strays beyond the applicable legal standards[.]"); *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011) ("An abuse of discretion occurs when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice."); *Newsom v. Tenn. Republican Party*, 647

S.W.3d 382, 385 (Tenn. 2022) ("A court abuses its discretion when it causes an injustice to the party challenging the decision by [] applying an incorrect legal standard"); *Earheart v. Cent. Transp.*, No. M2023-00384-SC-R3-WC, 2023 WL 8109482, at *5 (Tenn. Workers Comp. Panel Nov. 22, 2023) ("A trial court abuses its discretion when it causes an injustice by applying an incorrect legal standard"), *no app. filed*.

For these reasons, the Court of Criminal Appeals' outlying holding that misapplying controlling legal standards "d[id] not render Judge Dalton's actions 'illegal[,]'" **Ex. 1** at 5, similarly merits review to secure uniformity of decision.

B. THE NEED TO SECURE SETTLEMENT OF IMPORTANT QUESTIONS OF LAW AND PUBLIC INTEREST

To support sealing, a trial court must find that "a compelling interest support[s] [a] seal on [] particular documents." *In re Estate of Thompson*, 636 S.W.3d at 17. Satisfying "the 'compelling interest' standard demands more than broad, vague allusions to general privacy interests or potential harm." *Id.* at 23. Instead, the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values[.]" *In re NHC–Nashville Fire Litig.*, 293 S.W.3d at 560 (quoting *Drake*, 701 S.W.2d at 607–08 (in turn quoting *Press–Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 506 (1984))).

Put another way: "[T]he reasons for sealing judicial records must be 'compelling', with the burden for demonstrating the compelling reason placed on the party seeking to prevent public access to the records." *Baugh*, 2012 WL 6697384, at *7 (quoting *In re NHC–Nashville Fire Litig.*,

293 S.W.3d at 567). Further, a "court's failure to set forth those reasons—as to why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary—is itself grounds to vacate an order to seal[.]" *Shane Grp., Inc.*, 825 F.3d at 306.

Here, the trial court offered a laundry list of unsupported, boilerplate, and inherently nonsensical justifications for sealing. In particular, the trial court's order states:

> [T]his Court further finds that the public disclosure of these particular documents, especially at this premature juncture, would likely result in the publication of claims that (a) are currently insufficiently supported, (b) would annoy, embarrass, oppress, or create undue burdens for involved persons, (c) deny involved persons their rights to substantive, procedural, and administrative due process, and (d) delay court proceedings. The Court further finds that any substantiated concerns related to judicial competency may also be addressed through other appropriate avenues, which counsel for the existing parties are sufficiently equipped to pursue if they have not already.

Ex. 3 at 9.

These findings are incoherent, and they make little practical sense. For instance, the sealed documents—a motion for disqualification of the earlier trial judge and two supporting affidavits—already produced their intended result, so there is no "premature juncture" to which the trial court could sensibly be referring. *Id.*

The trial court's commentary that disclosure of the sealed documents would result "in the publication of claims" that "are currently insufficiently supported" is similarly bizarre. *Id.* The press

appropriately reports on allegations alone—including allegations in civil lawsuits and charges of presumed-innocent criminal defendants—every day. If the trial court's order is referring to claims *about Judge Blackburn's potential incompetency*—which is the strong implication of the order, although it is admittedly non-specific—that fact also would *support* transparency, rather than the other way around. *See Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996) ("Factors in the balance weighing against a finding of good cause [for secrecy] include: (1) the party benefitting from the protective order is a public entity or official; (2) the information sought to be sealed relates to a matter of public concern; and (3) the information sought to be sealed is relevant to other litigation"); *Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) ("[The last two factors clearly weigh against the protective order. The parties benefitting from the protective order are public officials, and the case certainly involves 'issues important to the public.'").

Next, the trial court stated—without specificity—that transparency "would annoy, embarrass, oppress, or create undue burdens for involved persons[.]" **Ex. 2** at 9. Given that this boilerplate series of different justifications was written disjunctively, one wonders: Which one is it? Which "involved persons"? And how, exactly? The trial court's order does not say, and the Banner is not in a position to guess. Had a litigant sought sealing on these bases, though, they would risk (and deserve) being admonished by a reviewing court for offering sealing justifications that were "brief, perfunctory, and patently inadequate." *See, e.g.*, *Shane Grp., Inc.*, 825 F.3d at 306 ("The parties' asserted bases for sealing off all

this information were brief, perfunctory, and patently inadequate."); *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002) ("So perfunctory was this motion that it could have been summarily rejected.").

Perhaps worst of all, the trial court added that transparency would "deny involved persons their rights to substantive, procedural, and administrative due process[.]" **Ex. 3** at 9. It is impossible for that to be true, and the trial court's claim otherwise is ridiculous. Simply put: There is not even a theoretical scenario in which the act of unsealing presumptively public judicial records could deny any such rights. The "involved persons" whose "substantive, procedural, and administrative due process" rights would purportedly be compromised by unsealing also are unidentified, *see id.*, making the claim even more bizarre.

The trial court's order—which intentionally "decline[d]" to make required factual findings, *see* **Ex. 3** at 8—concludes by suggesting what is really going on here, though. It states: "The Court further finds that any substantiated concerns related to judicial competency may also be addressed through other appropriate avenues, which counsel for the existing parties are sufficiently equipped to pursue if they have not already." *Id.* at 9.

It is hard to read this passage in any way other than to suggest that Judge Dalton is concealing from the public judicial records that allege her colleague is incompetent. *See id.* As a justification for doing so, Judge Dalton has determined that the public should be deprived of access to that information because "the existing parties are sufficiently equipped

to pursue" relief regarding it. *Id.* But a judge's potential incompetency is a matter of *public* concern, not a private matter that a trial court has any authority to restrict to litigants alone. Keeping judicial records secret because they call a colleague's competency into question also is not a recognized justification for sealing. In fact, precisely the opposite is true. *See Ballard*, 924 S.W.2d at 658 ("Factors in the balance weighing against a finding of good cause [for secrecy] include: (1) the party benefitting from the protective order is a public entity or official; (2) the information sought to be sealed relates to a matter of public concern; and (3) the information sought to be sealed is relevant to other litigation"); *Shingara*, 420 F.3d at 308 ("[T]he last two factors clearly weigh against the protective order. The parties benefitting from the protective order are public officials, and the case certainly involves 'issues important to the public.'").

With these considerations in mind, offering vague, implausible, and patently inadequate sealing justifications strictly for "the benefit of the Brotherhood of the Robe" is improper. *Cf. Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 473 (2015) (Scalia, J., dissenting). Indeed, it is arguably *misconduct* that compromises—or at least appears to compromise—the independence, integrity, and impartiality of the trial court judge and the judiciary itself. *See* Rule of Judicial Conduct 1.2; *id.* at cmt. 3.

It is also fair to say that the judiciary's institutional legitimacy depends on whether courts will reliably remedy improper sealing of the sort that happened here. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) ("Without publicity, all other checks are

insufficient[.]" (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827))). As the U.S. Court of Appeals for the Fifth Circuit has explained: "Public trust cannot coexist with a system wherein 'important judicial decisions are made behind closed doors' and, worse, private litigants do the closing." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 418 (5th Cir. 2021) (cleaned up); *cf. Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."). Thus, to "promote community respect for the rule of law" and "provide a check on the activities of judges and litigants," *Ballard*, 924 S.W.2d at 661, this Court should intervene promptly and restore the public's right to transparency.

C. GIVEN THAT REVIEW MUST BE PROMPT TO BE MEANINGFUL, THIS COURT SHOULD GRANT THE BANNER'S RULE 10 APPLICATION.

Review is "necessary for complete determination of the action on appeal[.]" Tenn. R. App. P. 10(a)(2). Because "news is time-sensitive and occurs spontaneously, that lack of access cannot be remedied retrospectively." *Karem v. Trump*, 404 F. Supp. 3d 203, 217 (D.D.C. 2019), *aff'd as modified*, 960 F.3d 656 (D.C. Cir. 2020). Thus, delaying review will irreparably harm the Banner, undermine the value of public access, and undermine newsgathering generally. *See, e.g.*, *id.*; *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 328 (4th Cir. 2021) ("The press and public thus have an important interest in reasonably contemporaneous access"); *Courthouse News Serv. v. O'Shaughnessy*, 663 F. Supp. 3d 810, 818 (S.D. Ohio 2023), *app. dismissed* (June 20, 2023)

("the public and press have an important interest in reasonably contemporaneous access"); *Courthouse News Serv. v. Jackson*, No. CIV A H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (quoting *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous[.] The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression[.] Each passing day may constitute a separate and cognizable infringement of the First Amendment.") (cleaned up)).

Because the Court of Criminal Appeals has suggested that there is no "appeal as of right from the denial of" an unsealing motion, *State v. Davis*, No. M2023-00065-CCA-R3-CO, 2024 WL 1528465, at *1 (Tenn. Crim. App. Apr. 9, 2024), it appears that there is no remedy available as of right under the Tennessee Rules of Appellate Procedure. At minimum, a traditional appellate remedy would not be available to the Banner until after a final judgment below, at which point the value of public access will have drastically diminished. Thus, review is warranted under Tennessee Rule of Appellate Procedure 10(a)(2).

Review also is warranted under Tennessee Rule of Appellate Procedure 10(a)(1), given that the trial court so far departed from the accepted and usual course of judicial proceedings as to require immediate review. Here, the trial court violated party-presentation rules by raising its own sealing arguments *sua sponte* in the litigants' place. After that,

the trial court credited its own unraised arguments without giving the Banner a chance to respond to them. It also intentionally refused to make mandatory factual findings that would promote appellate review and enable meaningful appellate scrutiny. *See* **Ex. 3** at 8 ("this Court declines to discuss or confirm any speculation regarding the specific content of the referenced documents"); *but see Drake*, 701 S.W.2d at 607 (requiring "***findings*** specific enough that a reviewing court can determine whether the closure order was properly entered") (emphasis added). Instead, the trial offered "brief, perfunctory, and patently inadequate" sealing justifications that inherently make no sense, *Shane Grp., Inc.*, 825 F.3d at 306—all with the apparent purpose of shielding a judicial colleague from lawful reporting about a matter of extraordinary public concern. For these reasons, the lower court so far departed from the accepted and usual course of judicial proceedings as to require immediate review. *See* Tenn. R. App. P. 10(a)(1).

VIII. STATEMENT OF THE RELIEF SOUGHT

This Court should grant review and reverse the trial court's June 26, 2024 order that "the cited documents [regarding Judge Blackburn's potential incompetency] should remain under seal." *See* **Ex. 2** at 9.

IX. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's June 26, 2024 sealing order.

Respectfully submitted,

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X. APPENDIX OF EXHIBITS

The Nashville Banner has appended the following exhibits to this Petition:

Ex. 1, Order, *State v. Johnson*, No. M2024-00959-CCA-WR-CO (Tenn. Crim. App. Aug. 15, 2024)

Ex. 2, Mot. of the Nashville Banner: (1) to Intervene for the Limited Purpose of Unsealing Sealed Record Documents' and (2) to Unseal Three Sealed Record Documents

Ex. 3, Order, *State v. Johnson*, No. 2021-C-1591 (Davidson Cty. Crim. Ct. Jun. 26, 2024)

Ex. 4, Notice of the Nashville Banner of Intent to Seek Cert. Review Absent Disposition by June 26, 2024

Ex. 5, Pet. of the Nashville Banner for Writ of Cert., Or, Alternatively, for Extraordinary Appeal Under Tenn. R. App. P. 10(a)

Ex. 6, Order, *State v. Johnson*, No. M2024-00959-CCA-WR-CO (Tenn. Crim. App. Jul. 11, 2024)

Ex. 7, Resp. of the State of Tenn.

Ex. 8, Order, *State v. Johnson*, No. 2021-C-1591 (Davidson Cty. Crim. Ct. Jun. 26, 2024)

XI. CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02 this Application contains 7,333 words as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font.

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz, BPR #032176

XII. CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of September, 2024, a copy of the foregoing was transmitted via the Court's electronic filing system to the following:

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