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

DENTON'S ELECTRONICS, INC.,	§	
	§	
Plaintiff-Appellee,	§	
	§	
v.	§	Case No. _____
	§	
LUCAS ROBERSON.,	§	Dickson County Chancery Court
	§	Case No.: 2023-CV-9
Defendant-Appellant.	§	

DEFENDANT-APPELLANT'S TENN. R. APP. P. 10(a) APPLICATION FOR EXTRAORDINARY APPEAL OF EX-PARTE PRIOR RESTRAINT ORDER

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Date: January 15, 2023

[1] In accordance with their professional obligation to provide for the "delivery of legal services at no fee . . . to individuals . . . seeking to secure or protect civil rights, civil liberties, or public rights," *see* RPC 8, Rule 6.1(b)(1), Horwitz Law, PLLC and the above-named attorneys enter a limited appearance in this action for the purpose of litigating the extraordinary appeal before this Court only.

I. INTRODUCTION

This extraordinary appeal concerns a categorically unconstitutional, ex parte prior restraint against protected speech that was issued by the Dickson County Chancery Court on January 13, 2023. The *Ex-Parte [Temporary Restraining] Order* at issue imposes a prior restraint forbidding pure speech about a public-facing business. A copy of the challenged order is attached to this Application as **Exhibit #1**.

In relevant part, the categorically unconstitutional prior restraint at issue provides that:

> **IT IS, THEREFORE, ORDERED** that Petitioner, **Denton's Electronics, Inc.**, be, and is awarded a temporary injunction and restraining order in accordance with Tenn. R. Civ. P. 65.01. Therefore, the Respondent is specifically ordered and enjoined from posting to any social media platform any additional information concerning Petitioner and/or it's [sic] employees. The Respondent is further ordered to immediately remove any social media posts concerning Petitioner and/or its employees from any social media platform and removing [sic] any comments concerning the same pending further orders of this Court. Failure to adhere to this *Order* may result in a finding of contempt.

Id. at 1.

For the reasons detailed below, the Dickson County Chancery Court's prior restraint is categorically unconstitutional; it is unconstitutionally overbroad; and it orders retractions that no American court may lawfully compel. Accordingly, the order should be vacated.

II. TENN. R. APP. P. 10(c)(1) STATEMENT OF QUESTION PRESENTED FOR REVIEW

This extraordinary appeal presents a single, straightforward

question of law: Is the Dickson County Chancery Court's ex parte, pre-trial, speech-based prior restraint forbidding pure speech about a business constitutional? Because the matter presents a question of First Amendment law, this Court reviews the question de novo. *See P&G v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996) ("the standard of review is different. The decision to grant or deny an injunction is reviewed for abuse of discretion. [] We review First Amendment questions de novo.") (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)).

III. TENN. R. APP. P. 10(c)(2) STATEMENT OF THE FACTS NECESSARY TO AN UNDERSTANDING OF WHY AN EXTRAORDINARY APPEAL LIES

On January 13, 2023, Petitioner Denton's Electronics, Inc.—who is really a "Plaintiff"—filed a *Verified Petition for Injunctive Relief and Damages*. *See* **Ex. 2**. The "Petition"—which is more accurately called a "Complaint"—avers that Lucas Roberson, the Defendant and the Appellant here, purchased an 85-inch TV from the Plaintiff in November 2022. *See id.* at ¶ 3. After doing so, the Plaintiff contends that Mr. Roberson complained that Denton's Electronics damaged his TV during installation, and that Mr. Roberson then mocked and criticized Denton's Electronics on social media "[i]n lieu of seeking recourse for whatever complaint [he] may have in court[.]" *See id.* at ¶¶ 7–10. The Plaintiff contends that Mr. Roberson's "multiple social media posts alleging that Petitioner damaged the TV are knowingly false." *Id.* at ¶ 11. The above allegations were also verified, deficiently, as "true and correct to the best

of [my] knowledge, information and belief"[2] by Mr. Al Denton, who owns Denton's Electronics. *See id.* at 5.

Based on the above allegations, the Plaintiff seeks a money judgment of $10,000.00 for libel and slander. *See id.* at 3, ¶ 4. As relevant to this appeal, the Plaintiff also requested that the Dickson County Chancery Court "grant immediate injunctive relief requiring the Respondent to [1] refrain from posting additional posts concerning the Petitioner and [2] immediately remove the negative posts currently posted pending further orders of this Court[.]" *See id.* at 3, ¶ 2.

On January 13, 2023—acting ex-parte—the Chancery Court granted the Plaintiff the prior restraint that he requested. In full, the Chancery Court's *Ex-Parte [Temporary Restraining] Order* states:

> This cause came to be heard upon the sworn *Petition* filed by Petitioner, **Denton's Electronics, Inc.**, and it appearing to the Court that, in accordance with Tenn. R. Civ. P. 65.04, Petitioner has put forth sufficient evidence in said Petition that the Respondent, **Lucas Roberson**, by causing [sic] immediate and irreparable harm to the Petitioner by posting damaging information to social media.
>
> **IT IS, THEREFORE, ORDERED** that Petitioner, **Denton's Electronics, Inc.**, be, and is awarded a temporary injunction and restraining order in accordance with Tenn. R.

[2] As this Court has explained repeatedly, such "information and belief" verifications are defective. *See Bridgewater v. Adamczyk*, No. M2009-01582-COA-R3-CV, 2010 WL 1293801, at *4 (Tenn. Ct. App. Apr. 1, 2010) ("'Personal knowledge' is defined as 'knowledge gained through firsthand observation or experience, as distinguished from belief based on what someone else has said.' Black's Law Dictionary 703 (7th ed. 2000). Our courts have rejected affidavits filed in support of motions for summary judgment that were submitted 'upon information and belief.'") (collecting cases), *no app. filed*.

> Civ. P. 65.01. Therefore, the Respondent is specifically ordered and enjoined from posting to any social media platform any additional information concerning Petitioner and/or it's [sic] employees. The Respondent is further ordered to immediately remove any social media posts concerning Petitioner and/or its employees from any social media platform and removing [sic] any comments concerning the same pending further orders of this Court. Failure to adhere to this *Order* may result in a finding of contempt.

Ex. 1 at 1.

By rule—and regardless of the order's flagrant unconstitutionality—the temporary restraining order will be effective unless and until it is reversed. *See Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 355 (Tenn. 2008) ("Erroneous orders must be followed until they are reversed."). Accordingly, Mr. Roberson has filed this extraordinary appeal seeking immediate relief vacating it.

IV. TENN. R. APP. P. 10(c)(3) STATEMENT OF THE REASONS SUPPORTING AN EXTRAORDINARY APPEAL

Pre-trial defamation injunctions are categorically unconstitutional. So, too, are overbroad speech restrictions constitutionally infirm. Courts may not lawfully compel retractions without contravening the First Amendment, either. For all of these reasons—or for any of them—the Chancery Court's *Ex-Parte [Temporary Restraining] Order* should be vacated.

A. Pre-trial defamation injunctions are categorically unconstitutional.

"[P]rior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v.*

Stuart, 427 U.S. 539, 559 (1976). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

To impose a prior restraint against pure speech, a "publication must threaten an interest more fundamental than the First Amendment itself. Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *P&G*, 78 F.3d at 226–27. With this context in mind, alleged defamation of a business falls at least marginally below the publication of the Pentagon Papers in terms of evaluating these interests. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). Nor is the fact that speech may be damaging a lawful justification for enjoining it. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) ("And although economic damage might be an intended effect of Mishkoff's expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business.").

Indeed, defamation can *never* lawfully be enjoined on a preliminary basis. *See, e.g., Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 311 (Ky. 2010) (holding that preliminary injunctions may never issue in defamation cases, and noting that "while the rule may temporarily delay relief for those ultimately found to be innocent victims of slander and

libel, it prevents the unwarranted suppression of speech of those who are ultimately shown to have committed no defamation, and thereby protects important constitutional values."); *List Indus. Inc. v. List*, No. 2:17-CV-2159 JCM (CWH), 2017 WL 3749593, at *3 (D. Nev. Aug. 30, 2017) ("[A] preliminary injunction poses a danger that permanent injunctive relief does not: that potentially protected speech will be enjoined prior to an adjudication on the merits of the speaker's or publisher's First Amendment claims.") (cleaned up); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 347 (Cal. 2007), *as modified* (Apr. 26, 2007) (same) (citing *DVD Copy Control Assn., Inc. v. Bunner*, 75 P.3d 1 (Cal. 2003) (conc. opn. of Moreno, J.). To the extent that Tennessee law is unsettled regarding that First Amendment-compelled mandate, this Court should also take the opportunity to settle the matter clearly and definitively. *Compare Lowery v. Redmond,* No. W2021-00611-COA-R3-CV, 2022 WL 1618218, at *4 (Tenn. Ct. App. May 23, 2022) (expressing doubt about a court's equitable jurisdiction to enjoin defamation even after trial, and noting that "the traditional rule has been that 'equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.'") (quoting *In re Conservatorship of Turner*, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at *9 (Tenn. Ct. App. May 9, 2014)), *with In re Conservatorship of Turner*, 2014 WL 1901115, at *9 (suggesting pre-trial defamation injunctions may be permitted, but requiring "a finding that the enjoined speech is defamatory" before an injunction may issue).

Further, given that speech regarding a matter of public concern—at minimum, the business practices of a public-facing company—is at

issue here, even a *post*-trial defamation injunction may be constitutionally impermissible. *See Sindi v. El-Moslimany*, 896 F.3d 1, 33 (1st Cir. 2018) (noting that an "[a]n injunction that prevents in perpetuity the utterance of particular words and phrases after a defamation trial" may still be unconstitutional even after the words and phrases have been found defamatory, because "[b]y its very nature, defamation is an inherently contextual tort," and "[w]ords that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice.").

Prior restraints against speech do not just harm speakers, either. Instead, they abridge *the public's* right to hear what a speaker has to say as well. *See, e.g., Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("Where a willing speaker exists, "the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) ("To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection.").

For all of these reasons, pre-trial defamation injunctions like the one challenged here are categorically unconstitutional. As such, by issuing such a prior restraint on an ex-parte basis, "the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review[.]" Tenn. R. App. P. 10(a). For similar reasons, this appeal presents weighty issues of public concern bearing on

bedrock constitutional rights. Accordingly, extraordinary review is warranted, and the Chancery Court's ex-parte, pre-trial prior restraint should be vacated. Further, because a pre-trial temporary injunction—as compared with the current temporary restraining order—would be categorically unconstitutional for the same reasons, this Court should order that the temporary injunction hearing scheduled "to take place on January 30, 2023 at 9:00 a.m." be cancelled. *See* **Ex. 1** at 2.

B. The Chancery Court's ex-parte prior restraint is unconstitutionally overbroad.

A speech restriction "may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.'" *See United States v. Stevens*, 559 U.S. 460, 473 (2010) (cleaned up). For this reason and others, "[a] court's equitable power to grant injunctions should be used sparingly, especially when the activity enjoined is not illegal, . . . and when it is broader than necessary to achieve its purposes." *Kersey v. Wilson*, No. M2005-02106-COA-R3-CV, 2006 WL 3952899, at *8 (Tenn. Ct. App. Dec. 29, 2006) (citing *Earls v. Earls*, 42 S.W.3d 877 (Tenn. Ct. App. 2000); *Terry v. Terry*, M1999-01630-COA-R3-CV, 2000 WL 863135 (Tenn. Ct. App. June 29, 2000) (*perm. app. denied* Jan. 8, 2001)).

Here, the scope of the prior restraint imposed by the Chancery Court goes far beyond just proscribing defamation. *See* **Ex. 1** at 1. Indeed, it does not even purport to be limited to defamation. *See id.*

Instead, the order forbids the Defendant's publication on social media of "any additional information concerning Petitioner and/or it's [sic] employees"—regardless of whether it is tortious or even false—

pending further orders. *See id.* The Chancery Court's order is thus facially overbroad and constitutionally infirm, and it should be vacated on those grounds, too. *Cf. Kauffman v. Forsythe*, No. E2019-02196-COA-R3-CV, 2021 WL 2102910, at *6 (Tenn. Ct. App. May 25, 2021) ("And the court's order was not limited to defamatory comments. It enjoined the parties from making any public comments about each other. The order was overly broad and infringed on constitutionally protected speech. So we vacate the restraining order.").

C. The Chancery Court's retraction order is categorically unconstitutional.

As part of its remedy, the Chancery Court additionally ordered Mr. Roberson "to immediately remove any social media posts concerning Petitioner and/or its employees from any social media platform and removing [sic] any comments concerning the same pending further orders of this Court." *See* **Ex. 1** at 1. But courts can *never* lawfully compel retractions, which involve compelled speech. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."). *See also Kramer v. Thompson*, 947 F.2d 666, 682 (3d Cir. 1991) ("we 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."); *Berman v. Kafka*, No. 3:13-CV-1109-JJBT, 2015 WL 12940184, at *3 (M.D. Fla. July 10, 2015) (holding that a court-ordered retraction is not "a cognizable form of equitable relief"). *Cf. Matchett v.*

Chicago Bar Ass'n, 125 Ill. App. 3d 1004, 1009, 467 N.E.2d 271, 275 (1984) (affirming denial of demand for apology and retraction because a plaintiff "may not compel [a defendant] to publish information it has chosen not to publish."); *Mazur v. Szporer*, No. CIV.A. 03-00042(HHK), 2004 WL 1944849, at *8 (D.D.C. June 1, 2004) ("A party cannot compel another to publish information it has chosen not to publish.")

Accordingly, the Chancery Court's retraction order must be vacated, too.

V. TENN. R. APP. P. 10(c)(4) STATEMENT OF THE RELIEF SOUGHT

The Chancery Court's *Ex-Parte [Temporary Restraining] Order* restricting the Defendant-Appellant's speech should be vacated and dissolved, and the temporary injunction hearing scheduled to take place on January 30, 2023 at 9:00 a.m. should be cancelled. *See* **Ex. 1** at 1–2.

Further, the relief sought by this Application should be granted on an expedited basis, without oral argument, based on the Parties' briefing to prevent an extended adjudication that would itself constitute irreparable injury. *See, e.g., Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). *See also Young v. Giles Cnty. Bd. of Educ.*, 181

F. Supp. 3d 459, 465 (M.D. Tenn. 2015) ("Under case law applicable to free speech claims, the loss of First Amendment freedoms, for even minimal periods of time, is presumed to constitute irreparable harm." (quotation omitted)).

VI. TENN. R. APP. P. 10(c) APPENDIX OF EXHIBITS

For the Appellant's "appendix containing copies of any order or opinion relevant to the questions presented in the application and any other parts of the record necessary for determination of the application," *see* Tenn. R. App. P. 10(c), the Appellant has appended the following two exhibits:

1. The Dickson County Chancery Court's Jan. 13, 2023 *Ex-Parte [Temporary Restraining] Order* (**Exhibit #1**); and

2. The Plaintiff's Jan. 13, 2023 *Verified Petition for Injunctive Relief and Damages* (**Exhibit #2**).

VII. CONCLUSION

For the foregoing reasons, the Appellant's Rule 10 Application should be granted.

Respectfully submitted,

By: /s/ Daniel A. Horwitz

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2023, a copy of the foregoing was sent via the Court's electronic filing system to the following parties or their counsel:

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