IN THE SUPREME COURT OF OHIO

CLARK AND BRENDA NELSON, Plaintiffs-Appellants, vs. TIJUAN DOW. Defendant-Appellee.	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 105994

APPELLANTS' MEMORANDUM SUPPORTING JURISDICTION

TABLE OF CONTENTS

I. Statement of the Case

The Appellate Court affirmed (as immaterially modified) an unprecedented injunction prohibiting Appellants Clark and Brenda Nelson ("the Nelsons") from attending City Council meetings based solely on their protected political speech. It violates constitutional standards long enforced by this Court that forbid judges from (1) imposing prior restraints on political speech and (2) restricting access to public forums. Even more troublingly, it was sought and obtained by a sitting politician, Appellee Tijuan Dow, against the Nelsons, who were campaign volunteers at the time for his political opponent. So using his background as a lawyer and prosecutor, Dow obtained a rubber-stamped order to silence his critics, banning the Nelsons from attending public hearings where they might criticize his policies or conduct in office.

The violence this decision does to the cornerstone of American democracy—which, as this Court has affirmed, requires political speech to be critical, even caustic, and politicians to be thick-skinned—cannot be overstated. Constitutional standards that protect political speech—also long affirmed by this Court—were simply ignored, and will be again. For by affirming the unlawful injunction, the Eighth District created a fissure in Ohio law. Its decision does not simply authorize politicians to silence their constituents for saying things they dislike. It holds that the very feature that *protects* that speech—that it is repeatedly directed at public officials and criticizes them—is what authorizes politicians fluent in the use of Ohio courts to *censor* it.

II. This case involves substantial constitutional questions.

Half a century ago, the U.S. Supreme Court held that courts must separate protected speech (like political hyperbole) from unprotected conduct (like threats) when applying statutes. In *Watts,* a man threatened to shoot President Lyndon Johnson if he was given a gun. But to preserve the higher values embodied in the First Amendment, the Supreme Court held that even

that speech could not constitutionally satisfy the elements of a statute that prohibited threatening the President, because in context it was not a "true threat" of violence:

> We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose 'against the background of 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.' *The language of the political arena*, like the language used in labor disputes *is often vituperative, abusive, and inexact*.[1]

This Court has faithfully enforced those values. As discussed below, it has enforced Constitutional protections forbidding courts from imposing prior restraints on political speech, like the injunctions at issue did by prohibiting the Nelsons from speaking at public hearings. It has enforced Constitutional protections forbidding courts from restricting access to public forums based on speakers' identities or the content of their speech, which the injunctions also did. And this Court has enforced the First Amendment's settled requirement that reviewing courts must conduct an independent, *de novo* review of the full record in First Amendment cases, to prevent any abrogation of the speech liberties upon which our democracy relies. For when the courts address First Amendment issues, "the judge is the primary representative of the public interest,"[2] and censorship harms not only its targets, but their would-be listeners—the citizens whose ballots lack democratic legitimacy if cast upon a government-censored debate.

The decision below flouts every one of these substantive constitutional protections. And though this Court promulgated the very forms Dow used to obtain *ex parte* and permanent civil protective orders under R.C. 2903.214(C) and (D)(1),[3] this Court has never been called to adjudicate the constitutional protections embodied by the statutory requirements that applicants

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[1] *Watts v. United States*, 394 U.S. 705, 708 (1969).
[2] *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).
[3] *State v. Smith*, 2013-Ohio-1698, 136 Ohio St. 3d 1, 2 fn. 2.

prove an "immediate and present danger to the person to be protected," R.C. 2903.214(D)(1), and that the supposed offenders "engag[ed] in a pattern of *conduct*" to "*knowingly* cause another person to believe that the offender *will cause physical harm* to the other person . . . *or cause mental distress* to the other person." R.C. 2903.211 (emphases added).

This Court has never been called to square this language with the constitutional questions the decision below creates. Constitutionally construed, the statutes parse conduct from speech and prevent thin-skinned legislators from wielding supposed "distress" at repeated and protected criticism as a tool of unlawful censorship. But the Court of Appeals uncritically accepted a trial court's determination that fully protected political hyperbole proves criminal stalking—as though repeatedly participating in public hearings is not a civic virtue, but evidence of a crime. It did not conduct an independent and constitutionally adequate review of the record, which shows that the Nelsons' repeated attendance at public hearings, and speech repeatedly directed at the legislator who represents them, was fully protected First Amendment expression at all stages.

Even under the elements of the stalking statute, the orders (and their affirmance) were against the manifest weight of the evidence, particularly if the lower courts had properly considered whether the supposedly "threatening" conduct (attending public hearings of a legislative body with other citizens), speech (about a legislator, at a public hearing of his legislative body) or gestures (pointing out or at that same legislator) were fully protected by the First Amendment. But the Court of Appeals decision creates independent constitutional questions, for the unusual factual circumstances of this unprecedented case involve a public official and public meetings, and its affirmance violates well-settled First Amendment prohibitions against prior restraints and speaker-based restrictions on access to public fora.

This Court has jurisdiction to hear matters where there remains a "debatable constitutional question to resolve," even if otherwise moot.[4] Constitutional questions unresolved by this Court also preclude mootness.[5] This appeal raises substantial and unsettled constitutional questions that were exacerbated but ignored by the decision below. This Court should hear them.

III. This case is of public and great general interest.

The decision below stands for a simple, stark proposition that, at a minimum, affects every citizen considering speaking out about public concerns at public meetings. Now, any politician in the Eighth District can obtain an *ex parte* court order to forbid a critical constituent from attending his official public hearings, and extend it for at least a year, simply by averring that the citizen's constitutionally protected speech reveals that his critic dislikes him.

IV. Statement of Facts

A. The Nelsons

The Nelsons are respected residents of Cleveland, Ohio. Employees of Cleveland's public library and public utility company, they reside in Cleveland's Ward 7, and were Dow's constituents when he obtained an order preventing them from attending City Council meetings.

The Nelsons were and remain active in local politics. They attend regular Ward and City Council hearings. In past years they even campaigned for Dow, but in 2013, they volunteered for Dow's political opponent. Dow appeared to them, and the neighbors they surveyed, to have spent little time or effort in the community. So the Nelsons investigated his candidacy to seek re-election.

Dow lashed out at the Nelsons to discredit them. On May 1, 2017, two weeks before an Ohio Board of Elections hearing, Dow stood on the floor of Cleveland City Council and stated that

[4] *Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St. 3d 28, 31 (1987).
[5] *In re A.G.,* 2014-Ohio-2597, ¶ 38, 139 Ohio St. 3d 572, 578, 13 N.E.3d 1146, 1153.

Brenda Nelson, an employee of the city water department, was selling drugs. On May 15, 2017, at the Board of Elections hearing itself, he presented a written document stating that the Nelsons were selling drugs. After the hearing, Brenda told Dow "your lies are going to catch up with you." She made no threat; he did not file any reports or seek involvement by security. And Dow later admitted that the drug story had been proven false.

Undeterred, the Nelsons continued to oppose Dow, so Dow remained fixated on them. On May 22, 2017, they attended a City Council meeting with hundreds of other citizens who packed the chamber to protest municipal investment in the Quicken Loans Arena. The Nelsons neither approached nor spoke with Dow, but he saw Brenda point at him from the audience. So he sent a security guard to confront her husband in the bathroom. And Dow was a former prosecutor, well-versed in the lax scrutiny trial courts afford this Court's *ex parte* forms, and had a successful menacing conviction under his belt.[6] So the next day, he asked a court to silence the Nelsons.

B. The Temporary Injunction

On May 23, 2017 Dow filed an *ex parte* petition for a Civil Stalking Protection Order ("CSPO") against the Nelsons under R.C. 2903.214, alleging that they had engaged in criminal conduct—menacing by stalking, prohibited by R.C. 2903.211. His petition reads in full:

> Respondent's on or about May 15, 2017 at 10am at the Cuyahoga County Board of Elections located at 2915 Euclid Avenue. Cleveland, OH 44115 approached me bent over, while I was sitting in the chair, *she put his finger in her face,* stating "I'm going to get you!" Then she proceeded to walk outside the board room. I waited a moment then walked out the board meeting and was met with verbal threats from Clark and Brenda Nelson stating, "you're going to get it wait and see." This culminated over years of stalking by the Nelson's, they have come to meetings acted unruly, looked at me in a menacing way and has driving past my house multiple times with the purpose of intimidation.

[6] *State v. Jankite*, 2007-Ohio-5706, ¶ 17, 2007 WL 3105249 (Eighth Dist.).

Dow made no mention of the Council meeting the day before. On June 5, 2017, based on this account, the trial court barred the Nelsons from coming within 500 feet of Dow.

C. The Hearing

The Nelsons demanded a judicial hearing, which lasted three days. Dow relied exclusively upon his own testimony—excepting his lone witness, who recanted her testimony on cross—but his story had grown. He opened with a newly raised "incident"—the City Council meeting on May 22, 2017, the day before he filed his petition. Dow testified that he saw the Nelsons at the meeting, and consulted with the City council security guard out of "fear for his safety." But he conceded that neither of the Nelsons approached or spoke to him that day.

Dow presented no testimony or evidence that would suffice to show that he feared any threat, much less that the Nelsons had engaged in conduct knowing he would. Instead, his testimony proves that he had no reason to fear physical violence from the Nelsons—his office entitled him to send armed guards after them and arrange a police presence. Dow testified that the Nelsons looked at him at the Ward meetings, causing him to fear for his safety, yet never asked them to leave, never called security guards, and filed no police reports documenting any supposedly disruptive behavior by them at any meeting. Nor did he explain where they were supposed to look at a public meeting where he was their elected representative.

The Nelsons' witnesses, all longtime attendees of Ward meetings, confirmed that Dow's paranoia was strategic. None heard the Nelsons make threats or behave in a disruptive fashion. Their testimony confirmed that what Dow considered "disruptive" was disagreeing with or criticizing his—as did his own. When Dow testified about a public meeting in 2016, he ascribed great significance to the fact that the Nelsons "came in with a group of people. They did." Of

course, that protesters attended together reflects common opposition, not violent threats, but Dow was not content to gaslight the constitutional right of assembly. He went after speech.

To substantiate his supposed fears, Dow testified that the Nelsons said things about him—their elected representative—at that public meeting (they "would blurt out stuff and they will reference me"), and looked angry at the politician whose policies they disliked ("They just looked at me in a menacing and angry way like usual"). Of course, Dow conceded on cross-examination that the Nelsons did *not* "say anything to threaten" him, and "at that particular meeting they did not make it threatening." For that task, he proffered his only witness, who testified that she saw Brenda rush in with a "bunch of thugs," but recanted after confronted with evidence that Brenda wasn't there, and confirmed that she did not see Clark "do anything."

The hearing confirmed the absence of any competent evidence—other than fully protected speech—to meet the General Assembly's standards. This Court's Form 10.03D, with which he obtained the Temporary Injunction, required him to "state the acts which the Respondent did that created an 'immediate and present danger.'" Dow wrote that the Nelsons had been stalking him "over the years," but even this dated vagary was reduced at the hearing to a "couple times" the Nelsons drove by his house in 2014—not immediate, even if driving while looking was a crime.

For their part, the Nelsons testified that they never stalked Dow, and though they drove down his street *en route* to visit a friend, or while doing an electoral survey when opposing his local-resident candidacy before the Board of Elections, they never saw him outside of his house. Indeed, his invisibility in the community was why they challenged his candidacy.

D. The Final Injunction

On June 16, 2017, after a three-day bench trial on the merits, the trial court entered a final Civil Stalking Protection Order against the Nelsons (the "Final Injunction"), enjoining them

against coming within 500 feet of Dow for a year. Not a single fact in evidence demonstrated anything other than protected political speech—even the finger-pointing. (It is well-settled law that the use of the middle finger, a far more aggressive finger-gesture than either of the Nelsons' here, is constitutionally protected speech,[7] and that the First Amendment requires persons who invoke over-delicate sensibilities to avert their eyes.[8])

Yet on this record alone, the CSPO enjoined the Nelsons from attending Ward and City Council meetings—as a Ward representative, Dow was there—depriving them of meaningful, and unrestricted participation in local democracy for a year. It caused personal humiliation and distress: their activism was once appreciated by fellow citizens, but now discredited as criminal stalking. They once exercised their right to attend public hearings; now they had to look over their shoulders to see if the savvy lawyer might put them in jeopardy of contempt. Throughout the 2017 campaign season, the Nelsons had to move themselves from public places where the Appellant was likely to show up. Clark had to leave polling locations. Brenda had to leave the supermarket.

E. The Decision Below

On June 29, 2017 the Nelsons filed a motion for relief from judgment, asking the trial court to reduce the injunction from 500 to 50 feet, and appending affidavits from Brenda's mother and cousin about an incident where she was forced to leave a grocery store because Dow walked in. On July 6, 2017 the trial court denied the motion, and on July 13, 2017, the Nelsons noticed appeal.

On May 10, 2018, the Court of Appeals upheld the Final Injunction, but modified its restriction to 50 feet—its sole concession that speech restrictions be "narrowly tailored." It did not

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[7] *See, e.g., Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir.1997); *Duran v. City of Douglas*, 904 F.2d 1378 (9th Cir.1990); *Nichols v. Chacon*, 110 F.Supp.2d 1099, 1102 (W.D.Ark.2000); *Brockway v. Shepherd*, 942 F.Supp. 1012, 1015 (M.D.Pa.1996).
[8] *Cohen v. California*, 403 U.S. 15, 21 (1971).

consider whether any of the supposedly threatening speech was constitutionally protected, or was political hyperbole, and accepted the trial court's determination that the injunction was necessary to protect Dow's physical safety. It neither made factual findings sufficient to satisfy constitutional standards that transform speech into threats, or considered whether narrow tailoring would also require the injunction it upheld to permit Appellants to attend public meetings at which, by Dow's admission, he was protected by armed guards. To the contrary, the Court of Appeals considered Dow's deployment of armed officers as *evidence* that the couple posed a physical threat to Dow.

In dissent, Judge Tim McCormack emphasized that Dow presented no evidence proving physical harm or mental distress, and that the Nelsons' First Amendment rights had been infringed.

V. Propositions of Law

A. The decision below affirms an unlawful prior restraint.

Judicial orders "that operate to forbid expression before it takes place" are prior restraints.[9] Even temporary restraining orders "i.e., court orders that actually forbid speech activities—are classic examples of prior restraints."[10] Prior restraints are the most serious and the least tolerable infringement on First Amendment rights,[11] and face a nearly insuperable presumption against constitutional validity.[12] "Prior restraints are simply repugnant to the basic values of an open society" because they sanction "indiscriminate censorship in a way that subsequent punishments do not.'"[13] Only extraordinarily powerful governmental interests can justify affirming one.[14]

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[9] *State ex rel. Toledo Blade Co. v. Henry Cty. Ct. Cmn. Pl.*, 2010-Ohio-1533, ¶ 20; *Seven Hills v. Aryan Nations*, 1996-Ohio-394 ("judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur" are prior restraints).
[10] *Alexander v. United States,* 509 U.S. 544, 550 (1993).
[11] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).
[12] *Toledo Blade*, 2010-Ohio-1533, ¶ 21.
[13] *Id*. ¶ 20.
[14] *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

None were shown here, and the Court of Appeals affirmed the restraints without considering or applying controlling standards, or tailoring the Injunctions to avoid constitutional infirmity. Moreover, by ignoring the First Amendment standards applicable to this unusual factual context, the decision below creates a split within the appellate districts on how no-contact, domestic-violence, and other restraining orders are reviewed.[15]

B. The decision below accepts insufficient and constitutionally precluded evidence, rather than independently reviewing the record to avoid abrogating the Nelsons' First Amendment rights.

In affirming the Temporary and Final Injunctions, the Court of Appeals improperly considered protected speech to be sufficient evidence of unlawful conduct, and affirmed a predicate finding of menacing by stalking. But as the United States Supreme Court declared in *Watts*, even speech that specifically alludes to violence is protected speech if its context shows it to be political hyperbole, and it is clear that the identifying or emphatic gestures, as well as the vigorous speech—even believing Dow's testimony—that makes up the entirety of the evidentiary record is all fully protected. Yet the Court of Appeals did not at all consider whether the Nelsons' past speech to Dow was constitutionally protected, creating another appellate fracture with Districts that do consider whether the underlying speech is protected,[16] and violating its duty to independently review the record for constitutional violations.[17]

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[15] *Puruczky v. Corsi*, 2018-Ohio-1335, ¶ 31 (11th Dist.) (vacating no-contact injunction as prior restraint; emphasizing reviewing courts' duty to independently search record).
[16] *Kreuzer v. Kreuzer*, 2001-Ohio-1542 (2d Dist.) (activities "might qualify as protected speech in another place at another time" but did not "qualify as protected speech on the facts of this case."); *State v. Bilder*, 99 Ohio App. 3d 653, 664 (9th Dist. 1994) ("Defendant's conduct exceeded mere speech "in its purest form."); *Dayton v. Smith*, 68 Ohio Misc. 2d 20, 24 (Mun. Ct. 1994) (A person practicing any of the above [First Amendment] rights could not be found guilty of violating R.C. 2903.211 without proof he intended to cause another person harm.").
[17] *Bose Corp. v. Consumers Union of U.S., Inc*., 466 U.S. 485, 499 (1984) ("emphasiz[ing] the need for an appellate court to make an independent examination of the entire record.").

The Court of Appeals also accepted that pure speech that causes mental distress could be subject to criminal penalties, ignoring clear First Amendment principles to which this Court has correctly adhered.[18] The Court of Appeals also accepted that evidence about the Nelsons' protected speech satisfied Dow's burden to show repeated conduct *known by the Nelsons* to cause him mental distress, even though when a candidate enters the political arena, he "must expect that the debate will sometimes be rough and personal,"[19] and cannot "cry Foul!" when confronted by opponents.[20] But its holding that pure speech can be enjoined as causing emotional distress flatly contradicts First Amendment holdings from the United States Supreme Court and this Court, which recognize that, however free the states are to regulate *conduct* that causes emotional distress, *speech* on matters of public concern that does so cannot be punished unless it fits into one of the narrow First Amendment exceptions (such as for "true threats").

C. The decision below affirms unconstitutional restrictions on citizens' access to public forums.

The Injunctions were unconstitutional speaker- and content-based restrictions on public-forum access, and the modifications made by the decision below did not salvage them. The meetings from which the Injunctions barred the Nelsons were designated public forums – that is, "public property which the state has opened for use by the public for expressive activity."[21] Any limitations on access must satisfy strict scrutiny if based on the content of the speech, or the

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[18] *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (speech "at a public place on a matter of public concern" is "entitled to 'special protection' under the First Amendment" and "cannot be restricted simply because it is upsetting); *Seven Hills*, 1996-Ohio-394 ("Speech may 'best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").
[19] *Ollman v. Evans*, 750 F.2d 970, 1002 (D.C. Cir. 1984); *Harte-Hanks v. Connaughton*, 491 U.S. 657, 687 (1989).
[20] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).
[21] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

identity of the speaker, and the Injunctions are both. Restrictions are content-based if they focus on the direct impact of the speech on its audience—like the supposed impact of the Nelsons' speech on Dow. [22] That injunctions directed at individuals are speaker-based needs little explication. The Injunctions must therefore survive strict scrutiny.[23]

Restrictions subject to strict scrutiny are presumptively impermissible, and "this presumption is a very strong one."[24] They only survive if the proponent of the restriction proves that the restriction serves a compelling governmental interest, and the regulation is narrowly tailored to achieve that interest.[25] As to the governmental interest, the unique factual context is particularly important, because unlike most correctly-decided stalking cases involving domestic violence disputes or other conduct, this case arises from textbook protected speech—political speech at public hearings. Even avoiding potential violence is generally not a compelling government interest, and avoiding distress to politicians surely cannot be.[26]

Even if there was a compelling interest, the Injunctions were not narrowly tailored to achieve it—and the Court of Appeals' modification does not save them. The effect of a CSPO in a small public meeting setting is to completely prohibit attendance at the public meetings. And this Court has instructed that a police presence—of which record evidence shows was available and implemented—is a more narrowly tailored way to regulate speech than expulsion.[27]

D. The restraining order has expired but this appeal is not moot.

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[22] *Seven Hills*, 1996-Ohio-394, 76 Ohio. St. 3d 304, 306.
[23] *Painesville Bldg. Dep't v. Dworken & Bernstein Co., L.P.A.*, 2000-Ohio-488.
[24] *Seven Hills*, 76 Ohio. St. 3d 304, 307, 1996-Ohio-394 ("We initially note that a prior restraint on speech carries a " 'heavy presumption' against its constitutional validity.").
[25] *Painesville Bldg. Dep't v. Dworken & Bernstein Co., L.P.A.*, 2000-Ohio-488 ("content-based regulations of core political speech are subject to strict, or exacting, scrutiny to determine whether a limitation is justified by a compelling, or overriding interest.").
[26] *Seven Hills*, 76 Ohio. St. 3d 304, 308–309, 1996-Ohio-394.
[27] *Id*. at 309.

Even if the CSPO's expiration were deemed to create mootness problems, this Court's jurisdiction remains undisturbed because this case involves a matter of great public interest,[28] and involves raises substantial constitutional questions. But this Court's jurisdiction is independently preserved by two important exceptions to the mootness doctrine.

1. Capable of Repetition Yet Evading Review.

Because deprivations of First Amendment rights are almost by definition too immediate to be fully remedied by judicial correction, courts—including this Court—frequently exercise jurisdiction under the well-settled "capable-of-repetition-and-evading-review" exception to the mootness doctrine. This exception applies where (1) the challenged action is too short to be fully litigated before it expires, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.[29]

As for duration, the Injunctions caused immediate harm and were judicially irremediable. The City Council cannot reconvene the meetings from which the Nelsons were banned. And the Injunctions lasted only a year, too short a time for an issue to be fully appealed to his Court.[30]

The Nelsons reasonably expect to face the same action. They remain politically active in the community, and remain unconvinced that Dow will serve the community's interests. Dow, for his part, ran again for office, seeking to represent the Nelsons.[31] The law assumes, "as a rule," that he will again, for politicians "are not easily discouraged in the pursuit of high elective

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[28] *Franchise Developers*, 30 Ohio St. 3d 28, 31, 505 N.E.2d 966, 969 (1987).
[29] *Fed. Election Comm'n v. Wisconsin Right To Life, Inc*., 551 U.S. 449, 462 (2007).
[30] *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (a year is too short); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 774 (1978) (18-month period is too short).
[31] Andrew J. Tobias, *Former Cleveland Councilman TJ Dow beats residency challenge, now faces scrutiny on whether he committed voter fraud*, CLEVELAND.COM (Feb. 15, 2018). Dow was defeated in the most recent primaries.

office,"[32] and parties who have repeatedly disagreed and "continue to face each other" are reasonably expected to replicate their disputes, particularly when a challenged action is blessed by a court.[33] Just as election-law challenges are not mooted by a tainted election, successful political censorship is not mooted because it already achieved its unlawful aim.[34]

Moreover, this exception protects not only the Nelsons, but also the public. This Court recognizes that the second element is met if *parties similar to the complaining party* will be subject to the same action.[35] Here, it is reasonable to expect that the Nelsons or other constituents exercising their First Amendment rights will such restraining order petitions based on their constitutionally protected speech to politicians, particularly now that this stratagem has proved successful in the Eighth District. Indeed, confusion breeds repetition, so rulings that muddle settled restrictions on speech-limiting acts also suspend mootness. For this reason, the United States Supreme Court held that a challenge to a 10-day temporary restraining order stopping a group from holding political rallies was not moot, and heard questions about "whether, by what process, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings."[36] So too should this Court determine "whether, by what process, and to what extent" a politician can restrict constituents from attending public meetings.

2. Collateral-Consequences

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[32] *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 (1st Cir. 1993).
[33] *Johansen v. San Diego Cty. Dist. Council of Carpenters*, 745 F.2d 1289, 1293 (9th Cir. 1984).
[34] *See, e.g., Joyner v. Mofford*, 706 F.2d 1523, 1529 (9th Cir. 1983) ("If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws including the one under consideration here—could never reach appellate review."); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (challenge not moot because law was still on books).
[35] *State ex rel. Cincinnati Enquirer v. Ohio Dep't of Pub. Safety*, 2016-Ohio-7987, ¶ 31.
[36] *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 176 (1968).

This case is also not moot because the Injunctions (and the decision below) continue to harm the Nelsons. They have been pronounced culpable of "menacing by stalking" for engaging in protected political speech. Any criticisms they may lawfully make about Dow's candidacy or conduct in office will be discredited by their undeserved reputation for criminality, which precludes a finding of mootness.[37] And this taint on their protected speech affects not only them, but their fellow citizens, who have a vital and independent interest in receiving their speech.[38]

This Court has recently reaffirmed that mere speculation does not defeat mootness.[39] But *Cyran* involved conduct, not speech—a domestic-violence protective order—and the Court correctly declined to assume without evidence that the family would continue to inflict *illegal* violence upon one another. *Cyran* has no bearing on the unprecedented ruling at issue here, which involves independent speech protections, and where politicians *are* reasonably expected to continue seeking office and using the legal tools given them by appellate courts.[40]

VI. Conclusion

For the foregoing reasons, the Nelsons respectfully request that this Court exercise its jurisdiction over the decision below and halt its continuing harm to their right to participate in our democracy.

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[37] *Cardoso v. Soldo*, 277 P.3d 811 (Ariz. App. 2012); *Poland v. Poland*, 518 S.W.3d 98 (Ark. App. 2017); *Putman v. Kennedy*, 900 A.2d 1256 (Conn. 2006); *Lethem v. Lethem*, 193 P.3d 839 (Haw. 2008); *Chretien v. Chretien*, 170 A.3d 260, 262-63 (Maine 2017); *Piper v. Layman*, 726 A.2d 887 (Md. App. 1999); *Seney v. Morhy*, 3 N.E.3d 577 (Mass. 2014); *Smith v. Smith*, 549 S.E.2d 912 (N.C. App. 2001); *Clements v. Haskovec*, 251 S.W.3d 79, 84 (Tex. App. 2008); *Hough v. Stockbridge*, 54 P.3d 192 (Wn. App. 2002), *rev'd on other grounds*, 76 P.3d 216.

[38] *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas"); *McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015) ("the injunction in this case had the potential to harm nonparties to the litigation because enjoining speech harms listeners as well as speakers").

[39] *Cyran v. Cyran*, 2018-Ohio-24, ¶ 11.

[40] *Id*. ¶ 14 ("we express no opinion about whether another exception to the mootness doctrine might apply in a different case.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 24, 2018, I sent a copy of the foregoing, via e-mail delivery, to:

Tijuan Dow

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/s Carolyn W. Allen
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[41] Counsel gratefully acknowledge the assistance of law students Jack Maib, Malek Khawam, and Brian Asquith. Brian and Malek are members of the First Amendment, Media & Entertainment Law Practicum at the Cleveland-Marshall College of Law, and Jack is a summer law clerk at the Chandra Law Firm.