IN THE SUPREME COURT OF TENNESSEE

PAMELA D. STARK,	§	
	§	
Appellant,	§	Case No.: _____
	§	
v.	§	W2019-00650-COA-R3-CV
	§	
JOE EDWARD STARK,	§	Shelby County Circuit Court
	§	Case No. CT-002958-18
Appellee.	§	

RULE 11 APPLICATION OF APPELLANT PAMELA D. STARK

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III. INTRODUCTION

This appeal concerns a citizen who is subject to an unlawful and egregiously overbroad prior restraint enjoining her from exercising her constitutional rights to speech and to petition the government for redress of her grievances. *See* R. at 80, ¶ 3.[1] The Appellant, Pamela Stark, initially refused to comply with the trial court's unlawful order, R. at 115–16, which compelled her—among other things—to retract her protected speech regarding matters of extraordinary public concern: domestic violence and malfeasance by the Memphis Police Department, *see* R. at 80, ¶ 2. As a result, the trial court *jailed* Ms. Stark for civil contempt until she agreed to do so. R. at 116, ¶¶ 4–5.

Because Ms. Stark's husband is a police officer in the Memphis Police Department, *see* R. at 90, ¶ 6, and because the Parties are divorcing, the trial court has instructed Ms. Stark that referencing her husband or his domestic violence violates Tennessee Code Annotated § 36-4-106(d)(3)'s statutory injunction, which "restrain[s] both parties [in a divorce] from . . . making disparaging remarks about the other to . . . either party's employer." R. at 79; TE at p. 26, line 19 – p. 27, line 21. As a consequence, Ms. Stark is "enjoined from making any [] public allegations against the [Appellee], Joe Stark, on social media (on any platform) or to his employer which may affect [Appellee's] reputation or employment." R. at 80, ¶ 3. The trial court additionally emphasized that its restraining order prohibits Ms. Stark from petitioning the Mayor of

[1] Within this Application, the Technical Record is cited as "R. at [page number]," and the Transcript of Evidence is cited as "TE at [page number], line [line number]."

Memphis regarding her husband in particular because the Appellee is a police officer and "[t]he mayor is [Appellee's] employer. Bottom line." TE at 26, lines 24–25.

The trial court's restraining order is unconstitutionally overbroad and remains in effect. *See* R. at 78–80. As evidenced by Ms. Stark's recent incarceration and her coerced censorship arising from it, the trial court's restraining order is also actively enforced. *See* R. at 115–16.

Specifically, between December 2018 and January 2019, Ms. Stark petitioned the Mayor of Memphis regarding corruption in the Memphis Police Department and her domestic assault at the hands of her husband, *see* TE at p. 19, line 10 – p. 20, line 14, and she posted on Facebook that she was "a recent victim of domestic violence at the hands of a Memphis Police Officer." R. at 41. Ms. Stark properly identified both her petition and her Facebook post as being "clearly protected under both the United States Constitution and the Tennessee Constitution." R. at 45, ¶ 6; TE at 26, lines 6–18. Even so, at the Appellee's urging, the trial court:

(1) Entered a restraining order that "enjoined [Ms. Stark] from making any other public allegations against the [Appellee], Joe Stark, on social media (on any platform) or to his employer which may affect [Appellee's] reputation or employment[,]" R. at 80, ¶ 3;

(2) Ordered Ms. Stark to "remove the December 14, 2018 Facebook post immediately[,]" R. at 80, ¶ 2;

(3) Held Ms. Stark in civil contempt of its restraining order when she refused to comply, R. at 115, ¶ 3; and

(4) Ordered Ms. Stark incarcerated indefinitely until she deleted her Facebook post about her husband as ordered. R. at 116, ¶ 4.

After a short period of incarceration, Ms. Stark deleted the Facebook post at issue under protest in lieu of remaining incarcerated pending appeal. *See* R. at 116, ¶ 5. Because she did so, however, the Court of Appeals held—erroneously—that her appeal had become moot and her challenge to the trial court's unlawful contempt order and the restraining order from which it arose could no longer be adjudicated. *See Stark v. Stark*, No. W2019-00650-COA-R3-CV, 2020 WL 507644, at *1 (Tenn. Ct. App. Jan. 31, 2020) ("Because the appellant has purged herself of civil contempt and was released from incarceration, we deem the issue moot and dismiss this appeal."). This Application followed.

For the reasons detailed below, review is warranted due to the need to secure uniformity of decision, because this case presents unusually important questions of law and public interest, and because the exercise of this Court's supervisory authority compels review. Accordingly, Ms. Stark's Rule 11 application for permission to appeal should be **GRANTED**.

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

Pursuant to Tennessee Rule of Appellate Procedure 11(b), the Appellant states that the judgment of the Tennessee Court of Appeals regarding which this Application is filed—attached hereto as **Exhibit #1**—was entered on January 31, 2020. *See id.; Stark*, 2020 WL 507644. No petition to rehear was filed. Accordingly, this Application having been filed within 60 days of the judgment of the Tennessee Court of Appeals, the Appellant's Rule 11 Application has been timely filed.

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

The Appellant presents the following questions for the Court's review:

1. Whether the canon of constitutional avoidance precluded the trial court from finding that Ms. Stark's truthful, constitutionally protected Facebook post and petition to the Mayor of Memphis regarding her husband—an Officer of the Memphis Police Department—violated Tennessee Code Annotated § 36-4-106(d)(3)'s statutory injunction "restraining both parties [in a divorce] from harassing . . . the other and from making disparaging remarks about the other to . . . either party's employer" and the restraining order premised upon Tennessee Code Annotated § 36-4-106(d)(3) regarding which Ms. Stark was found in civil contempt.

2. Whether the trial court lawfully held Ms. Stark in civil contempt for refusing to submit to an unlawful prior restraint and court-ordered censorship of her constitutionally protected speech.

3. Whether Ms. Stark's appeal of the trial court's *ultra vires* order finding her in civil contempt is moot.

4. Whether, if moot, any exception to the mootness doctrine applies to Ms. Stark's appeal.

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

Pamela Stark is a licensed attorney who at all times relevant to this appeal was employed as an Assistant District Attorney in Shelby County, Tennessee. *See* R. at 35, ¶ 1. Ms. Stark is also a victim of domestic violence who was physically assaulted by her husband, a Memphis Police Officer. R. at 28.

Critically, Ms. Stark is divorcing her husband. *See* R. at 1–4. As a consequence, she is subject to Tennessee Code Annotated § 36-4-106(d)(3)'s statutory speech injunction, which "restrain[s] both parties [in a divorce] from harassing . . . the other and from making disparaging remarks about the other to . . . either party's employer." This appeal arises out of an erroneous and unlawful restraining order that is premised upon Tennessee Code Annotated § 36-4-106(d)(3), *see* R. at 78–80—an order that was followed by Ms. Stark's imprisonment for civil contempt when she maintained her rights to speak and petition the government to redress her grievances in spite of it. *See* R. at 115–16.

While her divorce proceedings were pending, Ms. Stark declared publicly—and truthfully—that she was "a recent victim of domestic violence at the hands of a Memphis Police Officer," and she spoke out on Facebook regarding her concerns about the Memphis Police Department's conflict of interest in its investigation of her domestic assault. *See* R. at 41. In full, Ms. Stark's Facebook post stated as follows:

> Anyone who know[s] me, knows I am a staunch supporter of not only MPD, but law enforcement as a whole. That being said, police officers are only human. Further, they are human

> beings who are specifically trained to rely on each other for their very life. Thus, it is ridiculous to believe that law enforcement, especially from the same specific force, should ever investigate a case where there is potential wrong doing and/or legal consequences for one of their own. Being in charge of the investigation, they decide what if anything is done, documented, or collected as they investigate one of their own with no one watching over their shoulder.
>
> I speak now as a recent victim of domestic violence at the hands of a Memphis Police Officer. I can attest to exactly how wide "the thin blue line can get." Do not get me wrong, I understand it. Who among us would want to hang one of our own out to dry. This is even more so for the Brotherhood of the Blue. However, it is even more devastating. Who do you turn to when those [s]worn to serve and protect and enforce the law, don't.

Id.

Ms. Stark additionally petitioned the Mayor of Memphis to redress her grievances regarding both her assault and the Memphis Police Department's malfeasance in response to it. *See* TE at p. 19, line 10 – p. 21, line 5 (in which Appellee discusses Ms. Stark's letter to the Mayor and his concerns that her grievances would be redressed to his detriment as a result of it); TE Exhibit #2.[2]

[2] The petition itself was filed and marked as Exhibit #2 to the Transcript of Evidence, and it is identified in the record as "E-mail to the mayor from Ms. Stark." *See* TE at 3. Ms. Stark also designated it as an item to be included in the record on appeal. *See* R. at 150, ¶ 4. The exhibit appears to have been erroneously omitted from the appellate record, but because it is a public judicial record from this case and may be considered as such, *see generally Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *9 (Tenn. Ct. App. Feb. 19, 2009); *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987); *State v.*

After Ms. Stark's constitutionally protected speech and petition came to her husband's attention, Ms. Stark's husband moved the trial court for an order both compelling Ms. Stark to delete her Facebook post and restraining Ms. Stark from speaking further about her assault in any public forum or on social media. *See* R. at 36, ¶¶ 8–9. As grounds, the Appellee maintained that Ms. Stark's speech contravened Tennessee Code Annotated § 36-4-106(d)(3)'s statutory injunction and disparaged him to his employer. *See* TE at 7, lines 1–11. *See also* R. at 36, ¶ 7 (complaining that: "On or about January 4, 2019, Husband became aware that on December 14, 2018, Wife publicly posted her [domestic violence] allegation regarding Husband on Facebook and disparaged the Memphis Police Department's internal handling and investigation of said case.").

In response, Ms. Stark maintained—correctly[3]—that her speech and petition were "clearly protected under both the United States Constitution and the Tennessee Constitution." R. at 45, ¶ 6. *See also* TE at 26, lines 6–11 ("Judge, I have an absolute right under the Constitution and every law in this state to make allegations about mistreatment by

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Ballard, No. M1998-00201-CCA-R3-CD, 2000 WL 1369508, at *7 (Tenn. Crim. App. Sept. 22, 2000), a stampfiled copy of it is attached to this Application for the Court's convenience as **Exhibit #2**.

[3] A federal court has already held—correctly—that Ms. Stark's speech and petition were constitutionally protected. *See Pamela D. Stark v. City of Memphis et al.,* No. 2:19-cv-02396-JTF-tmp (Feb. 18, 2020 Report and Recommendation), p. 36 ("Ms. Stark's Facebook post criticizing the MPD and her repeated communications with various people about her husband's and the MPD's wrongful conduct are political speech, and political speech is protected by the First Amendment.").

the Police Department and their investigation. I have an absolute right to make allegations that I have been a victim of corruption from the Police Department."); R. at 79 ("Ms. Stark put on no defense proof only arguing that she had a right to post the statements.").

Upon review, however, the trial court found that Ms. Stark's speech and petition abridged Tennessee Code Annotated § 36-4-106(d)(3)'s statutory speech injunction because her husband is a police officer, because the Mayor of Memphis is his employer, and because her statements regarding her assault disparaged him. *See generally* R. at 78–79. The trial court also specifically held that Ms. Stark lacked any constitutionally protected right to speak or petition about her husband or the fact that he assaulted her, stating:

> You can sit there and argue that you have a freedom of speech, and but **the moment you sat there and said in this letter referencing your husband, that changed it. That was about him.** It wasn't about a general concern about police corruption.
>
> The fact that, you know, another police officer was arrested yesterday or last week or last month, if you want to sit there and rant about that, have at it. But **if you're going to make references to your husband, about your husband, about your situation, then that is off limits.** Bottom line.
>
> That post shall be removed today, and a mandatory injunction will go into effect that there will be no communication with employers. There is a special prosecutor involved in this case. That special prosecutor will deal with this Court. Whatever allegations have been made, we'll deal with that in due course. But at this point involving [sic] making any further allegations in social media is completely inappropriate and is being enjoined.

TE at 27, lines 1–21 (emphases added).

As a consequence, the trial court ordered Ms. Stark to delete her Facebook post referencing her domestic assault immediately. *See* TE at 27, line 13; R. at 80, ¶ 2 ("The Respondent, Pamela Stark, shall remove the December 14, 2018 Facebook post immediately."). Ms. Stark was also—and remains—"enjoined from making any [] public allegations against the [Appellee], Joe Stark, on social media (on any platform) or to his employer which may affect [Appellee's] reputation or employment." R. at 80, ¶ 3.

Maintaining that her speech was constitutionally protected, Ms. Stark initially refused the trial court's retraction order and declined to delete her Facebook post as instructed. *See* TE at 28, lines 5–7 ("THE COURT: Ms. Stark, are you going to remove that post, yes or no? MS. STARK: I am not."). As a consequence, Ms. Stark was held in civil contempt and *jailed* until she agreed to delete her Facebook post regarding her assault. R. at 115–16; R. at 116, ¶ 4 ("Ms. Stark was ordered to be held in custody until such time that she agreed to remove the Facebook post in question."). Specifically, the trial court stated:

> I'm making a finding that you are in direct contempt of court by willfully refusing to comply with this Court's orders. You will be held in the -- you will be held in custody until such time that you decide that you want to change your position and you apologize to this Court. We'll stand in recess until that time.

TE at 28, lines 15–21.

After a short period of incarceration, and in order to get out of jail, Ms. Stark deleted her Facebook post as ordered under protest. *See* R. at 116, ¶ 5 ("Only after consultation with counsel and being in custody for

four (4) hours did Ms. Stark agreed [sic] to remove the Facebook post as previously ordered."). Thereafter, Ms. Stark prosecuted a timely appeal of her contempt order. *See* R. at 124–25. Upon review, however, the Court of Appeals dismissed her appeal as moot on the basis that she had purged herself of contempt and that no exception to the mootness doctrine applied that would enable appellate review. *See Stark*, 2020 WL 507644, at *5–7.

In sum: This case arises out of: (1) Pamela Stark's exercise of her constitutionally protected rights to speak truthfully and petition the government to redress her grievances regarding matters of extraordinary public concern, and (2) her subsequent incarceration for maintaining those rights and resisting an unlawful court order compelling her to retract her constitutionally protected speech. As a practical matter, the effect of the Court of Appeals' judgment is that Ms. Stark was obligated to subject herself to a period of incarceration lasting months or even years in order to secure appellate review of the trial court's unlawful orders. Separately, as a legal matter, the Court of Appeals' judgment is unsupportable. Contrary to the Court of Appeals' opinion, the Parties' dispute is not moot at all, and <u>*every*</u> exception to the mootness doctrine would apply to this case even if it were.

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

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

(1) The need to secure uniformity of decision;

(2) The need to secure settlement of important questions of law;

(3) The need to secure settlement of questions of public interest; and

(4) The need for the exercise of the Supreme Court's supervisory authority.

1. THE NEED TO SECURE UNIFORMITY OF DECISION

The Court of Appeals correctly observed that this Court has identified several exceptions to the mootness doctrine, including whether "the issue is of great public importance or affects the administration of justice . . . ." *See Stark*, 2020 WL 507644, at *5 (cleaned up). In dismissing Ms. Stark's appeal, however, the Court of Appeals held that the "public importance" and "affects the administration of justice" exceptions to the mootness doctrine were not even "arguably relevant in this case," *id.*, notwithstanding the fact that Ms. Stark was held in contempt and then *jailed* for refusing to retract her constitutionally protected speech recounting both her domestic assault by a Memphis Police Officer and corruption within the Memphis Police Department and the criminal justice system generally.

The Court of Appeals' holding is wholly incompatible with this

Court's prior precedent addressing when speech involves a matter of public concern. As this Court has explained, "[s]peech involves a matter of public concern when its content can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *King v. Betts*, 354 S.W.3d 691, 714 (Tenn. 2011) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). Indeed, this Court has "note[d] that '[s]peech on matters directly affecting . . . safety of the public is ***obviously*** a matter of public concern.'" *Id.* (quoting *Chappel v. Montgomery Cty. Fire Prot. Dist.* No. 1, 131 F.3d 564, 578 (6th Cir.1997) (emphasis added)). Here, however, finding that issues of public concern were not even "arguably relevant" to Ms. Stark's appeal, the Court of Appeals held otherwise. *Stark*, 2020 WL 507644, at *5.

Notably, in similar contexts, courts have also emphasized the "well-established" nature of the right to transmit information regarding the police in particular. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) ("[A] citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."). Victims' rights in Tennessee, too, enjoy both constitutional and statutory protection. *See, e.g.*, *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 861 n.3 (Tenn. 2016) ("In 1998, the Tennessee Constitution was amended to guarantee that victims of crime have . . . the right to be free from intimidation, harassment, and abuse throughout the criminal justice system . . . The Victims' Bill of Rights, Tennessee Code Annotated section 40–38–102, provides that the rights of victims of crimes include the right to be treated with dignity and

compassion; have protection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends . . . ."). As a consequence, the public interest value in Ms. Stark's speech about a Memphis Police Department Officer, about the Memphis Police Department generally, and about her domestic abuse is plain.

Further, the First Amendment's constitutional guarantee of freedom of speech does not merely implicate the rights of the speaker. *See, e.g., McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) ("An injunction against speech harms not just the speakers but also the listeners"). Instead, it implicates *the public's* right to receive information and ideas as well. *See, e.g.*, *id.*; *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). *See also Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (holding that "due to the Free Speech concerns present, we find the potential for irreparable harm to Mishkoff more likely, and that the public would be negatively impacted, should we *not* dissolve the injunctions."). In light of these considerations, the Court of Appeals' holding that Ms. Stark's speech—for which she was subject to an unlawful prior restraint and then jailed—neither held any "public importance" nor "affect[ed] the administration of justice" represents a remarkable and unwarranted departure from prior precedent in several respects. *Cf. In re Lineweaver*, 343 S.W.3d 401, 408 n.6 (Tenn. Ct. App. 2010) (adjudicating appeal of contempt finding in light of public interest).

Further, and independently, the Court of Appeals' holding creates enormous uncertainty and a significant split of authority regarding a

party's right to appeal a civil contempt order that arises out of an assertedly unconstitutional injunction. In its opinion, the Court of Appeals held that "[b]ecause this is an appeal from the contempt order, Wife is limited in her ability to raise issues regarding the restraining order" and to contest the legitimacy of the underlying restraining order that she purportedly violated. *Stark*, 2020 WL 507644, at *4. In most circumstances, this is an accurate statement of the law, because "[o]rdinarily if a court issues an injunction, the parties enjoined must obey it, even if they believe the statute on which the injunction was based is unconstitutional." *Tenn. Dep't of Health v. Boyle*, No. M2001-01738-COA-R3CV, 2002 WL 31840685, at *8 (Tenn. Ct. App. Dec. 19, 2002) (citing *Howat v. Kansas*, 258 U.S. 181 (1922)).

"This rule, however, does not apply to civil contempt." *See id.* (emphasis added). The Court of Appeals' prior recognition of this exception cannot be squared with the Court of Appeals' holding below, in which the court determined that Ms. Stark's ability to challenge her contempt order and the restraining order from which it arose became moot the moment Ms. Stark purged herself of contempt. *Cf. id. with Stark*, 2020 WL 507644, at *4. *See also Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 512 (Tenn. 2005) (reversing mootness finding regarding civil contempt, and holding that "an injured party may recover damages pursuant to Tennessee Code Annotated section 29–9–105 from the contemnor who performed the forbidden act, *even though the contemptuous conduct is not ongoing*.") (emphasis added). As such, this Court should further accept review to secure uniformity of decision regarding whether a litigant may contest a contempt finding on

the basis that an underlying order is unconstitutional, and then argue that the finding of "civil contempt falls with the order if it turns out to have been erroneously or wrongfully issued." *Tenn. Dep't of Health*, 2002 WL 31840685, at *8 (quoting *Cliett v. Hammonds*, 305 F.2d 565, 570 (C.A. 5th Cir. Tex. 1962)). *See also Kramer v. Thompson*, 947 F.2d 666, 682 (3d Cir. 1991) ("[W]e find no support for the various retractions and withdrawals forced upon Thompson by the district court. Consequently, those orders of the district court compelling such retractions and withdrawals, and the associated contempt citations, must be reversed."); *Coffey v. Coffey*, No. E2012-00143-COA-R3CV, 2013 WL 1279410, at *5 (Tenn. Ct. App. Mar. 28, 2013) (holding that "**any** order that imposes punishment upon a petition for contempt is a final appealable order in its own right, even though the proceedings in which the contempt arose are ongoing.") (emphasis added).

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

The Court of Appeals' holding that litigants who are subject to unconstitutional speech-based prior restraints and unlawful censorship orders resulting in civil contempt must agree to remain incarcerated throughout the entire duration of their appeal—in this case, nearly a full year[4]—in order to secure appellate review of the unlawful orders that

[4] Ms. Stark was held in civil contempt on February 7, 2019. *See generally* TE. The trial court's written contempt order was entered on March 29, 2019. *See* R. at 115. Ms. Stark's notice of appeal was filed on April 14, 2019. *See* R. at 124. The Court of Appeals issued its opinion on January 31, 2020. *See Stark v. Stark*, No. W2019-00650-COA-R3-CV, 2020 WL 507644 (Tenn. Ct. App. Jan. 31, 2020).

resulted in their incarceration would horrify Kafka. It also encourages—indeed, compels—litigants to *violate* court orders and to remain in contempt of them in order to preserve their right to appellate review. The importance of remedying—and the public interest in remedying—such dystopian and intolerable precedent speaks for itself.

Separately, the trial court's order implicates extraordinarily important constitutional issues and questions of public interest. When construing statutory provisions, courts have a "duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution." *Davis–Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993) (collecting cases). Thus, "when faced with two equally plausible interpretations, one of which poses constitutional concerns, the canon of constitutional avoidance directs [courts] to adopt the other interpretation." *Moorcroft v. Stuart*, No. M2013-02295-COA-R3-CV, 2015 WL 413094, at *10 (Tenn. Ct. App. Jan. 30, 2015) (citing *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)). *See also Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.").

In the instant case, the trial court ruled without qualification that Tennessee Code Annotated § 36-4-106(d)(3)'s statutory injunction forbade Ms. Stark's Facebook post and petition to the Mayor regarding her husband, a Memphis Police Officer. *See* TE at p. 26, line 19 – p. 27,

line 21; R. at 78–80. The trial court also made this finding without determining—or even attempting to determine—whether her Facebook post and petition were truthful. *See* R. at 78–80; TE at 1–29. *But see Smith v. Daily Mail Publ'g 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."). Critically, though, because Ms. Stark's Facebook post and petition were constitutionally protected, the canon of constitutional avoidance precluded the trial court from interpreting Tennessee Code Annotated § 36-4-106(d)(3) in a manner that prohibited her constitutionally protected criticism of the Memphis Police Department and one of its officers. *See Moorcroft*, 2015 WL 413094, at *10. *Cf. Jackson v. Smith*, 387 S.W.3d 486, 495 (Tenn. 2012) ("We have an obligation to interpret statutes in a way that preserves their constitutionality. *Jordan v. Knox Cty.*, 213 S.W.3d 751, 780–81 (Tenn. 2007). Accordingly, we decline to interpret Tenn. Code Ann. § 36–6–306(b)(4) in a way that places it on a collision course with Article I, Section 20.").

During the proceedings before the trial court, Ms. Stark contended that she had not violated Tennessee Code Annotated § 36-4-106(d)(3)'s statutory injunction because her Facebook post and petition to the Mayor of Memphis about the Memphis Police Department and one of its officers were protected by both the First Amendment to the United States Constitution and the Tennessee Constitution. *See* R. at 45, ¶ 6; TE at 26, lines 6–11. Ms. Stark, of course, was correct; the right to criticize government officials as she did is among the central reasons for the First Amendment's existence. *See, e.g.*, *New York Times Co. v. Sullivan*, 376

U.S. 254, 270 (1964) (holding that the First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); Harry Kalven, Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REVIEW 191, 208 (1964). Indeed, the U.S. Supreme Court has famously explained that "it is a prized American privilege to speak one's mind, without perfectly good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941). *See also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("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."). As such, by any metric, ensuring that Tennessee Code Annotated § 36-4-106(d)(3)—a statute of statewide effect—is being applied in accordance with the First Amendment's guarantees and protects a survivor's right to speak out about domestic violence at the hands of a police officer qualifies as an important issue of law and public interest that merits review.

Separately, and independently, the fact that the trial court imposed a prior restraint against Ms. Stark and enforced its prior restraint through incarceration—a punishment that the Court of Appeals held was foreclosed from appellate review—alone presents the need to secure settlement of important questions of law and questions of public interest. Prior restraints are anathema to the First Amendment and a free society, and "[t]he Supreme Court has consistently railed against the use of prior

restraints on expression except in the most limited of circumstances." DAVID L. HUDSON, JR. THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:10 (2012). As Chief Justice Warren Burger explained for a unanimous Court in *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976): "[P]rior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights."

Orders enjoining the right to speak on a particular topic are especially disfavored and presumptively invalid, *id.* at 558, and "any system of prior restraints of expression comes . . . bearing a heavy presumption against its constitutional validity[,]" *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases). Of note, prior restraint problems also arise from "any civil harassment order that forbids speech with specified content, as in 'Do not say X to petitioner' or 'Do not say Y about petitioner.'" Aaron Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 825 (2013). Thus, the trial court's order—enforced on pain of contempt and imprisonment—that Ms. Stark retract her lawful speech about her husband represents a severe form of prior restraint that merits heavy constitutional scrutiny. It is not, as the Court of Appeals found, an order that should be insulated from any appellate review whatsoever. *Cf. Kramer*, 947 F.2d at 682 ("[W]e find no support for the various retractions and withdrawals forced upon Thompson by the district court. Consequently, those orders of the district court compelling such retractions and withdrawals, and the associated contempt citations, must be reversed.").

Further, the fact that Ms. Stark was restrained from speaking in the context of a domestic dispute does not insulate the trial court's

restraining order and resulting contempt order from First Amendment scrutiny. In similar contexts, other courts have properly invalidated such orders as being unconstitutionally overbroad. *See, e.g.*, *Molinaro v. Molinaro*, 33 Cal. App. 5th 824, 831 (2013) ("Although we have found the evidence sufficient to support the court's issuance of a domestic violence restraining order, we conclude the part of the order prohibiting Michael from posting 'anything about the case on Facebook' is overbroad and impermissibly infringes upon his constitutionally protected right of free speech.").

Here, the trial court determined that Ms. Stark was outright restrained from "mak[ing] references to [her] husband" or speaking "about [her] situation"—a euphemism for the domestic assault the Appellee committed against her—on social media or in any public forum whatsoever. *See* TE at 27, lines 10–21; R. at 80, ¶ 3 ("The Respondent, Pamela Stark, shall be further enjoined from making any other public allegations against the Petitioner, Joe Stark, on social media (on any platform) or to his employer which may affect Petitioner's reputation or employment."). The trial court also enforced that prior restraint through incarceration and court-ordered compulsion to retract her constitutionally protected speech. *See* R. at 116, ¶ 4. As detailed above, such a prior restraint—and the trial court's contempt order arising out of it—egregiously contravene core First Amendment doctrine. As such, this appeal presents the need to secure settlement of unusually important questions of law and questions of significant public interest, and review should be granted accordingly.

Ms. Stark's expressive actions also implicate another fundamental

constitutional right—the right to petition, which is guaranteed by both the First Amendment and Article I, Section 23 of the Tennessee Constitution. While freedom of speech dominates discussion of free-expression jurisprudence, the right to petition has ancient and independent roots. At its heart, the right to petition guarantees citizens the right to "make their wishes known to their representatives." *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961). Its guarantee is traced to the Magna Carta of 1215 and the English Petition of Right of 1628. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 395 (2011). "The right to petition was also highly respected by the American colonies, particularly because the colonial governments would often petition the Crown themselves." Dr. JoAnne Sweeney, *LOL No One Likes You: Protecting Critical Comments: Government Officials' Social Media Posts Under the Right to Petition*, 2018 WIS. L. REV. 73, 81 (2018). This Court, for its part, has recognized the exercise of the right to petition as "a high constitutional privilege" guaranteed by Tennessee's Constitution. *McKee v. Hughes*, 181 S.W. 930, 931 (1916).

This Court's most recent substantive analysis of the right to petition guaranteed by Article I, § 23 of the Tennessee Constitution came more than a century ago. *See id.* In *McKee v. Hughes*, 181 S.W. at 932, this Court also explained that critical considerations that would eventually come to dominate the U.S. Supreme Court's free speech jurisprudence—requirements of both falsity and malice—must be proven in order for an attempt to curtail the right of petition to be lawful. *See id.* at 931–32.

Here, before imposing its temporary restraining order and finding

Ms. Stark in contempt of it, the trial court made no attempt whatsoever to determine whether Ms. Stark's Facebook post and petition to the Mayor of Memphis contained truthful information or were malicious. *See* R. at 78–80; TE at 1–29. As a consequence, the limits of the right to petition—and whether the trial court's orders are compatible with "the Declaration of Rights embodied in our Constitution (article 1, § 23)," *McKee*, 181 S.W. at 931—present important questions of law and questions of public interest that merit this Court's review.

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

"The power to fully and finally adjudicate cases and controversies is constitutionally assigned to the judiciary of this state[.]" *Jackson*, 387 S.W.3d at 494. Thus, in the absence of a genuine bar to justiciability, "courts ***must*** decide the cases brought before them based on the law existing at the time of their decisions and on the facts presented to them." *Id.* (emphasis added).

Here, although Ms. Stark's appeal was not moot, and even though every recognized mootness exception applied to her appeal in the event that it was, the Court of Appeals declined to adjudicate her live case and controversy. As a consequence, Ms. Stark was left without any review of the trial court's egregiously unconstitutional prior restraint and censorship order. Exercise of this Court's supervisory authority is essential as a consequence.

"Generally, whether a claim is moot involves a question of law that this Court will review de novo." *Huggins v. McKee*, 500 S.W.3d 360, 375 (Tenn. Ct. App. 2016) (citing *All. for Native Am. Indian Rights in Tenn.,*

Inc. v. Nicely, 182 S.W.3d 333, 338–39 (Tenn. Ct. App. 2005)). A case becomes moot when it "has lost its justiciability for some reason occurring after commencement of the case[,]" *Hooker v. Haslam*, 437 S.W.3d 409, 417 (Tenn. 2014) (citing *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co.*, 301 S.W.3d 196, 204 (Tenn. 2009)), and when "the parties no longer have a continuing, real, live, and substantial interest in the outcome[,]" *id.* (citing *Norma Faye*, 301 S.W.3d at 210). Put differently, "a case will be considered moot if it no longer serves as a means to provide some sort of relief to the prevailing party." *Ford Consumer Fin. Co., Inc. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998).

Notwithstanding the Court of Appeals' judgment on the matter, the instant case continues to present a live controversy between the Parties. Separately, even if moot, all four recognized exceptions to the mootness doctrine apply. Appellate review is warranted accordingly.

A. <u>Ms. Stark's appeal is not moot.</u>

The controversy between the Parties did not become moot at any point, and it demonstrably persisted during Ms. Stark's appeal. Beyond disputing the propriety of the underlying restraining order from which the trial court's contempt finding arose, the Parties fiercely contest the appropriate measure of punishment arising from the trial court's contempt finding. Ms. Stark, for her part, argued that no punishment was warranted at all in light of the unlawful nature of the trial court's order. *See generally Stark*, 2020 WL 507644, at *4. By contrast, the Appellee contended on appeal that Ms. Stark's punishment for contempt should be *<u>increased</u>*. *See* **Exhibit #3**, Appellee's Brief, p. 27 ("Husband

would state that the proper punishment for Wife's direct contempt was a maximum punishment of ten (10) days in jail and a fifty dollar ($50) fine.").

This Court has previously held that disputes over both the propriety of a contempt finding and the proper punishment for civil contempt remain live—and do not automatically become moot—even though the underlying contemptuous conduct has ceased. *See, e.g.*, *Overnite Transp. Co.*, 172 S.W.3d at 511–12 (reversing mootness finding regarding civil contempt, and holding that litigants' disputes regarding both the propriety of contempt and the appropriate remedy regarding a claim of contempt remained live "even though the contemptuous conduct is not ongoing."). That is precisely the situation here. As a consequence, the Parties' controversy is not moot, and the Parties are entitled to have their live controversy adjudicated.[5] *Jackson*, 387 S.W.3d at 494.

B. Ms. Stark's appeal is justiciable under multiple recognized exceptions to the mootness doctrine.

Even if the Parties' controversy had become moot, Tennessee also recognizes four independent exceptions to the mootness doctrine:

> (1) when the issue is of great public importance or affects the administration of justice;
>
> (2) when the challenged conduct is capable of repetition and is of such short duration that it will evade judicial review;
>
> (3) when the primary subject of the dispute has become moot

[5] The Appellee also lodged a still-pending claim for attorney's fees arising out of the underlying restraining order and contempt proceeding, which the trial court reserved. R. at 80, ¶ 4; TE at p. 28, line 22 – p. 29, line 1.

but collateral consequences to one of the parties remain; and

(4) when the defendant voluntarily stops engaging in the conduct.

Hooker, 437 S.W.3d at 417–18 (Tenn. 2014) (quoting *Norma Faye*, 301 S.W.3d at 210–11).

Here, each mootness exception applies, and review is warranted as a result.

i. First Amendment rights are of great public importance, and the unlawful prior restraint of those rights undermines the administration of justice.

"The courts recognize an exception to mootness allowing them 'to address issues of great importance to the public and the administration of justice.'" *Nonprofit Hous. Corp. v. Tenn. Hous. Dev. Agency*, No. M2014-01588-COA-R3-CV, 2015 WL 5096181, at *10 (Tenn. Ct. App. Aug. 27, 2015) (citing *Norma Faye*, 301 S.W.3d at 210). This exception is available "under 'exceptional circumstances where the public interest clearly appears.'" *Norma Faye*, 301 S.W.3d at 210 (citing *Dockery v. Dockery*, 559 S.W.2d 952, 955 (Tenn. Ct. App. 1977)). Importantly, such circumstances can be and previously have been found in cases of civil contempt after contempt has been purged. *See, e.g.*, *In re Lineweaver*, 343 S.W.3d at 408 n.6.

When determining whether the public interest exception to the mootness doctrine applies, courts are instructed to consider the following factors:

(1) the public interest exception should not be invoked in cases affecting only private rights and claims personal to the parties;

> (2) the public interest exception should be invoked only with regard to "issues of great importance to the public and the administration of justice";
>
> (3) the public interest exception should not be invoked if the issue is unlikely to arise in the future; and
>
> (4) the public interest exception should not be invoked if the record is inadequate or if the issue has not been effectively addressed in the earlier proceedings.

Nonprofit Hous. Corp., 2015 WL 5096181, at *10 (quotation omitted). In this case, the public interest exception is easily satisfied, as all four factors favor Ms. Stark.

First, this case concerns far more than just the rights of Ms. Stark and the Appellee. Instead, the prior restraint at issue in this case harms all willing listeners and members of the public by preventing them from viewing and reading Ms. Stark's censored speech. *See, e.g., McCarthy*, 810 F.3d at 462 ("An injunction against speech harms not just the speakers but also the listeners (in this case the viewers and readers)."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

It is well-established that the U.S. Constitution protects the public's right to receive information and ideas. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 356 (2010) ("When Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to

control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) ("Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." (citation omitted)); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) ("To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("Where a willing speaker exists, "the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."); *Stanley*, 394 U.S. at 564 ("It is now well established that the Constitution protects the right to receive information and ideas" and that this right is "is fundamental to our free society.").

The trial court's contempt order—and the restraining order from which it arose—seriously undermine these public rights. To begin, the restraining order against Ms. Stark outright prohibits her from making disparaging remarks—*even if true*—about the Appellee to his employer, which in this case is the government. It also compelled Ms. Stark to submit to censorship and retract her constitutionally protected speech.

See R. at 80, ¶ 2.

Further, the trial court indicated that Ms. Stark is prohibited even from "mak[ing] *references* to her husband"—a Memphis Police Officer—in any public forum or on social media to *anyone*, which the trial court held is categorically "off limits." *See* TE at 27, lines 10–21. (emphasis added). *See also* R. at 80, ¶ 3. This prior restraint—which enjoins wholesale Ms. Stark's truthful speech about a government official—is grossly overbroad, it seriously abridges the public's right to receive information, and it censors a substantial amount of protected speech carrying enormous public interest value. *See id.* The trial court's contempt order—and the restraining order from which it arose—are both presumptively and insurmountably unconstitutional as a consequence. *See, e.g.*, *Bantam Books, Inc.*, 372 U.S. at 70.

Second, the Parties' dispute concerns "issues of great importance to the public and the administration of justice[.]" *See Nonprofit Hous. Corp.*, 2015 WL 5096181, at *10. As detailed above, prior restraints on speech affect not only the rights of the speaker; they also affect *the public's* right to hear what the speaker has to say. *See supra*, pp. 36–37. That right is of surpassing importance where, as here, Ms. Stark was held in contempt for her speech about law enforcement misconduct and a police department's handling of a domestic violence incident involving one of its officers—issues that self-evidently affect the literal administration of justice. Thus, Ms. Stark's speech carries significant public importance, particularly given the raging national debates regarding police violence, corruption, and law enforcement misconduct

generally.[6]

Third, the dispute that gives rise to Ms. Stark's appeal is likely—if not certain—to arise again in the future. The trial court's restraining order—the violation of which landed Ms. Stark in jail for contempt—remains pending. *See Stark*, 2020 WL 507644, at *3. Further, every divorcing litigant in this state is automatically subject to Tennessee Code Annotated § 36-4-106(d)(3)'s statutory injunction, including the countless litigants (numbering, conservatively, in the tens of thousands) who are married to public employees. Thus, not only is Ms. Stark likely to be held in contempt again; given Tennessee's high divorce rate,[7] its high rate of domestic violence,[8] and its large number of public employees, including police officers,[9] this exact situation is likely to repeat itself in future cases

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[6] *See, e.g.*, John Kelly & Mark Nichols, *We found 85,000 cops who've been investigated for misconduct. Now you can read their records*, USA TODAY (Oct. 14, 2019), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/.

[7] According to the most recent data available from the Tennessee Department of Health, the annual divorce rate compared to the annual number of marriages is approximately 44%. *Number of Marriages and Divorces with Rates per 1,000 Population by County*, TENN. DEP'T OF HEALTH (2018), https://www.tn.gov/content/dam/tn/health/documents/vital-statistics/marriage-divorce/TN%20Marriages%20Divorces%20-%202018.pdf

[8] *See generally Domestic Violence 2017*, TENN. BUREAU OF INVESTIGATION (JUNE 12 2018), https://www.tn.gov/content/dam/tn/tbi/documents/tibrs/Domestic%20Violence%202017_Final.pdf.

[9] According to the U.S. Department of Justice, in 2012, Tennessee employed at least 15,640 sworn police officers. OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, NAT'L SOURCES OF LAW ENF'T

involving different litigants. Further still, given that the domestic abuse incident about which Ms. Stark posted on Facebook—speech that the trial court determined was categorically enjoined without even making an inquiry into its accuracy—remains unresolved, a subsequent violation of the trial court's order is also especially likely in the instant case in particular.

Fourth, the record is adequately developed for this Court to adjudicate Ms. Stark's appeal. The Parties' dispute was fully—albeit incorrectly—adjudicated in the trial court. While the Court of Appeals ultimately dismissed Ms. Stark's appeal as moot, the trial court made its findings and conclusions of law in written orders following a full hearing, *see* R. at 78–80, 115–16, the transcript of which is included in the appellate record, *see* TE. Consequently, the public interest exception to the mootness doctrine is easily established, and Ms. Stark's claim is justiciable and should be adjudicated.

ii. The disputed conduct is capable of repetition yet evading judicial review.

The mootness exception permitting courts to adjudicate claims that are capable of repetition yet evading review similarly applies to this case. *See All. for Native Am. Indian Rights in Tenn.*, 182 S.W.3d at 339 ("Tennessee courts recognize the 'capable of repetition yet evading review' exception to the mootness doctrine[.]" (quoting *State ex rel. McCormick v. Burson*, 894 S.W.2d 739, 742 (Tenn. Ct. App. 1994))).

EMP'T DATA 15 (Apr. 2016), https://www.bjs.gov/content/pub/pdf/nsleed.pdf.

Given their short duration, the exception is also particularly well-suited for civil contempt cases in particular. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (holding that litigant's 12-month imprisonment for civil contempt was "'in its duration too short to be fully litigated' through the state courts (and arrive here) prior to its 'expiration.'") (quoting *First Nat'l Bank of Boston*, 435 U.S. at 774)). *Cf. First Nat'l Bank of Boston*, 435 U.S. at 774 (18-month period too short to enable review); *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 514–16 (1911) (2-year period too short to enable review).

Here, Ms. Stark submitted to the trial court's censorship order under protest following a period of actual incarceration. *See* R. at 116, ¶ 5. Given that the restraining order regarding which she was found in contempt remains pending in the trial court, *Stark*, 2020 WL 507644, at *3, there is also more than a reasonable likelihood that Ms. Stark will be held in contempt again. Further, given the inherently short duration of civil contempt—a mere four hours in this case—Ms. Stark was and will always be unable to obtain appellate review absent her willingness to remain incarcerated for months or years pending appeal, something that she has already demonstrated, reasonably, that she is disinclined to do. *See* R. at 116, ¶ 5. For all of these reasons, the challenged conduct is capable of repetition but will evade judicial review. *See Turner*, 564 U.S. at 440; *First Nat'l Bank of Boston*, 435 U.S. at 774; *Southern Pacific Terminal Co.*, 219 U.S. at 514–16.

<u>*Third*</u>, Ms. Stark will be prejudiced by the same constitutional affronts if and when they recur. *See All. for Native Am. Indian Rights in Tenn.*, 182 S.W.3d at 340. Ms. Stark has been forced to choose between

competing constitutional rights—on the one hand, exercising her rights to speak and petition about police misconduct and her domestic abuse at the hands of a Memphis Police Officer, and, on the other, maintaining her liberty and avoiding incarceration. *See* R. at 116, ¶ 4. As this Court has previously held, this presents no meaningful choice at all. *See, e.g.*, *State v. Valentine*, 911 S.W.2d 328, 332 (Tenn. 1995) ("[a] defendant should not be forced to choose between competing constitutional rights because of an illegality perpetrated by the state.").

It also cannot be emphasized enough that Ms. Stark is not the only person who is prejudiced by her appeal evading review. As detailed at length above, the Court of Appeals' refusal to adjudicate the Parties' dispute severely prejudices the willing listener as well. *See supra*, pp. 36–37. Given the U.S. Supreme Court's consistently clear instruction that the public has a constitutionally protected interest in receiving information and ideas, *see id.*, speakers like Ms. Stark—whose speech involves clear matters of public concern—should not be unlawfully censored and imprisoned by the government without either recourse or a meaningful opportunity for review thereafter. *Cf. Valentine*, 911 S.W.2d at 332.

As a consequence, the challenged conduct is capable of repetition and will continue to evade review if this Court denies Ms. Stark's Application. By contrast, the alternative—forcing Ms. Stark to sit in jail for months or years in order to secure appellate review of an unlawful contempt order and protect her constitutional rights to speak and petition for redress—is self-evidently untenable.

iii. Collateral consequences persist from Ms. Stark's contempt order.

Collateral consequences persist from the trial court's contempt order that further warrant and enable this Court's review. As this Court has held repeatedly, collateral consequences that preclude mootness "include the continued effect of an order that has expired or is invalid." *Hudson v. Hudson*, 328 S.W.3d 863, 866 (Tenn. 2010) (citing *Putman v. Kennedy,* 900 A.2d 1256, 1263 (Conn. 2006) (holding as a collateral consequence the effect of an expired domestic violence restraining order on the reputation of an appellant and on subsequent child custody issues); *May v. Carlton,* 245 S.W.3d 340, 344 & n.3 (Tenn. 2008)). Qualifying collateral consequences also include consequences affecting employment. *See, e.g.*, *Street v. New York*, 394 U.S. 576, 580 n.3 (1969) (holding as a collateral consequence disciplinary proceedings that the defendant's employer had instituted against him as a result of a conviction); *DePompei v. Ohio Adult Parole Auth.*, 999 F.2d 138, 140 (6th Cir. 1993) (holding as a collateral consequence the loss of a medical license flowing from a criminal conviction).

Ms. Stark is an attorney who was employed as an Assistant District Attorney at all times relevant to this matter. *See* R. at 35, ¶ 1. Beyond her substantial reputational interests in having the trial court's *ultra vires* contempt order reversed, alleged job-related "acts of misconduct" and statutory violations can and have resulted in the loss of public employment in this state. *See, e.g.*, *Jackson v. Shelby Cty. Civil Serv. Merit Bd.*, No. W2006-01778-COA-R3CV, 2007 WL 60518, at *2 (Tenn. Ct. App. Jan. 10, 2007). Further, given that Ms. Stark's employment as

an Assistant District Attorney—and, thereafter, a private attorney—required regular contact with the Memphis Police Department, prohibiting her from communicating with the Appellee's employer was and remains "devastating [to Ms. Stark's] career." *See* R. at 130. Further still, under the Tennessee Rules of Professional Conduct, the trial court's constitutionally invalid finding of contempt could result in professional consequences as severe as the loss of Ms. Stark's license to practice law. *See* Tenn. Sup. Ct. R. 8, RPC 8.4(d) (noting that it is professional misconduct to "engage in conduct that is prejudicial to the administration of justice"); RPC 8.4(g) (noting that it is professional misconduct to "knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party").

Consequently, the trial court's unlawful contempt order places Ms. Stark at significant risk of experiencing serious collateral consequences. Appellate review under the collateral consequences exception to mootness is warranted accordingly.

iv. Ms. Stark voluntarily ceased the challenged conduct and wishes to resume it.

"The mere voluntary cessation of allegedly illegal conduct will not moot a controversy such as to prevent courts from determining the legality of the practice." *Robin Media Grp., Inc. v. Seaton*, No. 03A01-9704-CH-00146, 1997 WL 760726, at *3 (Tenn. Ct. App. Dec. 11, 1997) (citations omitted). "[T]he rationale behind the voluntary cessation exception to the mootness doctrine is to prohibit a litigant from *temporarily* ceasing its wrongful conduct in order to frustrate judicial

review, only to resume such conduct after the case has been dismissed as moot." *Melton v. City of Lakeland*, No. W2018-01237-COA-R3-CV, 2019 WL 2375431 (Tenn. Ct. App. June 5, 2019) (citing *Norma Faye*, 301 S.W.3d at 205). In such cases, the party asserting mootness bears the "'heavy burden' of persuading the court that a controversy is moot by showing that 'there is no reasonable expectation that the putatively illegal conduct will be repeated, and [that] there are no remaining effects of the alleged violation.'" *Robin Media Grp.*, 1997 WL 760726, at *4 (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)).

Here, Ms. Stark was held in contempt and incarcerated for exercising her right to free speech and then refusing to retract a constitutionally protected Facebook post about police misconduct involving the Appellee. *See* R. at 115–16, ¶¶ 1–5. The record also makes plain that she voluntarily ceased that constitutionally protected conduct exclusively to get out of jail and wishes to resume it. *Id.* Accordingly, Ms. Stark's "voluntary cessation of allegedly illegal conduct" should not moot the Parties' controversy or "prevent courts from determining the legality of the practice" that the Parties continue to dispute today. *See Robin Media Grp., Inc.*, 1997 WL 760726, at *3 (citations omitted).

VIII. CONCLUSION

For the foregoing reasons, Ms. Stark's Rule 11 Application for permission to appeal should be **GRANTED**.

Respectfully submitted,

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IX. CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, excluding excepted sections, this brief contains 9,435 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).

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X. CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2020, a true and exact copy of the foregoing was served via the Court's e-filing system upon the following:

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XI. APPENDIX OF EXHIBITS

Exhibit #1: Opinion of the Court of Appeals, *Stark v. Stark*, No. W2019-00650-COA-R3-CV, 2020 WL 507644 (Tenn. Ct. App. Jan. 31, 2020)

Exhibit #2: Stampfiled Copy of Appellant's Petition to the Mayor of Memphis

Exhibit #3: Stampfiled Copy of Appellee's Brief in the Tennessee Court of Appeals

Exhibit #1

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 14, 2019 Session

PAMELA D. STARK v. JOE EDWARD STARK

Appeal from the Circuit Court for Shelby County
No. CT-002958-18 Robert Samual Weiss, Judge

No. W2019-00650-COA-R3-CV

This is an appeal from an order finding the appellant in civil contempt and ordering her incarcerated until she agreed to remove a social media post. The appellant was incarcerated for four hours before she purged herself of contempt by agreeing to remove the post. On appeal, the appellant challenges the civil contempt finding. Because the appellant has purged herself of civil contempt and was released from incarceration, we deem the issue moot and dismiss this appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY W. ARMSTRONG, J., joined.

Pamela D. Stark, Memphis, Tennessee, Pro Se.

Melissa C. Berry, Memphis, Tennessee, for the appellee, Joe Edward Stark.

OPINION

I. FACTS & PROCEDURAL HISTORY

After a five-year marriage, Pamela Stark ("Wife") filed a complaint for divorce from her husband, Joe Stark ("Husband") on June 29, 2018. Wife is an attorney and filed her complaint pro se. Husband is a sergeant with the Memphis Police Department.

Tennessee Code Annotated section 36-4-106(d) states that when a petition for divorce is filed and served, the following temporary injunction is in effect against both parties:

(3) An injunction restraining both parties from *harassing*, threatening,

> assaulting or abusing the other and from *making disparaging remarks about the other . . . to either party's employer*.

Tenn. Code Ann. § 36-4-106(d)(3) (emphasis added). The parties are permitted to apply to the court "for further temporary orders, an expanded temporary injunction, or modification or revocation of this temporary injunction." Tenn. Code Ann. § 36-4-106(d)(6).

Husband filed an answer and counter-complaint for divorce. Wife amended her complaint to add "interspousal tort" claims against Husband, including battery and intentional infliction of emotional distress. Wife alleged that she was injured during a physical altercation with Husband days before the complaint for divorce was filed.

On January 15, 2019, Husband filed a petition for a restraining order. Husband alleged that he had recently become aware of a Facebook post made by Wife on December 14, 2018, in which she publicly posted allegations regarding Husband and the alleged incident of domestic violence between them. Husband claimed that Wife's post also disparaged the Memphis Police Department and its investigation of the incident. Husband asserted that Wife's dissemination of these allegations in a public forum would cause him immediate and irreparable injury, including but not limited to loss of employment, demotion, or damage to his reputation within the department. As such, Husband asked the trial court to enter a restraining order directing Wife to remove the Facebook post and to cease and desist from making any future comments, orally or on social media, that might jeopardize his employment or impugn his reputation with the police department. Husband sought an award of attorney's fees incurred in bringing the petition for a restraining order.

Wife filed a response to the petition in which she alleged that her post was critical of the Memphis Police Department, not Husband. She also argued that the restraining order sought by Husband would infringe on her "constitutional rights." The trial court held a hearing on Husband's petition for a restraining order on February 7, 2019. At the outset, counsel for Husband explained that Husband was basically asking the trial court to extend the existing statutory injunctions to specifically address public posts on social media or communication with Husband's employer that would have a detrimental effect on his reputation or employment. Husband submitted as exhibits the Facebook post made by Wife and also an email Wife had sent to the mayor of Memphis about the incident. In the Facebook post, Wife claimed to be "a recent victim of domestic violence at the hands of a Memphis Police Officer," and she criticized the handling of the investigation. Husband testified that his co-workers at the police department saw the Facebook post before he did. He explained that he and Wife have many mutual friends on the social media site because Wife worked as a prosecutor. Husband testified that a special prosecutor from another city was appointed to conduct an investigation regarding the alleged incident of domestic violence involving him and Wife.

Wife's four-page email to the mayor likewise claimed that she was a victim of domestic violence at the hands of Husband and a victim of misconduct by the Memphis Police Department. She identified her husband by name and rank and described her version of the physical altercation between them and the events that followed. Wife asked the mayor to "look into this before it goes further." Husband testified that the city mayor is considered his ultimate boss and employer. He opined that Wife's social media post and email to the mayor constituted harassment and brought his reputation into question.

Wife did not testify but repeated her argument that she had an absolute right to criticize the police department. At the conclusion of the hearing, the trial judge informed Wife that the problem with her argument was the existence of the automatic injunction prohibiting her from "making disparaging remarks about the other [spouse] . . . *to either party's employer*." *See* Tenn. Code Ann. § 36-4-106(d)(3) (emphasis added). The trial judge acknowledged Wife's "freedom of speech" argument but emphasized that her email did not convey some general concern about police corruption but instead was in direct reference to Husband. He explained that the references to Husband were "off limits." The trial judge then orally ruled that the Facebook post had to be removed that same day and that Wife would not be permitted to make further allegations on social media or have communication with Husband's employer.

The following exchange occurred between the trial judge and Wife:

> The Court: That post shall be removed today, and a mandatory injunction will go into effect that there will be no communication with employers. There is a special prosecutor involved in this case. That special prosecutor will deal with this Court. Whatever allegations have been made, we'll deal with that in due course. But at this point involving making any further allegations in social media is completely inappropriate and is being enjoined.
>
> Ms. Stark: Well, Your Honor, I will just with all candor to the Court say you might as well take me into custody right now. I have contacted the FBI as well as having contacted the mayor of Memphis to try and get this addressed. I am saying that I am a victim of corruption from the Memphis Police Department, and I am going to pursue every course of action I have and –
>
> The Court: Ms. Stark, are you going to remove that post, yes or no?
>
> Ms. Stark: I am not.

The Court: Officer Houston, take her into custody. We'll stand in recess.

(Short break.)

The Court: Ms. Stark, please stand. Are you going to comply with this Court's orders?

Ms. Stark: No, I'm not.

The Court: All right. I'm making a finding that you are in direct contempt of court by willfully refusing to comply with this Court's orders. You will be held in the -- you will be held in custody until such time that you decide that you want to change your position and you apologize to this Court. We'll stand in recess until that time.

Wife was held in custody for four hours before she agreed to remove the Facebook post and was released.

Thereafter, the trial court entered its written order granting Husband's petition for a restraining order. The trial court entered a separate written order finding Wife in direct civil contempt. The order states that at the end of the hearing on the petition for a restraining order, "in open Court, [Wife] advised that the Court may as well [] find her in Contempt as she was not going to take the Facebook post of December 14, 2018 down which had just been ordered." The court noted that it then asked Wife directly whether she was going to abide by the court's order, to which she responded, "No." As such, the order states, the trial court found Wife in direct contempt of court, and she was immediately taken into custody. According to the order, Wife was ordered to be held in custody until she agreed to remove the Facebook post, and after being held in custody for four hours, she agreed to remove the post as ordered. Therefore, the written order states that Wife had already purged her contempt. Wife timely filed a notice of appeal.

II. ISSUES PRESENTED

Wife presents the following issues, which we have slightly restated, in her brief on appeal:

1. Whether the trial court erred by issuing a restraining order involving matters which were not subject to adjudication or final judgment in the pending divorce and interspousal tort case before the court;

2. Whether the trial court erred in finding sufficient proof under Tennessee Rule of Civil Procedure 65.04 to establish either a right or an immediate and irreparable injury, loss, or damage to warrant the restraining order;

3. Whether the trial court erred in issuing a restraining order without employing the proper constitutional analysis associated with Wife's infringed rights;

4. Whether the trial court erred in conducting summary contempt proceedings to impose sanctions for direct civil contempt; and

5. Whether the trial court erred in imposing contempt sanctions before the court's order was actually violated.

In his posture as appellee, Husband asserts that Wife's issues on appeal must be limited to those challenging the contempt order, not the restraining order entered in the context of the underlying divorce action, which remains pending in the trial court.

III. DISCUSSION

At the outset, we address the issue raised on appeal by Husband. Husband argues that Wife has only perfected an appeal from the order of contempt, and therefore, the issues she can raise on appeal must be limited to those presenting proper challenges to the contempt order. We agree with Husband in this regard.

"Contempt proceedings are sui generis and are incidental to the case out of which they arise." *Baker v. State*, 417 S.W.3d 428, 435 (Tenn. 2013) (citing *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d 465, 474 (Tenn. 2003)). The term "sui generis" means "[o]f its own kind or class; unique or peculiar." *Black's Law Dictionary* (11th ed. 2019). "The contempt proceeding may be 'related to the underlying case but independent from it.'" *Ballard v. Cayabas*, No. W2016-01913-COA-R3-CV, 2017 WL 2471090, at *2 (Tenn. Ct. App. June 8, 2017) (quoting *Green v. Champs-Elysees, Inc.*, No. M2013-00232-COA-R3-CV, 2014 WL 644726, at *7 (Tenn. Ct. App. Feb. 18, 2014)).

A contempt proceeding "often stems from an underlying proceeding that is not complete." *Doe*, 104 S.W.3d at 474. However, "[a] judgment of contempt fixing punishment is a final judgment from which an appeal will lie." *Hall v. Hall*, 772 S.W.2d 432, 436 (Tenn. Ct. App. 1989) (citing *State v. Green*, 689 S.W.2d 189 (Tenn. Crim. App. 1984)). A contempt judgment "becomes final upon entry of the judgment imposing a punishment therefore." *State ex rel. Garrison v. Scobey*, No. W2007-02367-COA-R3-JV, 2008 WL 4648359, at *4 (Tenn. Ct. App. Oct. 22, 2008) (citing *Green*, 689 S.W.2d at 190). The contempt ruling must be appealed within thirty days. *Blakney v. White*, No. W2018-00617-COA-R3-CV, 2019 WL 4942436, at *4 (Tenn. Ct. App. Oct. 8, 2019). "'It matters not that the proceedings out of which the contempt arose are not complete.'"

Moody v. Hutchison, 159 S.W.3d 15, 31 (Tenn. Ct. App. 2004) (quoting *Green*, 689 S.W.2d at 190). "An order that imposes punishment for contempt 'is a final appealable order in its own right, even though the proceedings in which the contempt arose are ongoing.'" *Ballard*, 2017 WL 2471090, at *2 (quoting *Coffey v. Coffey*, No. E2012-00143-COA-R3-CV, 2013 WL 1279410, at *5 (Tenn. Ct. App. Mar. 28, 2013)).

Here, Wife filed a notice of appeal within thirty days of the trial court's contempt order. Accordingly, she has properly perfected an appeal from the contempt order. However, the divorce case in which the restraining order was entered remains pending. In considering Wife's issues, we must bear in mind that this is an appeal from the contempt order, not an appeal from the restraining order. *See Garrison*, 2008 WL 4648359, at *4 (reviewing the contempt issues presented on appeal separately "as distinct from the remainder of the appeal" and dismissing the remainder of the appeal for lack of a final judgment).

Because this is an appeal from the contempt order, Wife is limited in her ability to raise issues regarding the restraining order. Wife argues that she can also challenge the restraining order, noting that one of the essential elements of a civil contempt finding is that the court order alleged to have been violated must have been a "lawful" order. *Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346, 354 (Tenn. 2008). However, in this context:

> A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties. An order is not rendered void or unlawful simply because it is erroneous or subject to reversal on appeal. Erroneous orders must be followed until they are reversed.

Id. at 355 (internal citations omitted). For these reasons, we emphasize that the limited issue before this Court is whether the trial court erred by holding Wife in civil contempt.

The Tennessee Supreme Court has explained civil contempt as follows:

> Civil contempt is remedial in character and is applied when a person refuses or fails to comply with a court order. [*State v.*] *Beeler*, 387 S.W.3d [511, 520 (Tenn. 2012)]. A civil contempt action is brought to force compliance with the order and thereby secure private rights established by the order. *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 510 (Tenn. 2005) (citing *Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 377 S.W.2d 908, 912 (1964)). When a trial court orders imprisonment after finding civil contempt, the confinement is remedial and coercive in nature, designed to compel the contemnor to comply with the court's order. Consequently, compliance with the order will result in the contemnor's immediate release from confinement. *Id.* at 511. It has long

> been said that in a civil contempt case, the contemnor "carries the keys to his prison in his own pocket." *State ex rel. Anderson v. Daugherty*, 137 Tenn. 125, 191 S.W. 974, 974 (1917).

Baker, 417 S.W.3d at 435-36.[1] "Beyond the 'civil' or 'criminal' classification, contempt is also categorized as 'direct' or 'indirect.'" *Id.* at 436 n.7. "Contempt can be further classified as direct or indirect depending on whether the misbehavior occurred in the court's presence." *In re Brown*, 470 S.W.3d 433, 443 (Tenn. Ct. App. 2015). "Direct contempt is based on acts committed in the presence of the court[.]" *Id.* at 443-44.

In the case before us, the trial court held Wife in direct civil contempt and ordered her incarcerated until she agreed to remove the Facebook post. Wife was in custody for approximately four hours before she agreed to remove the post and was released. Thus, Wife has purged herself of contempt.

This Court has repeatedly held that issues raised on appeal regarding civil contempt findings are moot if the contemnor has already purged himself or herself of contempt by the time the issue reaches this Court. "A case, or an issue in a case, becomes moot when the parties no longer have a continuing, real, live, and substantial interest in the outcome." *Hooker v. Haslam*, 437 S.W.3d 409, 417 (Tenn. 2014). For instance, in *Simpkins v. Simpkins*, 374 S.W.3d 413, 417 (Tenn. Ct. App. 2012), a husband was found in civil contempt for failure to pay health insurance premiums and failure to provide proof of life insurance. On appeal to this Court, the husband argued that the trial court erred by finding him in civil contempt without finding that he had the ability to comply with the orders he allegedly violated. *Id.* Because the husband had already "cured his contemptuous conduct" by paying the premiums and providing proof of insurance, we held that "the issue of civil contempt is moot." *Id.* at 418.

In *Pfister v. Searle*, No. M2000-01921-COA-R3-JV, 2001 WL 329535, at *2 (Tenn. Ct. App. Mar. 28, 2001), the trial court found a mother in civil contempt and ordered her jailed until she delivered the parties' child for visitation. The mother was released when the child was produced the next day. *Id.* at *4. On appeal, the mother argued that the evidence did not support a finding that she willfully violated the order because it was confusing. *Id.* We held that "because the [mother] complied with the court's order to produce her child, thereby purging her civil contempt, that judgment is now moot, and we decline to address it." *Id.* at *1. "The validity of the trial court's order finding her in civil contempt [was] moot." *Id.* at *4. *See also In re A.G.*, No. M2007-

[1] Unlike civil contempt, "[s]anctions for criminal contempt are generally both punitive and unconditional in nature, designed to punish past behavior, not to coerce directly compliance with a court order or influence future behavior." *Baker*, 417 S.W.3d at 436. Criminal contempt is often regarded as a crime. *Id.* "[W]hen a court imposes a definite term of confinement for conduct constituting criminal contempt, the contemnor cannot shorten the term by agreeing not to continue in the behavior that resulted in his confinement." *Id.*

0799-COA-R3-JV, 2009 WL 3103843, at *5 (Tenn. Ct. App. Sept. 28, 2009) (concluding that a mother's challenge to her sentence for criminal contempt was moot when she had already served the sentence and it was "unclear what meaningful relief lies within the power of this court to give her at this point"); *Boggs v. Boggs*, No. M2006-00810-COA-R3-CV, 2007 WL 2353156, at *5 (Tenn. Ct. App. Aug. 17, 2007) (deeming the appellant's arguments regarding two civil contempt findings moot where the appellant paid the amount ordered and was released from custody).

"Generally, whether a claim is moot involves a question of law that this Court will review de novo." *Huggins v. McKee*, 500 S.W.3d 360, 375 (Tenn. Ct. App. 2016) (citing *All. for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d 333, 338-39 (Tenn. Ct. App. 2005)). "The general rule remains that appellate courts 'should dismiss appeals that have become moot regardless of how appealing it may be to do otherwise.'" *Hooker*, 437 S.W.3d at 417 (quoting *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co.*, 301 S.W.3d 196, 210 (Tenn. 2009)). However, even if a case may have become moot, "before dismissing it a court should consider whether to exercise its discretion to apply one of the recognized exceptions to the mootness doctrine." *Id.* The Tennessee Supreme Court has identified "a limited number of exceptional circumstances that make it appropriate to address the merits of an issue notwithstanding its ostensible mootness[.]" *City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013). Those "exceptional circumstances" are:

> (1) when the issue is of great public importance or affects the administration of justice; (2) when the challenged conduct is capable of repetition and evades judicial review; (3) when the primary dispute is moot but collateral consequences persist; and (4) when a litigant has voluntarily ceased the challenged conduct.

Id. (citing *Lufkin v. Bd. of Prof'l Responsibility*, 336 S.W.3d 223, 226 (Tenn. 2011)).

The only exception arguably relevant in this case is "when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain." *Hooker*, 437 S.W.3d at 417-18. This exception is "applicable in the court's discretion." *Id.* The court "may refrain from dismissing an appeal as moot when collateral consequences remain following the dismissal of the appeal." *Hudson v. Hudson*, 328 S.W.3d 863, 865-66 (Tenn. 2010). This exception to the mootness doctrine applies if "prejudicial collateral consequences" are shown to exist. *Id.* at 866. "Such collateral consequences can include the continued effect of an order that has expired or is invalid." *Id.*

In the case at bar, members of this Court asked Wife at oral argument why this appeal should not be dismissed as moot when Wife had purged herself of contempt and been released from incarceration. Wife argued that the issue of contempt was not moot

because (1) the contempt finding was a "blight" on her record, (2) the contempt finding might be used against her in the divorce trial, and (3) an issue of attorney's fees had been reserved in the trial court.

We begin with her argument regarding attorney's fees. In *Dockery v. Dockery*, No. E2009-01059-COA-R3-CV, 2009 WL 3486662, at *2 (Tenn. Ct. App. Oct. 29, 2009), we considered whether a husband's appeal challenging his contempt conviction was moot when he had already completed his jail sentence. In addition to the jail sentence, the husband was also ordered to pay the wife's attorney's fees. *Id.* *2 at n.2. As such, we held that his "entire appeal" was not moot, but any challenge to the length of his sentence was moot because it no longer presented a justiciable controversy. *Id.* at *2 n.2, *10. Unlike *Dockery*, however, the trial court in this case did not order Wife to pay Husband's attorney's fees in connection with the finding of contempt. As we noted in a related appeal of a recusal motion Wife filed in this case, "Following the trial court's oral ruling on the motion for restraining order, Wife essentially invited the trial court to find her in contempt after stating that she would not follow the trial court's order." *Stark v. Stark*, No. W2019-00901-COA-T10B-CV, 2019 WL 2515925, at *10 (Tenn. Ct. App. June 18, 2019). Thus, Husband never filed a petition for contempt or sought attorney's fees in connection with contempt. The trial court's order granting Husband's petition for a restraining order reserved a ruling on his request for attorney's fees *in connection with his request for a restraining order*. As a result, it is not necessary to address the contempt finding on appeal due to any outstanding issue regarding attorney's fees, which was present in *Dockery*.

Wife's arguments regarding the "blight" on her record and the possible use of the contempt order in the divorce trial are likewise unconvincing.[2] Another panel of this Court rejected a similar argument in *Bradford v. Bradford*, No. 86-262-II, 1986 WL 2874, at *2 (Tenn. Ct. App. Mar. 7, 1986). The appellant was no longer incarcerated under the court's contempt order but insisted that the issues on appeal were not moot because he "may continue to suffer consequences as a result" of the contempt finding. *Id.* The appellant argued that the contempt finding might be used against him in a custody matter or a subsequent contempt proceeding. *Id.* We found that argument "highly speculative." *Id.* This Court was "not persuaded that the finding of contempt may still have 'some practical effect' in the future which would keep defendant's case from being moot." *Id.*

Additionally, in *State v. Jenkins*, No. C/A 157, 1989 WL 124950, at *1 (Tenn. Ct. App. Sept. 13, 1989), an individual was held in contempt for failure to submit to paternity blood testing but purged himself of contempt by submitting to the blood test. On appeal, we held that "[his] challenges to the contempt order are moot since no meaningful relief can be rendered." *Id.* Quoting a case from Maryland, the dissenting judge in *Jenkins*

[2] This was a short-term marriage with no children, and neither party requested alimony.

suggested that the issue was not moot because the contempt order would remain in court records "for all to see." *Id.* at *2. Although recognizing that the contempt order "may not ever be utilized" and that its "effect beyond mere existence is not known, and may be none," the dissent took the position that the mere existence of a contempt order was enough to give substance to the appeal. *Id.* However, the majority opinion was to the contrary. Thus, Tennessee courts have not recognized the type of vague and speculative interests asserted by Wife as sufficient "prejudicial collateral consequences."[3]

Absent a showing by Wife of specific prejudicial collateral consequences resulting from the trial court's finding of contempt, we decline to apply the collateral consequences exception to the mootness doctrine. *See Hudson*, 328 S.W.3d at 866 (dismissing an appeal as moot because the father "ha[d] not shown that we should refrain from dismissing his appeal as moot" by describing "prejudicial collateral consequences necessary to invoke this exception to the mootness doctrine").

IV. CONCLUSION

For the aforementioned reasons, this appeal is dismissed. Costs of this appeal are taxed to the appellant, Pamela Stark, for which execution may issue if necessary.

CARMA DENNIS McGEE, JUDGE

[3] We recognize that in some jurisdictions, special exceptions have been created in cases involving attorneys held in criminal contempt. *See, e.g., Johnson v. State*, 306 Ga. App. 844, 846 (2010) (explaining the general rule that an appeal of a criminal contempt order is moot upon the contemnor's release from jail, but in Georgia, "an exception to this rule has been made in cases involving an attorney"); s*ee also Nakell v. Attorney Gen. of N. Carolina*, 15 F.3d 319, 322-23 (4th Cir. 1994) (distinguishing a case involving "a layperson not subject to professional discipline" from one involving an attorney who could face possible discipline as a result of a criminal contempt conviction); *Matter of Betts*, 927 F.2d 983, 988 (7th Cir. 1991) ("In the case of an attorney convicted of criminal contempt of court, the conviction may have collateral consequences, such as action by the state attorney registration and disciplinary authority.")

However, a civil contempt order "does not entail the kind of collateral consequences that a criminal conviction entails." *S.E.C. v. Res. Dev. Int'l*, 291 F. App'x 660, 665 (5th Cir. 2008); *see also U.S. v. Johnson*, 801 F.2d 597, 600 (2d Cir. 1986) (stating that collateral legal consequences "are difficult to establish as to a civil contempt"). The Florida Court of Appeals declined to dismiss an attorney's appeal of a *criminal* contempt conviction as moot in *Keezel v. State*, 358 So. 2d 247, 248-49 (Fla. Dist. Ct. App. 1978), recognizing the "adverse legal consequences" flowing from the criminal conviction. However, the Court declined to apply the same rule to an attorney who was only found in *civil* contempt in *O'Connor v. O'Connor*, 415 So. 2d 902, 903 (Fla. Dist. Ct. App. 1982), deeming his appeal moot. The Court distinguished *Keezel* and found its reasoning "not persuasive in this civil contempt matter, wherein the appellant is an attorney." *Id.* at n.1. Here, Wife was only held in civil contempt, rather than criminal contempt, and she did not present any argument on appeal regarding the possibility of disciplinary action, so we decline to find any collateral consequences based on her status as an attorney.

Exhibit #2

Stark, Pamela

From: pamand3ds <pamand3ds@aol.com>
Sent: Friday, January 25, 2019 8:36 AM
To: Stark, Pamela
Subject: Fwd:

Sent from my Samsung Galaxy smartphone.

-------- Original message --------
From: Pamela Fleming <pamand3ds@aol.com>
Date: 1/7/19 12:18 PM (GMT-06:00)
To: mayor@memphistn.gov
Subject:

Dear Mayor Strictland:

I write to you as a victim, first of domestic violence, then of the misconduct of the Memphis Police Department. You see I am a prosecutor with the Shelby County District Attorney General's Office and my husband is a Sergeant with the Memphis Police Department. On June 17, 2018, my husband, Sgt. Joe Stark, and I had an argument which lead to my decision to end our marriage. I asked him to leave, he refused. I then placed a basket of his clothing on our screened in front porch. At this point, my husband decided to begin throwing my trial suits outside. As he carried an arm load of my suits upstairs, I tried to grab them. Intentionally or not, my arm got trapped in the clothes hangers and under his arm and he proceeded to drag me up the stairs of our home. At the top of the stair, as I got to my feet, my husband then slammed me three or more times into the door frame leading to the upstairs' outside door before proceeding to throw my clothes over the railing. I received a laceration to my elbow and had bruising and swelling of both my arm and knee.

I opted not to call the police. This decision was based in part on the normal concerns that any victim experiences which of course was magnified and complicated by our jobs. Unfortunately, approximately a week later, my husband became concerned that I would report him to the police and decided to make a preemptive strike of his own. He "reported" the incident to police himself. His stated purpose, in so doing, was to cover himself in case "his wife" called the police. He told Memphis Police that "his wife" had attacked him and she

was injured in the process. He refused to give a statement or give any contact information for "his wife" and reportedly denied being "the victim of anything."

Contemporaneously, a Colonel with the Memphis Police Department contacted my supervisory, Deputy General Ray Lepone. Deputy Lepone was told that 'Joe and I were having problems' and that it needed to just remain a "memo" and not a report in order to protect both of our careers. I first learned of this "behind the scene activity" on June 28th when I was called into Deputy Lepone's office for a wellness check as the Colonel both knew and relayed that I had been injured in the incident. I was also told that at this point this was a "memo" and not a report. My office recused itself from any potential investigation; however, as I later learned, MPD chose not to exercise this same precaution.

Despite the stated desires of MPD, this did not remain a "memo." As I am sure you are aware, the law prohibits any domestic violence act with injuries from being recorded as a "memo". Thus, the reporting system used by MPD kicked the memo out of the system and turned it into an official "report." From that point, things get very complicated. While it is my understanding that my husband only referred to me as "his wife", MPD researched and located my name and listed me as "the suspect" and my husband as "the victim". This was done even though the report, and thus investigation, was mandated due to my injuries.

After the "memo" turned into an official report, the investigating officer, I believe Sgt Mote, also went to Deputy Lepone for the purpose of discussing criminal charges. Deputy Lepone contacted Chief Shearin as the office had already recused itself and the conversation was wholly inappropriate. It is my understanding that at this time Sgt. Mote was removed from the case and a Sgt. Codero was assigned. I will note that MPD had never spoken to me, checked on the nature of my injuries, or received anymore information then what has already been stated at the time the investigator attempted to discuss charging decisions with Deputy Lepone.

I was contacted by Sgt Cordero on June 29th. This contact was initiated by having me paged over the intercom system at the District Attorney's Office because, as Sgt. Cordero explained, my husband had given them no contact information for "his wife." I agreed to give a statement and meet with Sgt Cordero on July 1st. I gave an audio recorded statement, taped at my request, which was later transcribed, reviewed and signed by me. The statement was titled a "suspect/victim" statement. Sgt Cordero photographed my elbow which was still scabbed over from the laceration I received during the assault two weeks prior. I showed Sgt. Cordero a photograph on my cell phone which showed a large bruise on my forearm still visible over a week after the assault. Likewise, I gave Sgt Cordero a list of people who had observed my injuries the day after the assault. Sgt. Cordero did not download the photograph or write down the names that I gave him. I was told that my husband, though repeatedly refusing to give an official statement, indicated that I had jumped on his back and punched him in the head as he was attempting to throw my clothes outside. I told Sgt. Codero that this was impossible and invited him to my home to see the layout and verify this for himself. He refused.

A few days later, it was brought to my attention that the report in the MPD reporting system listed me as a suspect, my husband as a victim, and the crime being investigated as a domestic assault. However, everything else was marked as confidential. I verified that this was true and contacted Sgt. Cordero and spoke with his

supervisor, Lt. Roach, as well concerning the situation. I was repeatedly informed that this would be changed. It has not been. I also asked to file a report of my own, I was not allowed to. When I asked what would happen with the case, I was told they had to determine if a crime was even committed based on the fact that I had indicated that my husband's intention was to throw my clothes over the balcony, not to injury me.

It is my position that the Memphis Police Department has not only violated my rights, but also violated the law both as it relates to domestic violence and official misconduct.

Domestic Assault:

T.C.A. 36-3-618 Purpose- Legislative Intent

T.C.A. 36-3-619 Officer response- Primary Aggressor- Factors- Reports- Notice of legal rights

T.C.A. 39-13-111 Domestic Assault

T.C.A. 39-13-101 Assault

Misconduct Involving Public Officials and Employees

T.C.A. 39-16-401 Definitions for Public Misconduct Offenses

T.C.A. 39-16-402 Official Misconduct

T.C.A. 39-16-403 Official Oppression

1. Based on these laws, it is difficult to imagine a scenario, not involving a police officer, where someone would go to the police with the stated purpose of covering for himself while indicating that another person was injured, and police would not check on the welfare of that other person
2. Likewise, it seems rather unlikely that under any other circumstance a report would be generated based on a person being injured, yet that person would be named as a suspect.
3. The law clearly gives a person the right to file a report, yet I was denied that right. Further, MPD's actions denied me the right to circumvent them and file a complaint with a district attorney within 10 days as the protection specifically provided for within the law.
4. The laws of domestic violence clearly favors an arrest. This was not done. Further, the rules for determining a primary aggressor were clearly ignored.
5. These laws require that I be given certain information. I was not given this information, despite having been noted as a "suspect/victim" by MPD on the statement I gave.
6. Though MPD opted to take a "suspect/victim" statement from me, the official report continues to list me as suspect only.
7. Domestic assault does not require intentionality, but specifically allows for knowing or reckless intent.
8. It was wholly inappropriate for an MPD Colonel to come to my place of employment with the stated purpose of preventing this from becoming an official report. Quite frankly, it seems and felt like intimidation.

I want to make very clear that I am not asking for special consideration based on my status as a prosecutor. Quite the opposite. I shudder to imagine what happens to those individuals in a relationship with a law enforcement officer who are not well known to MPD, who do not have a long-standing working relationship with law enforcement, and who are not as well versed in the law as I am.

I have tried everything I can to get MPD to correct this situation. Of course, my job further complicates this. I am placed in a position where I can be accused of using my status as a prosecutor to manipulate the system. Further, the District Attorney's office which would normally be available to assist, has recused itself. Even this is suspect, given MPD did not see any reason to recuse themselves in this situation.

This report basically forecloses on my future. As a prosecutor who has tried over 125 cases, I would like to pursue a judicial appointment in the future. However, any background check will show a report listing me as a suspect in a domestic assault. This is even further complicated by the fact that it is marked as confidential. Thus, the very unusual circumstances surrounding this report cannot even be accessed. Not only does this significantly reduce any hope of a judicial appointment, but it has the same affect on my seeking employment with any other governmental agency. Additionally, given the nature of my employment, basically everyone I work with, prosecutors as well as law enforcement, have access to this information, not the facts, just the accusations.

I cannot allow this to stand as it already has for the last six months. I love my job and I am a huge supporter of law enforcement, including MPD, but this is just wrong and unjust. Still, I have no desire to take this further. I do not wish to involve outside investigative agencies or the court system, but I will if I have to. So, it is in desperation I ask you to look into this before it goes further.

Sincerely,

Pamela Diane Stark

901-488-5817

Sent from Mail for Windows 10

Exhibit #3

IN THE COURT OF APPEALS OF TENNESSEE AT JACKSON

PAMELA DIANE STARK, Appellant, vs. JOE EDWARD STARK, Appellee.	)))))))))))	Court of Appeals No.W2019-00650-COA-R3-CV Appeal from Shelby County Circuit Court Court Docket No. CT-002958-18, Division VIII

REPLY BRIEF OF JOE EDWARD STARK, APPELLEE

Respectfully Submitted,

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STATEMENT OF THE CASE

This is the response to the brief filed by Pamela Diane Stark, hereinafter referred to as "Wife," arising from a divorce proceeding between Joe Edward Stark, hereinafter referred to as "Husband," and Wife. At the time of the filing of Wife's appeal, the divorce proceeding was pending and remains pending in the trial court at the time of filing of this reply brief. Wife filed her Complaint for Divorce on June 29, 2018.[1] Upon Wife filing her Complaint for Divorce and Husband being served with same, the temporary injunctions set forth in Tennessee Code Annotated §36-4-106(d) went into effect by operation of statute. Husband filed his Answer to Complaint for Absolute Divorce on August 2, 2018 and his Amended Answer and Counter Complaint for Divorce on August 13, 2018.[2] After filing her Request for Leave of the Court to Amend Complaint for Divorce and receiving permission of the Court to amend same, Wife filed her Amended Complaint for Divorce and Interspousal Tort Action on November 28, 2018.[3]

On January 15, 2019, Husband filed a Petition for Restraining Order pertaining to a Facebook post made by Wife in which she criticized the Memphis Police Department's (Husband employer's) handling of the domestic violence allegations she made against Husband.[4] On the same date, Wife filed her Response to [Husband's]

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[1] (A. R. Vol. I, p. 1).
[2] (A.R. Vol. I, p. 6 and p. 9).
[3] (A.R. Vol. I, p. 25).
[4] (A.R. Vol. I, p. 35).

Petition for Restraining Order.[5] On February 7, 2019, the trial court heard Husband's Petition for Restraining Order.[6] At the conclusion of the hearing, the trial court found that Ms. Stark's Facebook post, as well as an e-mail Wife sent to Memphis Mayor Strickland[7], violated the statutory temporary injunction in effect which enjoins the parties from making disparaging comments about the other to the other party's employer.[8] The trial court ordered from the bench that Wife was to remove the Facebook post immediately, that the parties were to refrain from communicating with the other party's employer about the opposing party, and enjoining the parties from making further allegations on social media.[9] Wife responded by stating "Well, your Honor, I will just with all candor to the Court say you might as well take me into custody right now."[10] Thereafter, Wife was taken into custody.[11] Wife finally agreed to remove her Facebook post after she was held in custody for four (4) hours and consulted with counsel.[12]

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[5] (A.R. Vol. I, p. 44).
[6] (A.R. Vol. II).
[7] Although Wife's Designation of Record on Appeal and Wife's Amended Designation of Record on Appeal reflect that the Exhibits from proceedings on February 7, 2019 were to be included in the Record on Appeal (A.R. Vol. II, p. 27, ll. 13-21), the exhibits are not included in either Volume I or Volume II of the Appellate Record. However, the e-mail Wife sent to Memphis Mayor Strickland is referenced in A.R. Vol. II, p. 19, ll. 10-25 and p. 20, ll. 1-14.
[8] (A.R. Vol. II, p. 26, ll. 19-25).
[9] (A.R. Vol. II, p. 27, ll. 13-21).
[10] (A.R. Vol. II, p. 27, ll. 22-24).
[11](A.R. Vol. I, p. 115).
[12] (A.R. Vol. I, p. 116).

On February 13, 2019, the trial court entered its Order on Petition for Restraining Order pursuant to Tennessee Rules of Civil Procedure Rule 65.03.[13] On March 8, 2019, Husband filed his Motion to Amend Order on Petition for Restraining Order pursuant to Tennessee Rules of Civil Procedure Rule 65.03 to Conform with the Transcript pursuant to Tennessee Rules of Civil Procedure 60.01.[14] On March 29, 2019, the trial court entered its Order on Direct Civil Contempt.[15]

[13] (A.R. Vol. I, p. 78).
[14] (A.R. Vol. I, p. 81).
[15] (A.R. Vol. I, p. 115).

STATEMENT OF THE FACTS GERMANE TO THE APPELLATE ISSUES

Throughout the divorce proceedings, Wife has alleged that Husband committed an act of domestic violence upon her on or about June 17, 2018 which, she alleges, precipitated her filing her Complaint for Divorce.[16] Wife was, at relevant times[17], an Assistant District Attorney for the Shelby County District Attorney General's Office.[18] Husband is employed as a Memphis Police Officer.[19] At relevant times, the Memphis Police Department and a Special Prosecutor, appointed after the Shelby County District Attorney General's Office recused itself, were investigating the alleged incident.[20]

On January 3, 2019, Wife caused to be issued four (4) Subpoenas to Take Depositions of Memphis Police Department officers.[21] On January 9, 2019, Husband filed his Motion for Protective Order relating to the Subpoenas to Take Depositions of Memphis Police Department officers , as well as other subpoenas Wife had caused to be issued.[22]

On or about January 4, 2019, Husband became aware that on December 14, 2018, Wife made a public post on Facebook wherein she disparaged the Memphis Police Department's internal handling and investigation of the June 17, 2018, incident and also specifically stated:

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[16] (A.R. Vol. I, pp. 27-28).
[17] Wife has since resigned her position at the Shelby County District Attorney's Office (A.R. Vol. I, p. 130).
[18] (A.R. Vol. II, p. 16, ll. 21-22).
[19] Id.
[20] (A.R. Vol. II, p. 18, ll. 5-24) and (A.R. Vol. I, p. 106).
[21] (A.R. Vol. I, p. 49)
[22] Id.

> I speak now as a recent victim of domestic violence at the hands of a Memphis Police Officer. I can attest to exactly how wide "the thin blue line can get." Do not get me wrong, I understand it. Who among us would want to hang one of our own out to dry. This is even more so for the Brotherhood of the Blue. However, it is even more devastating. Who do you turn to when those worn [*sic*] to serve and protect and enforce the law, don't.[23]

Because of Husband and Wife's respective jobs at the time, Husband and Wife had mutual friends, including mutual contacts on social media, and mutual coworkers and professional colleagues and contacts.[24] On January 14, 2019, Husband's counsel provided notice to Wife of her intent to file and present to the Court on January 15, 2019, Husband's Petition for Restraining Order and Supporting Affidavit.[25] On January 15, 2019, Husband's counsel and Wife appeared at the trial court in this matter as Husband's counsel intended to address the Court to seek a temporary restraining order related to Wife's Facebook post and disparaging comments Wife was making against Husband and to his employer.[26] Husband's counsel was unable to address the trial court as it was in a jury trial and unavailable to entertain Husband's request for immediate relief.[27] The parties ultimately agreed to set the hearing

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[23] (A.R. Vol. I, p. 41).
[24] (A.R. Vol. II, p. 16, ll. 17-22).
[25] (A.R. Vol. I, p. 58)
[26] Id.
[27] Id.

on Husband's Petition for February 7, 2019 given the trial court's availability and the parties availability.[28]

At the hearing on the Petition for Restraining Order, Husband testified that the current Complaint for Divorce pending is the third (3) divorce complaint filed by Wife since the parties were married six (6) years ago[29], that his previous counsel had to withdraw because of the amount of e-mails from Wife and the time spent having to deal with Wife[30], and that Wife was attempting to depose Husband's coworkers, Memphis police officers, in her home.[31] Husband testified to these actions to show a concerted effort by Wife to harass Husband through her litigation tactics. Husband testified that Wife's Facebook post referenced him when she stated that she was a "victim of domestic violence at the hands of a Memphis police officer."[32] Husband also testified about an e-mail sent by Wife to Memphis Mayor Jim Strickland on January 25, 2019. Husband was not a party to the e-mail and only became aware of same because Wife filed it in the divorce matter as an exhibit to a pleading.[33] Husband was named specifically in the e-mail to Mayor Strickland.[34] Because of Husband's position as a Memphis Police Officer, Mayor Strickland is Husband's employer.[35] Husband further testified that he felt as if Wife's actions could cause

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[28] Id.
[29] (A.R. Vol. II, p. 11, ll. 16-22).
[30] (A.R. Vol. II, p. 12, ll. 12-25) and (A.R. Vol. II, p. 13, ll. 1-17).
[31] (A.R. Vol. II, p. 13, ll. 18-25).
[32] (A.R. Vol. II, p. 18, l. 25 and p. 19, ll. 1-4).
[33] (A.R. Vol. II, p. 19, ll. 10-19).
[34] (A.R. Vol. II, p. 19, ll. 22-24) and (A.R. Vol. II, p. 20, ll. 8-10).
[35] (A.R. Vol. II, p. 20, ll. 16-22).

issues with his continued employment with Memphis Police Department, were meant to harass and intimidate him, and had caused him emotional distress and problems at work.[36] Wife did not produce any evidence to refute Husband's testimony, did not call any witnesses, nor did she take the stand herself to testify as to her position related to Husband's request for a restraining order.[37]

At the conclusion of the hearing, counsel for Husband argued that the temporary injunction already in place restrains both parties from harassing, threatening, assaulting or abusing the other and from making disparaging remarks about the other to or in the presence of...either party's employer.[38] Wife argued that she had a constitutional right to make allegations about alleged mistreatment by the police department and alleged corruption in their investigation.[39] The trial court disagreed with Wife and found that there was already a mutual restraining order in place via statute which included that neither was to make disparaging comments to an employer.[40] Although the trial court found that Mayor Strickland is Husband's employer, the Court did not find that Wife was in contempt for her action of making disparaging comments in writing her e-mail to Mayor Strickland.[41] The trial court made an oral ruling, which was later memorialized into a written order, that Wife was to take down the Facebook post, that orders would go into

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[36] (A.R. Vol. II, p. 21, ll. 2-13).
[37] (A.R. Vol. I, p. 79) and (A.R. Vol. II).
[38] (A.R. Vol. II, p. 24, ll. 21-25) and (A.R. Vol. II, p. 25, l. 1).
[39] (A.R. Vol. II, p. 26, ll. 6-13).
[40] (A.R. Vol. II, p. 26, ll. 19-25) and (A.R. Vol. II, p. 27, ll. 1-12).
[41] Id.

effect restraining the parties from communicating with the employer of the other party and restraining the parties from making further allegations on social media.[42] In response Wife stated "Well, your Honor, I will just with all candor to the Court say you might as well take me into custody right now."[43] The trial court thereafter gave Wife two (2) additional opportunities to change her position as the whether she would take down her Facebook post, including one opportunity after a forty-five (45) minute recess, and Wife refused.[44] The trial court then held Wife in direct contempt for willfully refusing to comply with the court's orders.[45]

On February 13, 2019, the trial court entered its Order on Petition for Restraining Order pursuant to Tennessee Rules of Civil Procedure Rule 65.03.[46] The trial court's order reflects its finding that Wife was aware of the potential effect of the allegations and the public posting of same on Husband's reputation and his employment.[47] The trial court expressed its position that the allegations had been referred to a special prosecutor and were being addressed through the proper channels and that the sole purpose of Wife's post and contacting of Mayor Strickland was to harass Husband in direct contravention of the statutory injunction already in place.[48] The trial court's written Order on Petition

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[42] (A.R. Vol. II, p. 27, ll. 13-21).
[43] (A.R. Vol. II, p. 27, ll. 22-24).
[44] (A.R. Vol. II, p. 28, ll. 5-14).
[45] (A.R. Vol. II, p. 28, ll. 15-18).
[46] (A.R. Vol. I, p. 78).
[47] Id.
[48] (A.R. Vol. I, p. 79).

for Restraining Order enjoined Wife from "making any other public allegations against [Husband] on social media (on any platform) or to his employer which may affect [Husband's] reputation or employment."[49] On March 8, 2019, Husband filed his Motion to Amend Order on Petition for Restraining Order pursuant to Tennessee Rules of Civil Procedure Rule 65.03 to Conform with the Transcript pursuant to Tennessee Rules of Civil Procedure 60.01.[50] On March 29, 2019, the trial court entered its Order on Direct Civil Contempt which memorialized the events that occurred on February 7, 2019, with regard to the trial court's finding of contempt against Wife.[51]

On or about April 14, 2019, Wife filed a Rule 3 Notice of Appeal. On August 12, 2019, Wife filed her Brief in this matter. Wife included five (5) issues for review in her brief[52]:

> Whether the Circuit Court erred in assuming jurisdiction to issue a restraining order involving matters which were not subject to a future adjudication or final judgment within the pending cause of action before the court.
>
> Whether the Circuit Court erred in finding sufficient proof under Tennessee Rules of Civil Procedure 65.01 to established [*sic*] either a right and/or pending immediate and irreparable injury, loss or damage.
>
> Whether the Circuit Court erred in issuing a restraining order without employing the proper

[49] (A.R. Vol. I, p. 80).
[50] (A.R. Vol. I, p. 81).
[51] (A.R. Vol. I, p. 115).
[52] Appellant's Brief, p. 1.

constitutional analysis associated with the infringed upon rights of Wife/Appellant.

Whether the Circuit Court erred in conducting summary contempt proceedings to impose sanctions for direct civil contempt.

Whether the Circuit Court erred in imposing contempt sanctions prior to the Court's orders having been violated.

STANDARD OF REVIEW

The factual findings of the trial court are accorded a presumption of correctness and will not be overturned by the Court of Appeals unless the evidence preponderates against them while the conclusions of law of the trial court are reviewed under a pure *de novo* standard without any presumption of correctness attaching to the trial court's conclusions of law.[53] The trial court has the sound discretion, within the provisions of the law, to make a determination of contempt.[54] The trial court's determination of contempt will not be disturbed absent an abuse of discretion.[55] On appeal, the appellant must overcome the presumption of guilt by showing that the evidence preponderates against the trial court's finding of contempt.[56] "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.[57]

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[53] Campbell v. Florida Steel Corp., 919 S.W.2d 26, 35 (Tenn. 1996); Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993); Tennessee Rules of Appellate Procedure Rule 13(d).

[54] Odom v Odom, 2018 WL 3532080, at *2 (Tenn. Ct. App. 2018); *quoting* Watkins ex rel. Duncan v. Methodist Healthcare Sys., 2009 WL 1328898, at *3 (Tenn. Ct. App. 2009); *see also* Robinson v. Air Draulics Eng'g Co., 377 S.W. 2d 908, 912 (Tenn. 1964).

[55] Id.

[56] Id.

[57] Odom, at *2; *see* In re Brown, 470 S.W.3d 433, 442 (Tenn. Ct. App. 2015) (*quoting* Gonsewski v. Gonsewski, 350 S.W.3d 99, 105 (Tenn. 2011).

LAW AND ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN ENTERING THE RESTRAINING ORDER ENJOINING WIFE FROM MAKING ANY OTHER PUBLIC ALLEGATIONS AGAINST HUSBAND ON SOCIAL MEDIA OR TO HIS EMPLOYER WHICH MAY AFFECT HUSBAND'S REPUTATION OR EMPLOYMENT.

On May 22, 2001, the Tennessee legislature codified the mandatory injunctions set forth in Tennessee Code Annotated §36-4-106. One of the purposes of enacting this legislation was to require parties to a divorce to act in a reasonable and rational manner through the divorce proceedings.[58] Upon a divorce action being filed and served upon the respondent and throughout the duration of the matter, mandatory injunctions take effect, including "an injunction restraining both parties from harassing, threatening, assaulting or abusing the other and from making disparaging remarks about the other ... to either party's employer."[59] Tennessee Code Annotated §36-4-106(d)(6) provides that nothing set forth in the temporary injunction statute shall preclude either party from applying to the court for further temporary orders, an expanded temporary injunction, or modification or revocation of this temporary injunction.

Wife argues that there is not a link between the restraining order sought by Husband, and thereafter entered by the trial court, and the pending divorce action. In codifying Tennessee Code Annotated §36-4-

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[58] Amy J. Amundsen, *Mutual Temporary Injunctions in Divorce Cases*, Tennessee Bar Journal, 17 (November 2001).
[59] Tennessee Code Annotated §36-4-106(d)(3).

106(d)(3), the Legislature clearly believed there to be a "link" between a divorce action and the right of a party to that divorce action to be free from disparaging remarks to his or her employer and potential damaging effect to the employment of that party by actions of the opposing party. On November 28, 2018, Wife filed her Amended Complaint for Divorce and Interspousal Tort Action wherein she requested the trial court to award her medical expenses and damages for the alleged battery occurring as a result of Husband's alleged domestic violence, reasonable damages for intentional infliction of emotional distress, and damages in the amount of her student loan balance.[60] Wife also has requested a "reasonable division of the parties' joint assets" which she takes the position includes Husband's Deferred Retirement Option Plan (DROP) through the City of Memphis.[61] It is illogical for Wife to take the position that "neither the conduct to be restrained nor the harm to be avoided is a matter before the [trial] court."[62] Husband's job security and continued employment is necessary for not only Husband's livelihood but also for any financial and/or division of property award the trial court may provide Wife at the final adjudication of this matter. Wife continues to take the position that the court restrained her from making allegations about Memphis Police Department misconduct, when in fact the trial court restrained Wife from making disparaging comments or allegations about Husband that could impact Husband's employment with the Memphis Police

[60] (A. R., Vol. I, p. 25).
[61] Id.
[62] Appellant's Brief, p. 7.

Department.[63] Specifically, the trial court enjoined Wife from "making any other public allegations against [Husband] on social media (on any platform) or to his employer which may affect Petitioner's reputation or employment.[64] In fact, in it's oral ruling the trial court even stated:

> [Wife], here's the problem. You're under a mutual restraining order. You are. Notwithstanding that any other – when you filed your Complaint, the restraining order was put into place. And that included not to make any disparaging comments to an employer. The mayor is his employer. Bottom line.
>
> You can sit there and argue that you have a freedom of speech, and – but the moment you sat there and said in this letter referencing your husband, that changed it. That was about him. It wasn't about general concern about police corruption.
>
> The fact that, you know, another police officer was arrested yesterday or last week or last month, if you want to sit there and rant about that, have at it. But if you're going to make references to your husband, about your husband, about your situation, then that is off limits. Bottom line.[65]

II. THE PROOF SUBMITTED FOR THE RESTRAINING ORDER WAS SUFFICIENT UNDER THE REQUIREMENTS OF TENNESSEE RULES OF CIVIL PROCEDURE RULE 65.03 AND/OR 65.04.

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[63] Appellant's Brief, p. 8.
[64] (A.R. Vol. I, p. 81).
[65] (A. R. Vol. II, p. 26, ll. 19-25 and p. 27, ll. 1-12).

Husband's Petition for Restraining Order was originally filed pursuant to Tennessee Rules of Civil Procedure Rule 65.03 as Husband intended to seek immediate, temporary relief. Rule 65.03 and Rule 65.04 have a similar burden as both require a showing of immediate and irreparable injury, loss, or damage caused by the adverse party's actions. Husband has a statutory right to be free from Wife making disparaging remarks about him to his employer.[66]

Wife takes the position in her brief that her Facebook post was concerning her allegation of misconduct by Memphis Police Department while ignoring the fact that her Facebook post also specifically referenced Husband and her allegations that Husband committed an alleged act of domestic violence against her.[67] Further, the trial court heard proof regarding an e-mail that Wife sent to Mayor Jim Strickland which specifically included her Husband's name and the fact that he is an employee of the Memphis Police Department.[68] Husband clearly presented allegations that Wife had violated his right to be free from disparaging remarks about him to his employer in his Petition for Restraining Order and presented evidence during the hearing on the same.[69] Husband further alleged that Wife's actions could have immediate and irreparable harm to his employment and/or his reputation with his employer.[70] At the time Husband filed his Petition he was unaware of Wife's e-mail to Mayor Strickland, which she filed in

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[66] Tennessee Code Annotated §36-4-106(d)(3).
[67] Appellant's Brief, p. 8.
[68] (A.R. Vol. II).
[69] (A.R. Vol. I, p. 35) and (A.R. Vol. II).
[70] Id.

the cause some ten (10) days later as an exhibit to a pleading, and, therefore, could not have included reference to same in his Petition for Restraining Order. Wife takes the position that the injury sought to be avoided could not be immediate and irreparable because Husband did not seek the immediate relief he originally prayed for and because the hearing on the matter was set several weeks after the Petition was filed. Wife is well aware that the reason immediate relief was not sought was because the trial court was in a jury trial and, therefore, unavailable to address a request for an immediate order.[71] Husband would submit that it was necessary to seek the Restraining Order, even if immediate relief in the form of a temporary restraining order could not be obtained, as the divorce is still pending due to Wife's litigation tactics and there is no trial date currently set where Husband would be able to address Wife's Facebook post and contact of Mayor Strickland regarding Husband. Wife had the opportunity to but did not present any evidence at the hearing on Husband's Petition to refute Husband's testimony regarding the necessity of the Restraining Order.[72]

II. THE RESTRAINING ORDER ENTERED BY THE CIRCUIT COURT IS NOT AN UNCONSTITUTIONAL INFRINGEMENT OF RIGHTS OF 1) FREE SPEECH GUARANTEED UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 19 OF THE TENNESSEE CONSTITUTION AND 2) GOVERNMENTAL ACCESS AND REDRESS UNDER ARTICLE 1, SECTION 23 OF THE TENNESSEE CONSTITUTION.

[71] (A.R. Vol. I, p. 58).
[72] (A. R. Vol. II).

A "prior restraint" is used to describe administrative or judicial orders that forbid a communication prior to that communication occurring.[73] "Temporary restraining orders and permanent injunctions – i.e. court orders that actually forbid speech activities – are classic examples of prior restraints."[74] When a court's action is directed at suppressing speech because of its content before the speech is communicated, that action is a prior restraint.[75] Both the First Amendment of the United States Constitution and Article I, Section 19 of the Tennessee Constitution provide broad protections to prevent the abridgement of a person's right to freedom of speech and, therefore, these protections require the application of strict scrutiny review when faced with the question of whether a person's freedom of speech has been infringed.[76] To withstand strict scrutiny review, the restraint on speech must be "narrowly tailored to serve a compelling government interest." "The right of free speech is not absolute at all times and under all circumstances."[77] "Free speech does not include the right to cause substantial emotional distress by harassment or intimidation."[78] Husband is unaware of any Tennessee case law which analyzes the

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[73] Loden v. Schmidt, 2015 WL 1881240, at *7 (Tenn. Ct. App. 2015).
[74] Id., *See, e.g.*, Alexander v. U.S., 509 U.S. 544, 550 (1993).
[75] Gider v. Hubbell, 2017 WL 1178260, at *10 (Tenn. Ct. App. 2017); *quoting* In re Conservatorship of Turner, 2014 WL 1901115 (Tenn. Ct. App. 2014).
[76] *Id.*
[77] Purifoy v. Mafa, 556 S.W.3d 170, 191 (Tenn. Ct. App. 2017); *quoting* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571 (1942).
[78] Purifoy, at 191; *quoting* State v. Cooney, 894 P.2d 303, 307 (Mont. 1995).

prong of Tennessee Code Annotated §36-4-106(d)(3) related to communicating with employers or other injunctions similar to the one in the case at bar.

In *Gider v. Hubbell*, the Court found an injunction restricting the Mother in a child custody action from making disparaging and clearly defamatory remarks about Father online or to the child or in the presence of the child to be proper given the facts of the case. The Court did find that some of the restrictions placed on Mother's speech were overbroad and vague.[79] Specifically, the Court found that the prohibition against any mention of Father by Mother on social media may overly restrict her right to free speech.[80]

Wife alleges in her brief that the trial court's Restraining Order entered on February 13, 2019, amounts to a "prior restraint" on her right to freedom of speech protected by the United States Constitution and the Tennessee Constitution to publish her allegations of Memphis Police Department misconduct.[81] Husband presented proof at the hearing in this matter regarding the harassing litigation tactics Wife has engaged in throughout the pending divorce as well as the past two (2) divorce filings by Wife. The trial court found that Wife's e-mail to Mayor Strickland violated the temporary injunction as set forth in Tennessee Code Annotated §36-4-106(d)(3) which took effect when Wife filed her Complaint for Divorce and served Husband with same.[82] The

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[79] Gider, at *11-12.
[80] *Id.*
[81] Appellant's Brief, p. 11.
[82] (A.R. Vol. II, p. 26, ll. 19-25).

court's Restraining Order entered on February 13, 2019, was an expansion of Tennessee Code Annotated §36-4-106(d)(3) to protect the rights of Husband in the divorce proceeding. Further, Wife is free to publish her allegations about the Memphis Police Department and the trial court specifically so stated.[83] Wife argues that there is no compelling governmental interest in the case at bar. However, there is clearly a compelling governmental interest in protecting the employment of a party to a divorce as the trial court was attempting to do here when it entered its Restraining Orders, otherwise the temporary injunction set forth in Tennessee Code Annotated §36-4-106(d)(3) would not have been enacted. Husband would submit that unlike the injunction in *Gider*, the Restraining Order in the instant case is narrowly tailored to restrict Wife's speech only insomuch as is necessary to protect Husband's interest. By enjoining Wife from making allegations against Husband that would affect his employment and/or reputation with his employer, the trial court narrowly tailored the Restraining Order. Wife claims in her brief that under the drafting of the Restraining Order, Wife would be enjoined from calling the police should Husband "shoot her down in the street" as it would affect his employment and reputation.[84] Wife's argument is extreme and nonsensical. Clearly, if Husband were to in fact "shoot [Wife] down in the street" and Wife, as a result, made a police report, Wife would not be held in contempt for violating the Restraining Order in place. The trial court's Restraining Order was meant to protect Husband from

[83] (A.R. Vol. II, p. 27, ll. 7-10).
[84] Appellant's Brief, p. 12.

having disparaging remarks made about him to his employer while the parties' divorce proceedings are pending.

Wife further argues that the Restraining Order also violates her right to seek redress from publicly elected officials. During her closing arguments, Wife stated that she had contacted the FBI to attempt to address what she alleges to be corruption in the Memphis Police Department. Further, at the time of the hearing on Husband's Petition for Restraining Order, a Special Prosecutor was investigating the events that occurred on June 17, 2019.[85] Wife had then, and currently has now, multiple avenues of redress[86], and the trial court did not restrict those avenues.

IV. THE TRIAL COURT CORRECTLY FOUND WIFE IN CONTEMPT OF COURT FOR HER WILLFUL MISCONDUCT IN THE PRESENCE OF THE TRIAL COURT.[87]

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[85] (A.R. Vol. II, p. 27, ll. 15-16).

[86] Wife filed a separate accelerated interlocutory appeal under Docket Number W2019-00901-COA-T10B-CV related to the trial court's denial of Wife's Motion to Recuse in which Wife made the same or similar arguments concerning the Restraining Order and contempt findings. Wife has also filed an Action for Declaratory Relief and/or Judgment against Judge Weiss in the United States District Court for the Western District of Tennessee under Docket Number 2:19-cv-2406-JTF-tmp related to the Restraining Order issued by the trial court and a Complaint for Damages and Permanent Injunction against Husband, Husband's Counsel, Mayor Strickland, members of the Memphis Police Department, the Memphis City Attorney and Assistant City Attorney, and the Shelby County District Attorney and Deputy District Attorney under Docket Number 2:19-cv-02396-JTF-tmp related to an alleged conspiracy between the named parties related to the investigation of the alleged June 17, 2018, incident.

[87] Husband has responded to Wife's final two (2) issues in this one section.

In Tennessee, there are two types of contempt of court with civil contempt intended to benefit a litigant while criminal contempt is intended to punish an offense against the authority of the court.[88] The appellate courts are not bound by the labels of "civil" or "criminal" affixed by the parties and/or the trial court but instead should characterize a contempt as criminal or civil by determining the conduct involved and the sanctions imposed.[89] Contempt can further be categorized as "direct" or "indirect" depending on where the contemptuous conduct occurs.[90] While indirect contempt is based upon acts committed outside the presence of the court and may only be punished after notice and an opportunity to be heard, direct contempt is based upon acts committed in the presence of the court and may be punished summarily.[91] Courts generally agree that summary contempt powers should be used sparingly and in cases of exceptional circumstances.[92] The court's authority to punish certain acts derives from Tennessee Code Annotated §29-9-102. Said statute sets forth certain forms of conduct that is deemed contemptuous including, but not limited to: (1) the willful misbehavior of any person in the presence

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[88] Odom, at *2; *quoting* Duke v. Duke, 2014 WL 4966902, at *30 (Tenn. Ct. App. 2014).

[89] Odom, at *2; *see* Jones v. Jones, 1997 WL 80029, at *2 (Tenn. Ct. App. 1997).

[90] State v. Turner, 914 S.W. 2d 951, 955 (Tenn. Crim. Appeals 1995); *see* State v. Maddux, 571 S.W.2d 819 (Tenn. 1978).

[91] Turner; Tennessee Rules of Criminal Procedure Rule 42.

[92] Odom, at *5; *quoting* In re Brown, 470 S.W.3d 433, 445 (Tenn. Ct. App. 2015).

of the court, or so near thereto as to obstruct the administration of justice; (2)...; (3)...; (4) Abuse of, or unlawful interference with, the process or proceedings of the court; (5)...; and (6)...[93] Rule 42(a) of the Rules of Tennessee Criminal Procedure provides that a criminal contempt may be punished summarily if the judge saw or heard the contemptuous conduct and same occurred in the actual presence of the court. Tennessee's summary contempt mechanism is intended to punish conduct when necessary to "vindicate the dignity and authority of the court."[94] Rule 42(a) does not require notice or an opportunity to be heard in defense when conducting summary contempt proceedings for direct contempt.[95]

The trial court's order is titled "Order on Direct Civil Contempt" and the sanctions imposed upon Wife were in the form of a "purge." However, in looking at the trial court's actions, this Court should look to the totality of the circumstances, including the conduct involved, when determining whether the trial court held Wife in criminal or civil contempt. Wife is a licensed attorney in the State of Tennessee and is therefore an Officer of the Court. Although Wife has represented herself *pro se* in the pending divorce action, Wife was employed as a prosecutor for many years and charged with upholding the law and court orders. Wife was still a prosecutor at the time of the February 7, 2019 hearing, and she was well aware of what actions are

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[93] Tennessee Code Annotated §29-9-102.

[94] Turner at 956; *see* Shiflet v. State, 400 S.W.2d 542, 543 (Tenn. 1966), etc.

[95] Tennessee Rules of Criminal Procedure Rule 42.

inappropriate, could interfere with the court's processes, and what the punishment for those actions could be. Wife's first statement to the trial court upon its oral order was not that the court was violating Wife's First Amendment right to free speech nor was it a request for an interlocutory appeal on the Restraining Order, instead Wife's statement was "I will just with all candor to the Court say you might as well take me into custody right now."[96] The court then provided Wife with two (2) additional opportunities, one (1) of which was while Wife was in handcuffs, to correct her misbehavior in front of the court and agree to change her position.[97] Wife refused. Husband would submit that the trial court's finding of Wife in contempt was necessary to vindicate the dignity and authority of the court as Wife disrespected the court and its ruling in open court. Wife argues in her brief that the trial court's contempt proceedings were premature as she did not have an opportunity to appeal the Restraining Order and request a stay before being held in contempt and that she was denied requisite notice.[98] Wife was not held in contempt for violating the mandatory injunction or for violating the Restraining Order that the trial court had just orally ordered, Wife was held in contempt for her disrespect of the trial court and for telling the court three (3) times that she was not going to comply with his orders. How Wife could claim she lacked notice when she herself instigated this series of events by willfully engaging in contemptuous conduct and statements to the court, especially in light of

[96] (A.R. Vol. II, p. 27, ll. 22-24).
[97] (A.R. Vol. II, p. 28, ll. 5-14).
[98] Appellant's Brief, p. 16.

the fact that she was and is a licensed attorney with litigation experience, Husband cannot reconcile. Husband would submit that the punishment for the contempt is now moot as Wife removed her Facebook post after being in custody for approximately four (4) hours. However, Husband would state that the proper punishment for Wife's direct contempt was a maximum punishment of ten (10) days in jail and a fifty dollar ($50) fine.[99] This Court can modify the trial court's punishment of Wife up to the maximum punishment allowed or remand to the trial court for imposition of same.

CONCLUSION

Pursuant to the foregoing facts and arguments, Appellee/Husband Joe Edward Stark respectfully requests that this Court dismiss the appeal filed by the Appellant/Wife Pamela Diane Stark and award Appellee/Husband his reasonable attorney's fees and costs in defending against Wife's appeal.

Respectfully Submitted,

By: /s/ Melissa C. Berry

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[99] Tennessee Code Annotated §29-9-103.