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

PATRICK M. MALONE,	§	
	§	
Respondent-Appellant,	§	
	§	
v.	§	M2023-01453-COA-WR-CV
	§	
JAMES WILLIAM ROSE and,	§	Williamson County Chancery Court
JENNIE ADAMS ROSE,	§	Case No.: 19CV-48249
	§	
Petitioners-Appellees.	§	

RESTRAINED NON-PARTY APPELLANT/PETITIONER MICHAEL P. MALONE'S PRINCIPAL BRIEF IN SUPPORT OF CERTIORARI

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IV. APPLICABLE STANDARDS OF REVIEW

1. Whether the trial court's *sua sponte* prior restraint orders forbidding Mr. Malone's speech about what took place in a public judicial proceeding abridge the First Amendment is a question of constitutional law that this Court reviews de novo. *See Bredesen v. Tennessee Jud. Selection Comm'n*, 214 S.W.3d 419, 424 (Tenn. 2007) ("The issues presented for review—issues of . . . constitutional law—are questions of law which this Court reviews de novo with no presumption of correctness accorded to the trial court's conclusions.") (collecting cases); *see also Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996) ("the standard of review is different. The decision to grant or deny an injunction is reviewed for abuse of discretion. [] We review First Amendment questions de novo.") (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)).

2. Whether the trial court's *sua sponte* prior restraint orders are void because they were entered while a motion to recuse was pending is a question of law that this Court reviews de novo. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999) ("Cases that involve mixed questions of law and fact are subject to de novo review.").

3. Whether the trial court's *sua sponte* prior restraint orders are void for lack of jurisdiction is a question of law that this Court reviews de novo. *State v. L.W.*, 350 S.W.3d 911, 915 (Tenn. 2011) ("A determination of jurisdiction is a question of law, which we review de novo with no presumption of correctness.") (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)).

4. Under Tenn. Code Ann. § 27-8-101:

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

Id.

V. INTRODUCTION

This certiorari appeal concerns a pair of unconstitutional prior restraint orders that prohibit non-party Appellant Michael Malone from discussing what happened in a public judicial proceeding.[1] Compounding the illegality, the trial court issued the offending orders while a motion to recuse was pending and against a non-party witness over whom the trial court lacked lawful jurisdiction.[2]

As detailed below, the trial court's prior restraint orders are facially unconstitutional; they are void under Tennessee Supreme Court Rule 10B, section 1.02; and they are void for lack of jurisdiction. Further, as this Court has already determined, Michael Malone—a non-party to this action—"has no other means of obtaining appellate review of the trial court's orders other than by writ of certiorari." *See* Order (Nov. 9, 2023); Tenn. Code Ann. § 27-8-101. As a result, this Court should exercise its certiorari authority, and the gag provisions set forth in the Chancery Court's August 15, 2023 *Order from June 9, 2023, Hearing Denying Bond*[3] and its duplicative August 17, 2023 *Order from June 9, 2023, Hearing Denying Bond*[4] should be **VACATED**.

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[1] R. at 28 ("It is further ORDERED, ADJUDGED, and DECREED that Paternal Grandfather and Father shall be, and are hereby, prohibited from speaking to the minor child about these legal proceedings, as that topic is an adult issue."); R. at 36 (same).

[2] R. at 10–22 (August 7, 2023 motion to recuse); R. at 23–30 (Aug. 15, 2023 prior restraint order); R. at 31–38 (Aug. 17, 2023 prior restraint order); R. at 39–47 (Sep. 13, 2023 order denying motion to recuse).

[3] R. at 23–30.

[4] R. at 31–38.

VI. STATEMENT OF THE CASE

On June 9, 2023, the Williamson County Chancery Court—ex-Judge Binkley presiding—held a hearing on Respondent Patrick M. Malone's motion to set bail pending appeal of his criminal contempt convictions.[5] Maternal grandparents James Williams Rose and Jennie Adams Rose—the Appellees here—"ask[ed] that the motion be denied[,]"[6] the effect of which would be to keep Patrick Malone (their granddaughter's single father) incarcerated for nearly a year while his appeal unfolded.[7]

At the end of Patrick Malone's bond hearing, Judge Binkley orally ruled that "I see no reason at all why bond should be set in this case. So I'm not setting a bond."[8] Patrick Malone had "a *right* to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case," though. *See* Tenn. R. Crim. P. 32(d)(1) (emphasis added); *see also* Tenn. R. Crim. P. 42(b)(3) (an "alleged contemner is *entitled* to admission to bail as provided in these rules.") (emphasis added). Thus, the same day, Patrick Malone moved this Court for review under Tenn. R. App. P. 8(a).[9] Three days later—on June 12, 2023—this Court summarily vacated Judge Binkley's illicit bond denial and remanded "with instructions to set bail in an appropriate amount."[10]

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[5] *See generally* Tr. of June 9, 2023 Proceedings.
[6] *Id.* at 13:16–21.
[7] *Id.* at 77:22–78:23.
[8] *Id.* at 89:25–90:2.
[9] *See* Jun. 9, 2023 *Emergency Tenn. R. App. P. 8(a) Motion for Review of Categorically Illegal Denial of Bail* (Case M2022-01261-COA-R3-CV).
[10] R. at 9.

On August 7, 2023, Patrick Malone moved to recuse Judge Binkley from presiding over this case any further.[11] On August 15, 2023 and August 17, 2023—*before* adjudicating the pending motion to recuse—Judge Binkley entered two written orders arising from the June 9, 2023 bond hearing that: "ORDERED, ADJUDGED, and DECREED that Paternal Grandfather and Father shall be, and are hereby, prohibited from speaking to the minor child about these legal proceedings, as that topic is an adult issue."[12] The second written order was identical to the first order but for an explanatory footnote that states:

> This Order was lost in the shuffle of appellate filings following the June 9, 2023, hearing in which this Court denied bond. Since the June 9, 2023, hearing, the Court of Appeals entered an Order requiring that bond be set. In compliance with the Court of Appeals' Order, on June 22, 2023, another hearing was held and this Court set bond with strict bond conditions. The Order resulting from the hearing on June 22, 2023, regarding Father's bond remains in effect. **This Order from the June 9, 2023, hearing is now being entered for the sake of a complete record, and so there is a written Order reflecting that Father and Paternal Grandfather are under a Court Order not to discuss these proceedings with the child.**[13]

On September 13, 2023, the trial court denied Patrick Malone's motion to recuse.[14] On October 13, 2023, non-party Appellant Michael Malone ("Mr. Malone")—who Judge Binkley had made clear is "under a

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[11] *Id.* at 10–22.
[12] *Id.* at 28 (Aug. 15, 2023 prior restraint order); *id.* at 36 (Aug. 17, 2023 prior restraint order).
[13] *Id.* at 31, n.1 (emphasis added).
[14] *Id.* at 39–47.

Court Order not to discuss these proceedings with" his granddaughter Rosie[15]—timely petitioned this Court for certiorari. This Court granted Mr. Malone's petition for certiorari on November 9, 2023,[16] and this appeal commenced.

VII. STATEMENT OF FACTS

On June 9, 2023, the Williamson County Chancery Court held a hearing on Patrick M. Malone's motion to set bail pending appeal.[17] Patrick Malone's father, Michael Malone—the Appellant here—participated in that hearing as a witness.[18] Mr. Malone was not subpoenaed by any party.[19] As a result, Mr. Malone participated voluntarily, rather than under the aegis of any legal process.

Arguing in opposition to Patrick Malone's motion to set bail, the Appellees "ask[ed] that the motion be denied,"[20] the effect of which would have been to keep Patrick Malone incarcerated for 350 days while he exercised his right to appellate review.[21] Given that Patrick Malone is a single father who "tak[es] care of Rosie [the Appellees' granddaughter] the majority of the time[,]"[22] the Appellees' position can reasonably be characterized as an attempt to render Rosie parentless for nearly a year.

Before Mr. Malone testified, Judge Binkley *sua sponte* ordered Mr.

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[15] *Id.* at 31, n.1.
[16] *Id.* at 80–81.
[17] Tr. at 4:3–6.
[18] *Id.* at 21:18–64:5.
[19] *See generally* Appellate Record (reflecting no subpoena).
[20] Tr. at 13:16–21.
[21] *Id.* at 77:22–78:23.
[22] *Id.* at 26:8–10.

Malone—Rosie's paternal grandfather—not to discuss anything that he heard in the courtroom with Rosie, and Judge Binkley demanded specific assurances that Mr. Malone would comply with that directive.[23] Judge Binkley's asserted basis for his demand was that: "You don't talk to a young child about adult matters in the courtroom. And that's all I'm asking you to do."[24] Judge Binkley also threatened Mr. Malone with contempt if he violated the trial court's *sua sponte* gag order.[25]

Mr. Malone then testified on his son's behalf.[26] Although the hearing concerned Patrick Malone's entitlement to an appeal bond, the trial court questioned Mr. Malone at length about what he had told Rosie about her father's incarceration by the trial court.[27] Mr. Malone explained that Rosie—who was two days shy of eleven years old at the time—was "very mature" and old enough to "know[] what's going on."[28] The trial court then expressed that it was "troubled greatly by [the Petitioner] . . . talking to his granddaughter about why [her father] is in jail."[29]

Following the hearing, Judge Binkley orally denied Patrick Malone an appeal bond and kept him incarcerated pending appeal, stating: "I see no reason at all why bond should be set in this case. So I'm not setting a

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[23] *Id.* at 8:12–9:9.
[24] *Id.* at 8:24–9:1.
[25] *Id.* at 8:18–23.
[26] *Id.* at 21:18–64:5.
[27] *Id.* at 47:8–50:25.
[28] *Id.* at 47:19–24; *see also id.* at 47:8–11.
[29] *Id.* at 77:11–14.

bond."[30] Because, given the nature of the case, Patrick Malone had a *right* to a bond pending appeal, this Court summarily reversed the trial court's illicit bond denial three days later.[31]

The trial court did not enter a written order regarding the June 9, 2023 hearing until more than two months afterward—on August 15, 2023.[32] On August 17, 2023, the trial court also entered a second written order regarding its June 9, 2023 hearing that was identical to its first order but for an explanatory footnote that states:

> This Order was lost in the shuffle of appellate filings following the June 9, 2023, hearing in which this Court denied bond. Since the June 9, 2023, hearing, the Court of Appeals entered an Order requiring that bond be set. In compliance with the Court of Appeals' Order, on June 22, 2023, another hearing was held and this Court set bond with strict bond conditions. The Order resulting from the hearing on June 22, 2023, regarding Father's bond remains in effect. **This Order from the June 9, 2023, hearing is now being entered for the sake of a complete record, and so there is a written Order reflecting that Father and Paternal Grandfather are under a Court Order not to discuss these proceedings with the child.**[33]

The key gag provision is set forth on page six of both orders, and it appears in the record at R. 28 and R. 36, respectively. The provision states: "It is further ORDERED, ADJUDGED, and DECREED that Paternal Grandfather and Father shall be, and are hereby, prohibited

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[30] *Id.* at 89:25–90:2.

[31] R. at 9 ("Upon due consideration, the trial court's decision denying bail is vacated, and the matter is remanded to the trial court with instructions to set bail in an appropriate amount.").

[32] *Id.* at 23–30.

[33] *Id.* at 31, n.1 (emphasis added).

from speaking to the minor child about these legal proceedings, as that topic is an adult issue." *Id.* Thus, Mr. Malone—a non-party—is presently laboring under a permanent prior restraint order that forbids him from speaking to Rosie about "these legal proceedings," *id.*—including the fact that ex-Judge Binkley illicitly denied her father an appeal bond and incarcerated him for weeks without lawful authority at the Appellees' urging.[34]

Between the June 9, 2023 hearing and the trial court's entry of its orders regarding that hearing two months later, additional proceedings unfolded in the trial court. One of them was a motion to recuse Judge Binkley from presiding over this case any further, which Patrick Malone filed on August 7, 2023.[35] The trial court did not adjudicate the motion to recuse until September 13, 2023.[36] Thus, the trial court entered the August 15, 2023 and August 17, 2023 prior restraint orders at issue in this appeal while Patrick Malone's motion to recuse was pending.[37] This certiorari appeal followed.

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[34] *Id.* at 9 ("Upon due consideration, the trial court's decision denying bail is vacated, and the matter is remanded to the trial court with instructions to set bail in an appropriate amount.").
[35] *Id.* at 10–22.
[36] *Id.* at 39–47.
[37] *Id.* at 10–22 (August 7, 2023 Motion to Recuse); *id.* at 23–30 (Aug. 15, 2023 prior restraint order); *id.* at 31–38 (Aug. 17, 2023 prior restraint order); *id.* at 39–47 (Sep. 13, 2023 order denying motion to recuse).

VIII. ARGUMENT

A. THE TRIAL COURT'S *SUA SPONTE* PRIOR RESTRAINT ORDERS FORBIDDING MR. MALONE FROM DISCUSSING WHAT HAPPENED IN A PUBLIC JUDICIAL PROCEEDING VIOLATE THE FIRST AMENDMENT.

1. The trial court's prior restraint orders are presumptively—and insurmountably—unconstitutional.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). As a result, they are presumptively invalid. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (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). "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

Given this context, even when a prior restraint order is designed (ostensibly) to protect children, such a speech-restricting order "bear[s] a heavy presumption against its constitutional validity[,]" *Bantam Books, Inc.*, 372 U.S. at 70, and must be able to withstand "the heavy burden" of First Amendment scrutiny. *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."). In particular, 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.*, 78 F.3d at 227.

Because the right to truthfully recount what happened in a public judicial proceeding is itself a clearly established First Amendment right, an order forbidding such speech will never clear this bar. *See Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized."); *State v. Montgomery*, 929 S.W.2d 409, 413–14 (Tenn. Crim. App. 1996) ("The law is crystal clear: the media may publish . . . testimony of witnesses testifying in open court during a public trial with impunity. Any restraint placed on this right is violative of the First Amendment."); *cf. Wood v. Goodson*, 253 Ark. 196, 203, 485 S.W.2d 213, 217 (1972) ("No court, as we have indicated, [has] the power to prohibit the news media from publishing that which transpires in open court."); *Pelosi v. Spota*, 607 F.

Supp. 2d 366, 373 (E.D.N.Y. 2009) ("Though *Cox* and its progeny generally addressed press access to, and publication of, judicial records, the reasoning of those decisions is clear that no right to privacy attaches to those records, regardless of whether they are obtained by a member of the press or the general public."). The right also applies especially powerfully in the context of criminal prosecutions like Patrick Malone's,[38] which the Sixth Amendment mandates must be "public." *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

To be sure, there are rare circumstances in which courts "may constitutionally restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, when the trial court determines that those comments pose a substantial likelihood of prejudicing a fair trial." *State v. Carruthers*, 35 S.W.3d 516, 563 (Tenn. 2000). The trial court's post-trial prior restraint orders were not addressed to any such concerns, though, and they did not purport to be.[39]

Nor were any concerns about trial prejudice present. For one thing, Patrick Malone's trial had concluded—that is why the Parties were before the Court on a motion to set bail pending appeal[40]—so prejudice to an impending trial was not even theoretically at risk. For another, the trial court's gag orders did not identify any concerns about trial prejudice.[41] For a third, the trial court's gag orders are both explicitly

[38] This appeal stems from a criminal contempt trial.
[39] R. at 28; *id.* at 36.
[40] Tr. at 4:3–6.
[41] R. at 28; *id.* at 36.

speaker-based (applying only to Mr. Malone and Patrick Malone) and explicitly content-based (characterizing the restricted commentary as an "adult issue"),[42] making the order simultaneously under-inclusive and over-inclusive with respect to concerns about trial prejudice. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional . . . ."); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999) ("[D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 793 (1978) ("This purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive."); *see also Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (citing *First Nat'l Bank of Boston*, 435 U.S. at 784); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm'n*, 429 U.S. 167, 175–76 (1976) (citing *Mosley*, 408 U.S. at 96).

If some other compelling justification for restricting Mr. Malone's speech could have been implicated as a theoretical matter, the trial court did not mention it. And in any case, such a determination would require a specific finding of danger, and the justification for a restriction would have to be carefully "balanced" against Mr. Malone's First Amendment rights afterward. *See Gider v. Hubbell*, No. M2016-00032-COA-R3-JV,

[42] *Id.* at 28*; id*. at 36.

2017 WL 1178260, at *11 (Tenn. Ct. App. Mar. 29, 2017). Neither of those things happened here.[43]

For all of these reasons, the trial court's *sua sponte* prior restraint orders violate the First Amendment. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *See Mills v. State of Ala.*, 384 U.S. 214, 218 (1966). Here, the trial court's prior restraint orders forbid all discussion between Mr. Malone and his grandchild about what took place in a public judicial proceeding—a proceeding that also happened to feature serious misconduct *by the trial court* that took this Court just three days to reverse.[44]

Put another way: the trial court "act[ed] illegally." *See* Tenn. Code Ann. § 27-8-101. Mr. Malone—a non-party who lacks any right of appeal—also has "no other plain, speedy, or adequate remedy" available to address that illegality. *See id.* Thus, a writ of certiorari vacating and reversing the trial court's gag orders should issue promptly, not only to protect Mr. Malone from an explicit threat of contempt,[45] but also because the trial court's illicit prior restraint orders are causing Mr. Malone irreparable injury. *See, e.g., Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("it is well-settled that 'loss of First Amendment

[43] R. at 28; *id.* at 36.
[44] R. at 9 ("Upon due consideration, the trial court's decision denying bail is vacated, and the matter is remanded to the trial court with instructions to set bail in an appropriate amount.").
[45] Tr. at 8:18–23.

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); citing *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.")).

2. The trial court's prior restraint orders rest on an impermissible justification.

The trial court's sole professed concern underlying its *sua sponte* gag orders was that discussion about any aspect of the underlying legal proceedings is "an adult issue."[46] Thus, the orders turned on Judge Binkley's personal view that Rosie should not hear about what happens in an entire branch of government because "[y]ou don't talk to a young child about adult matters in the courtroom."[47] As detailed below, this justification not only isn't compelling; it is not even *permissible*.

Judge Binkley, of course, is entitled to have and to enforce his own views "about adult matters" as to his own children. What he may *not* do, though, is impose his personal parenting preferences on others under color of law without any pretense of authority to do so.

In American society, the right of parents to assume the "primary role" in their children's upbringing is "established beyond debate[.]" *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the

[46] R. at 28; *id.* at 36.
[47] Tr. at 8:24–25.

parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). As a result, parents enjoy the right to raise their children in a host of ways that government officials might not like. *See, e.g., Ginsberg v. State of N. Y.*, 390 U.S. 629, 639 (1968) (emphasizing that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines [depicting nudity] for their children."). Thus, as long as no showing of substantial, demonstrable harm to a child has been made (and no such finding was made here[48]), parents have a "fundamental right . . . to raise their children as they see fit." *See Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993) ("when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit.").

During the proceedings below, Judge Binkley transgressed that fundamental right and usurped Patrick Malone's exclusive right to parent Rosie, imposing his own personal parenting preferences on Rosie's father and grandfather on pain of contempt. As Rosie's sole parent, though, Patrick Malone alone—not Judge Binkley, and not the Appellees—had the right to parent Rosie[49] and to determine what "issues" she is mature enough to hear about. *See, e.g., In re R.D.H.*, No. M2006-00837-COA-R3JV, 2007 WL 2403352, at *6 (Tenn. Ct. App. Aug.

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[48] R. at 28; *id.* at 36.

[49] While the trial court has granted Mr. and Mrs. Rose—as grandparents—the limited right to *visit* Rosie, they have no right to *parent* her, and Tennessee law both does not and could not lawfully grant it to them.

22, 2007) ("Parental rights are superior to the rights of others and continue without interruption unless a parent consents to relinquish them, abandons the child, or forfeits parental rights by conduct that substantially harms the child."); *In Re Brooklyn M.*, No. M2023-00024-COA-R3-PT, 2024 WL 65218, at *4 (Tenn. Ct. App. Jan. 5, 2024) ("parental rights are superior to the claims of other persons and the government"). Those rights include the right to determine what information Rosie is mature enough to handle, even if Judge Binkley might disapprove of Rosie receiving it. *Cf. Ginsberg*, 390 U.S. at 639. Absent a showing of substantial harm, though—which not only was not established here, but which was not even something that the trial court's gag orders *considered*[50]—the Government lacks authority to interfere with Patrick Malone's parenting choices. *See Hawk*, 855 S.W.2d at 577.

Certainly, the Government cannot interfere with Patrick Malone's exclusive and fundamental right to parent his child on a *sua sponte* basis without affording the gagged parties notice and a meaningful opportunity to be heard regarding the infringement. *See Tomes v. Tomes*, No. M2020-00833-COA-R3-CV, 2021 WL 2808822, at *2 (Tenn. Ct. App. July 6, 2021) ("Procedural due process requires that litigants ' "be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner." "') (quoting *State ex rel. Groesse v. Sumner*, 582 S.W.3d 241, 258 (Tenn. Ct. App. 2019) (in turn quoting *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006)). Such requirements are "essential components of procedural due process." *Id.* (citing *Manning v.*

[50] R. at 28; *id.* at 36.

City of Lebanon, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003)). The trial court failed to respect them, though, opting to gag Mr. Malone and Patrick Malone summarily on its own motion instead.[51] That was error, *see id.*, and it contravened party-presentation rules to boot. *See State v. Bristol*, 654 S.W.3d 917, 924–25 (Tenn. 2022).

For all of these reasons, Judge Binkley's prior restraint orders forbidding discussion with Rosie about what happened in a public judicial proceeding rested on an impermissible justification. The orders were issued in usurpation of Patrick Malone's parental role and in contravention of his fundamental and exclusive right to parent his child. They were issued in violation of procedural due process guarantees and party-presentation rules, too. Thus, the trial court's gag orders not only were not supported by a compelling justification sufficient to withstand First Amendment scrutiny; they were unsupported by any permissible justification at all.

3. The Appellees' contrary arguments are unpersuasive.

In their Response to Mr. Malone's petition for a writ of certiorari, the Appellees defended Judge Binkley's *sua sponte* prior restraint orders (which, it is worth emphasizing, did not apply to them) by insisting that "[c]ommon sense and human decency tells [sic] us that that [sic] it is inappropriate for an adult to speak to an eleven-year-old child regarding ongoing litigation involving her Maternal Grandparents and her Father—three individuals for whom she loves [sic] and cares." Resp. to Michael Malone's Pet. for Writ of Cert. (Nov. 3, 2023) at 4. Others might

[51] R. at 28; *id.* at 36; *see also* Tr. at 8:24–9:1.

contrarily believe that common sense dictates that a child has a right to know that her single father was illicitly incarcerated for more than a month—at the Appellees' behest—because a trial judge with a history of misconduct[52] entered a flagrantly illegal order that this Court promptly reversed, though. Thus, other people's common sense might contrarily reflect "the plain moral maxim, that honesty is the best policy." *Missroon v. Waldo*, 11 S.C.L. 76, 77 (S.C. Const. App. 1819).

The Appellees' asserted version of "common sense" also is not a substitute for First Amendment law—and it contradicts it. *See, e.g.*, *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979) ("Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards."). The Appellees' desire to hide from Rosie the fact that they procured her single father's illicit incarceration and attempted to prolong it is perhaps understandable. As far as justifying prior restraints, though, their interest in concealing their behavior from Rosie ranks at least marginally

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[52] *Chase v. Stewart*, No. M2018-01991-COA-R3-CV, 2021 WL 402565, at *3 (Tenn. Ct. App. Feb. 4, 2021), *reh'g denied* (Mar. 16, 2021), *appeal denied, not for citation* (Aug. 6, 2021); Jamie Satterfield, *Appeals court removes Tennessee judge from case with lawyer who revealed his secret arrest*, KNOXVILLE NEWS SENTINEL (Mar. 21, 2021), https://www.knoxnews.com/story/news/crime/2021/03/22/tennessee-appeals-court-pulls-judge-michael-binkley-casey-moreland-brian-manookian/4450016001/ ("Moreland's dark side was still under wraps, though, when Binkley — then a lawyer who wanted to be a judge — was nabbed in a prostitution sting on Dickerson Avenue in 2010, according to records reviewed by Knox News. Moreland erased all record of the charge against Binkley the very same day. With his secret safe, Binkley ran for election to the Williamson County bench in 2012 and won.").

below national security concerns like the release of the Pentagon Papers in terms of societal interests. *See Procter & Gamble Co.*, 78 F.3d at 226–27 ("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."); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Thus, to justify the trial court's prior restraint here, far more is required.

The Appellees cannot justify the trial court's prior restraint by reference to actual law, though. Most of their First Amendment arguments were unburdened by citation. *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 7–9. They certainly failed to meet the phalanx of authority marshaled by Mr. Malone's petition head-on. Instead, the best they could come up with was a claim that Tenn. R. Civ. P. 65.07 affords trial courts wide latitude to enter restraining orders and injunctions and that "we see restraints on speech fairly regularly in the context of domestic relations cases." *Id.* at 8.

Neither Tenn. R. Civ. P. 65.07 nor the existence of a domestic relations case displaces the First Amendment, though. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Thus, any order entered under Tenn. R. Civ. P.

65.07—and for what it's worth, the orders challenged here were not—must comply with the First Amendment. Nor is there any "domestic relations" exception to the First Amendment, the Appellees' contrary belief notwithstanding. *See, e.g., Gider*, 2017 WL 1178260, at *11–12 (requiring courts to consider "whether the activity restrained poses a 'clear and present danger or a serious and imminent threat to a protected competing interest'" and invalidating certain speech restrictions in family law case as "overbroad or vague").

* * *

For all of these reasons, the trial court's *sua sponte* prior restraint orders contravene the First Amendment; they rest on a justification that is not even permissible; and the Appellees cannot meet their burden of overcoming the "heavy presumption against [the orders'] constitutional validity." *Bantam Books, Inc.*, 372 U.S. at 70. As a result, the orders should be vacated as unconstitutional.

B. THE TRIAL COURT'S PRIOR RESTRAINT ORDERS ARE VOID BECAUSE THEY VIOLATED TENNESSEE SUPREME COURT RULE 10B SECTION 1.02.

1. The trial court's prior restraint orders were entered illicitly while a motion to recuse was pending.

On August 7, 2023, Patrick Malone moved to recuse Judge Binkley from presiding over this case any further.[53] Judge Binkley did not adjudicate the motion until September 13, 2023, though, when he determined—without a hearing—that he was more credible than a witness who provided sworn testimony about a phone call she had with

[53] R. at 10–22.

Judge Binkley that Judge Binkley contrarily claimed (not under oath) did not occur.[54]

While Patrick Malone's motion to recuse was pending, Judge Binkley entered the two prior restraint orders at issue in this appeal.[55] The orders did not include a finding of good cause to rule immediately, as Rule 10B Section 1.02 required.[56] *See* Tenn. S. Ct. R. 10B, § 1.02 ("While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken."). Thus, by rule, the trial court lacked authority to enter the orders, *see id.*, and they must be vacated accordingly.

Tennessee Supreme Court Rule 10B section 1.02 is not ambiguous. It provides in clear terms that "[w]hile [a motion to recuse] is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken." *Id.* As this Court has explained and emphasized, Section 1.02's provisions are mandatory. *See Prewitt v. Brown*, No. M2017-01420-COA-R3-CV, 2018 WL 2025212, at *8 (Tenn. Ct. App. Apr. 30, 2018) ("Tennessee Supreme Court Rule 10B sets out the procedures that ***shall be*** employed to determine whether a judge should preside over a case.") (emphasis original). Thus, "[u]pon the filing of the

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[54] *Id.* at 39–47. The Petitioner also notes, for context, that Judge Binkley has previously decried as "totally false" allegations about him that, in fact, were true. *See supra* at n. 52.
[55] *Id.* at 23–30; *id.* at 31–38.
[56] *See id.*

motion for recusal, pursuant to the clear and mandatory language of Section 1.02 of Tennessee Supreme Court Rule 10B, the trial court should have 'ma[d]e no further orders and take[n] no further action on the case' until the recusal issue was addressed." *See Rodgers v. Sallee*, No. E2013-02067-COA-R3-CV, 2015 WL 636740, at *4 (Tenn. Ct. App. Feb. 13, 2015).

"Notwithstanding the fact that a motion seeking recusal was pending," though, "the trial court proceeded to subsequently enter two written orders regarding separate matters in the case before ruling on the issue of recusal." *Id.* As a result, the orders were void, and this Court must vacate them. *See, e.g., Adams v. Dunavant*, No. W2022-01747-COA-T10B-CV, 2023 WL 1769356, at *4 (Tenn. Ct. App. Feb. 3, 2023) ("Judge Townsend did not follow the Supreme Court's rules. He entered an order on December 7, 2022, without stating good cause for not obeying the dictates of Rule 10B, § 1.02, and he failed to address the motion to recuse as required in Rule 10B, § 1.03. Consequently, we must vacate the December 7, 2022 order and any orders in the interpleader action that Judge Townsend has filed since."); *Clay Cnty. v. Purdue Pharma L.P.*, No. E2022-00349-COA-T10B-CV, 2022 WL 1161056, at *4 (Tenn. Ct. App. Apr. 20, 2022) ("the trial judge signed an order on the sanctions matter against the Endo Defendants prior to adjudicating the pending motion for recusal and did so without finding good cause to do so. . . . we hold that the order on sanctions against the Endo Defendants, which had been incorporated into the order on recusal, should be vacated."); *Tucker v. State*, No. M2018-01196-CCA-R3-ECN, 2019 WL 3782166, at *3 (Tenn. Crim. App. Aug. 12, 2019) ("the error coram nobis court erred by not

ruling on the motion to recuse before entering an order denying the petition for writ of error nobis. Therefore, we vacate the order denying the petition and remand this case for consideration of Petitioner's petition for writ of error coram nobis."); *Rodgers*, 2015 WL 636740, at *1 ("We determine that the trial court erred in entering orders regarding contested matters while the motion seeking recusal was pending. We therefore vacate the trial court's orders and remand the case for further proceedings"); *Matter of Conservatorship of Tapp*, No. W2021-00718-COA-R3-CV, 2023 WL 1957540, at *1 (Tenn. Ct. App. Feb. 13, 2023) ("We vacate the orders entered by the trial court while the recusal motion remained pending and remand for further proceedings before a different trial judge.").

2. The Appellees' contrary arguments are not persuasive.

The Appellees concede that the trial court entered the prior restraint orders being challenged here "[w]hile [a motion to recuse] was pending[.]" *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 4. Even so, relying on this Court's unpublished decisions in *Xingkui Guo v. Rogers*, No. M2020-01321-COA-T10B-CV, 2020 WL 6781244, at *4 (Tenn. Ct. App. Nov. 18, 2020), and *Adkins v. Adkins*, No. M2021-00384-COA-T10B-CV, 2021 WL 2882491, at *8 (Tenn. Ct. App. July 9, 2021), the Appellees insist that the trial court was permitted to enter the orders while a motion to recuse was pending because it had previously ruled orally. *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 5–7. The Appellees are wrong for two reasons.

First, the prior restraint orders that the trial court entered while

Patrick Malone's motion to recuse was pending differed materially from its earlier oral ruling in several respects. Most prominently: The trial court added Patrick Malone to the gag order, which was not a ruling the trial court made orally. *Compare* Tr. at 8:17–9:3 (directing only Michael Malone to comply with the trial court's directive), *with* R. at 28 and R. at 36 ("It is further ORDERED, ADJUDGED, and DECREED that Paternal Grandfather **and Father** shall be, and are hereby, prohibited from speaking to the minor child about these legal proceedings, as that topic is an adult issue.") (emphasis added). The trial court also orally directed Mr. Malone not to "discuss with anyone **the testimony** in this courtroom[,]" including Rosie. *See* Tr. at 8:7–15 (emphasis added). In its later written order, though, the trial court expanded its written gag order to cover "these legal proceedings" in their entirety—not just "the testimony" from Patrick Malone's post-trial bond proceeding, *see id.*—but it narrowed the earlier restriction from "anyone" to discussion with Rosie alone. *See* R. at 28 and R. at 36.

These are major substantive differences that do not plausibly come within the "purely administrative" exception the Appellees urge. *See Xingkui Guo*, 2020 WL 6781244, at *4 (holding that "[t]he purpose of section 1.02 is to ensure that a trial court makes no substantive decisions while the motion to recuse is pending" and that, as a result, the "purely administrative" signing and filing of an order, while a motion to recuse is pending, that reflects an earlier oral adjudication does not violate Tennessee Supreme Court Rule 10B, section 1.02). As a result, the materially different written orders that the trial court entered here

cannot be treated as "purely administrative" decrees. *Cf. Adkins*, 2021 WL 2882491, at *8 ("as in *Guo*, entry of the order was purely administrative and did not violate section 1.02 of Tennessee Supreme Court Rule 10B."). The trial court's substantively modified orders—which the trial court entered while a motion to recuse was pending in contravention of Tennessee Supreme Court Rule 10B section 1.02—must be vacated accordingly.

Second, the anti-textual "earlier oral adjudication" exception invented by *Xingkui Guo* and *Adkins*—both of which are unpublished, non-precedential decisions—is wrong and unsupportable. Supreme Court Rule 10B, section 1.02 is mandatory, and its procedures "***shall be*** employed[.]" *See Prewitt*, 2018 WL 2025212, at *8 (emphasis original). Its unambiguous text also contains no "earlier oral adjudication" exception. *See* Supreme Court Rule 10B, section 1.02 ("While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken."). Instead, Supreme Court Rule 10B, section 1.02's straightforward text prohibits any "further action" from being taken while recusal is pending absent only one specified exception. *Id.* Thus, elementary canons of construction instruct that no further exceptions are contemplated. *Cf. Rich v. Tennessee Bd. of Med. Examiners*, 350 S.W.3d 919, 927 (Tenn. 2011) ("Applying the canon of construction 'expressio unius est exclusio alterius,' which holds that the expression of one thing implies the exclusion of others, we infer that had the legislature intended to allow

the additional exception asserted by the Board, it would have included specific language to that effect.").

Given this context, *Adkins* and *Guo*'s extra-textual invention of a "purpose"-based exception to Supreme Court Rule 10B, section 1.02's text is impermissible. *See Xingkui Guo*, 2020 WL 6781244, at *4 (inventing an earlier oral adjudication exception to section 1.02 on the ground that "[t]he purpose of section 1.02 is to ensure that a trial court makes no substantive decisions while the motion to recuse is pending."). As one of this Court's members has recognized:

> [T]he Court of Appeals cannot speculate away the express mandate of the Tennessee Supreme Court that "While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken." No leeway is given for [an exemption not specified].

Doe v. Davis, No. M2018-02001-COA-R3-CV, 2019 WL 4247753, at *8. n.1 (Tenn. Ct. App. Sept. 6, 2019) (Bennett, J., dissenting). This Court has also correctly held, since its unpublished decisions in *Adkins* and *Guo* (neither of which is precedential), that "'except in the rare case of an obvious scrivener's error, purpose — even purpose as most narrowly defined — cannot be used to contradict text or to supplement it.'" *Solomon v. Solomon*, No. M2021-00958-COA-R3-CV, 2023 WL 3730597, at *2 (Tenn. Ct. App. May 31, 2023) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law*: *The Interpretation of Legal Texts* 57 (2012)).

As importantly, *Adkins'* and *Guo*'s essential premise—that the entry of a written order after a trial court has earlier ruled orally is a

"purely administrative" matter—reflects a gross and fundamental misunderstanding of Tennessee law. *See Guo*, 2020 WL 6781244, at *4 ("The trial court's electronic signing and filing of the order on August 6, 2020 was purely administrative, and these acts were not in violation of Tennessee Supreme Court Rule 10B, section 1.02."); *Adkins*, 2021 WL 2882491, at *8 ("as in *Guo*, entry of the order was purely administrative and did not violate section 1.02 of Tennessee Supreme Court Rule 10B."). In reality, a trial court's entry of a written order is *not* a "purely administrative" matter. To the contrary, as this Court has held many times (including in published opinions that *are* precedential), an oral ruling has no force whatsoever, so a written order is all that matters. *See Sparkle Laundry & Cleaners, Inc. v. Kelton*, 595 S.W.2d 88, 93 (Tenn. Ct. App. 1979) ("A Court speaks only through its written judgments, duly entered upon its minutes. Therefore, **no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered**.") (emphasis added); *Saweres v. Royal Net Auto Sale, Inc.*, No. M2010-01807-COA-R3CV, 2011 WL 3370350, at *2 (Tenn. Ct. App. Aug. 1, 2011) (collecting cases for same proposition); *see also Ladd by Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 104 (Tenn. Ct. App. 1996) ("A court speaks only through its written orders."). The Tennessee Supreme Court—whose decisions bind this Court—has held the same. *See Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015) ("'It is well-settled that a trial court speaks through its written orders—not through oral statements contained in the transcripts[.]'") (cleaned up).

Trial judges thus have the right and ability to change their minds

between issuing oral rulings and entering written orders formalizing them. *See* Tenn. R. Civ. P. 54.02(1) ("the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties."). They also do so from time to time, *see, e.g.*, Rule 10 App., M2023-01029-COA-R10-CV; *In re Adison P.*, No. W2015-00393-COA-T10B-CV, 2015 WL 1869456, at *6 (Tenn. Ct. App. Apr. 21, 2015) ("Notwithstanding its accuracy in memorializing Judge Beal's oral rulings, this draft order was not ultimately entered."), and no one would reasonably consider such action to be "purely administrative." Thus, *Adkins* and *Guo*'s invention of a non-precedential, textually-unmoored, purpose-based "earlier oral adjudication" exception to Supreme Court Rule 10B, section 1.02's unambiguous text rests on an unsupportable premise: that oral rulings carry force and mechanically result in "purely administrative" memorialization through a written order later on. *Id.*

In any case, Supreme Court Rule 10B, section 1.02's text is unambiguous, and that text contemplates no "earlier oral adjudication" exception to its mandate that trial courts "make no further orders and take no further action on the case" until a motion to recuse has been adjudicated. As a result, "'the duty of the courts is simple and obvious, namely, to say *sic lex scripta*, and obey it.'" *Knox Cnty. ex rel. Env't Termite & Pest Control, Inc. v. Arrow Exterminators, Inc.*, 350 S.W.3d 511, 524 (Tenn. 2011) (cleaned up).

Applying that text here, Supreme Court Rule 10B, section 1.02 obligated Judge Binkley to "make no further orders and take no further

action on the case" until Patrick Malone's motion to recuse him was adjudicated. *Id.* He violated that directive, as the Appellees have conceded. *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 4 (conceding that the trial court entered the prior restraint orders being challenged here "[w]hile [a motion to recuse] was pending[.]"). Judge Binkley's orders entered while Patrick Malone's motion to recuse him was pending—including the prior restraint orders challenged here—must be vacated accordingly. *Adams*, 2023 WL 1769356, at *4; *Clay Cnty.*, 2022 WL 1161056, at *4.

* * *

For all of these reasons, the trial court's prior restraint orders were entered illicitly while a motion to recuse was pending. As a result, they should be vacated as void for failure to comply with the mandatory requirements of Tennessee Supreme Court Rule 10B section 1.02.

C. THE TRIAL COURT'S PRIOR RESTRAINT ORDER IS VOID FOR LACK OF JURISDICTION.

"A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 355 (Tenn. 2008) (collecting cases). By contrast, "an order entered without either subject matter jurisdiction or jurisdiction over the parties is void . . . ." *Id.* Further, "[a] court may not create jurisdiction over a matter where none exists." *Welch v. State*, No. W2008-01179-CCA-R3-PC, 2009 WL 1741394, at *2 (Tenn. Crim. App. June 15, 2009), *no perm. app. filed*.

Here, Mr. Malone is not a party to this action; he does not reside in Tennessee; and his only role in this proceeding was as a voluntary non-

party witness who was not even subpoenaed. Given these circumstances, the trial court lacked any plausible authority to permanently enjoin Mr. Malone from speaking to his granddaughter about the proceedings through an order entered well after trial.[57] Certainly, the trial court lacked any authority to do so *sua sponte* without giving Mr. Malone notice and a meaningful opportunity to contest the restraint. *See Bristol*, 654 S.W.3d at 924 ("The party-presentation principle helps preserve several fundamental values of our judicial system. . . . Limiting review to the issues presented by the parties promotes fairness by ensuring that litigants have a meaningful opportunity to participate in the adjudicative process.").

If the Appellees believe that some other consideration afforded the trial court post-trial authority to regulate the speech of a non-party who was not even under subpoena, it is their burden—as the proponents of jurisdiction—to identify it. *Cf. Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445 (Tenn. 2012) ("Whenever subject matter jurisdiction is challenged, the burden is on the plaintiff to demonstrate that the court has jurisdiction to adjudicate the claim."). They have already conceded that they cannot identify any authority permitting the trial court's action below, though. *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 10 ("To be candid with the Court, the Maternal Grandparents must concede that they have been unable to find any

[57] The Petitioner acknowledges trial courts' narrowly limited authority to restrain extrajudicial commentary by trial witnesses in advance of or during a trial under appropriate circumstances. *See Carruthers*, 35 S.W.3d at 563. That authority is not at issue here.

authority which allows a court to issue orders on a voluntary non-party witness."). That should end the matter.

Because Mr. and Mrs. Rose insist on "point[ing]" to Rule 65 as a potential source of authority for the trial court's *sua sponte* orders gagging a non-party, though, *see id.*, the rule merits discussion. Tennessee Rule of Civil Procedure 65.07 provides in relevant part that "restraining orders or injunctions may be issued upon such terms and conditions and remain in force for such time as shall seem just and proper to the judge **to whom application therefor is made**, and the provisions of this Rule shall be followed only insofar as deemed appropriate by such judge." *See id.* (emphasis added). The orders challenged here were not made on "application," though. Instead, they were entered on the trial court's own motion, thereby preventing meaningful notice or an opportunity to respond. *But see id.*; Tenn. R. Civ. P. 7.02(1) ("An application to the court for an order **shall be by motion** which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.") (emphasis added).

Rule 65 also contemplates—repeatedly—that relief may be obtained against *parties*. *See* Tenn. R. Civ. P. 65.04(1) ("No temporary injunction shall be issued without notice to **the adverse party**.") (emphasis added); Tenn. R. Civ. P. 65.04(2) ("A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated **by an adverse party** and the movant will

suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions **of the adverse party** will tend to render such final judgment ineffectual.") (emphases added); Tenn. R. Civ. P. 65.04(5) ("A temporary injunction becomes effective and binding **on the party** enjoined when the order is entered. It shall remain in force until modified or dissolved on motion or until a permanent injunction is granted or denied.") (emphasis added). Mr. Malone was not a party, though, as all agree.

The balance of the Appellees' argument for jurisdiction fares no better. They insist that "[t]he trial court issued the Order to protect [Rosie's] best interests." *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 10. The trial court's orders make no finding to that effect and did not purport to do so, though.[58] Rosie's purported best interests are not a source of jurisdictional authority, either, and they do not confer Tennessee's trial courts with freestanding, unrestricted authority to take whatever action they please against anyone they please.

It is also fair to wonder whether the Appellees' claim that "[t]he trial court issued the Order to protect [Rosie's] best interests" is true. *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 10. Instead, one could reasonably conclude that the orders were entered for the benefit of *the trial court* to inhibit discussion about its illegal action (which this Court had already reversed by the time the orders entered). Alternatively, one might reasonably conclude that the orders were entered for the benefit of *the Appellees*—who claim to love Rosie and to want what is best for her—

[58] R. at 23–30; R. at 31–38.

to conceal from Rosie the fact that they had ensured her single father and sole custodial caregiver was unlawfully jailed for more than a month and that they had attempted to jail him unlawfully for nearly a year. Such explanations are also particularly compelling given the trial court's apparent interest in ensuring that Rosie blamed her father alone for his own (unlawful) incarceration, rather than anyone else.[59]

At any rate, trial courts have no plausible post-trial authority to restrict the speech of a non-party—let alone to do so permanently and selectively. As proponents of the trial court's jurisdiction, the Appellees are also the parties who have the burden of demonstrating that it existed, *see Redwing*, 363 S.W.3d at 445, and they admit they cannot. *See* Resp. to Michael Malone's Pet. for Writ of Cert. at 10 ("To be candid with the Court, the Maternal Grandparents must concede that they have been unable to find any authority which allows a court to issue orders on a voluntary non-party witness."). The trial court's extra-legal prior restraint orders must be vacated accordingly.

IX. CONCLUSION

For the foregoing reasons, the Williamson County Chancery Court's unconstitutional and void prior restraint orders should be **VACATED**.

[59] Tr. at 50:4–21.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

As permitted by Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief (Sections III–IX) contain 9,066 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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

I hereby certify that on this 9th day of January, 2024, a copy of the foregoing was sent via the Court's electronic filing system, via USPS mail, or via email to the following parties:

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