No. _____

In the Supreme Court of the United States

RICHARD DUCOTE, ESQ., VICTORIA MCINTYRE, ESQ., & S.S.,

Petitioners,

v.

S.B.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners Richard Ducote and Victoria McIntyre are attorneys representing Petitioner S.S., the mother of a now 14-year-old son, in a Pennsylvania child custody case. After S.S. lost custody to the father, Respondent S.B., and the ruling was affirmed on appeal, at S.B.'s urging the trial court issued a "gag order" against all three Petitioners forbidding them to: "*speak publicly or communicate about this case including, but not limited to print and broadcast media, on-line or web-based communications, or inviting the public to view existing on-line or web-based publications*"; and "*direct or encourage third parties to speak publicly about this case including, but not limited to, print and broadcast media, on-line or web-based communications*…" The order further enjoined S.S. from using her own name in any public legislative testimony, and all Petitioners from saying anything publicly that would in any manner "*tend to identify*" the child or the parents. Finally, Petitioners were ordered to remove all public postings with "*information about this case.*" However, no such "gag order" was imposed on S.B. and his attorney.

The question presented is:

Is such a "gag order" an unconstitutionally vague and overbroad prior restraint and content-based restriction violating Petitioners' First Amendment free speech rights?

PARTIES TO THE PROCEEDINGS

Petitioners Richard Ducote, Esq. and Victoria McIntyre, Esq. were not parties, but counsel, in the Allegheny County, Pennsylvania, Court of Common Pleas custody case, and were appellants in the Pennsylvania Superior Court and the Supreme Court of Pennsylvania cases.

Petitioner S.S. was the defendant in the Court of Common Pleas child custody case, and an appellant in the Pennsylvania Superior Court and the Supreme Court of Pennsylvania cases.

Respondent S.B. was the plaintiff in the Court of Common Pleas child custody case, and the appellee in the Pennsylvania Superior Court and the Supreme Court of Pennsylvania cases.

RELATED PROCEEDINGS

Silver v. Court of Common Pleas of Allegheny County, 802 Fed.Appx. 55 (3d Cir. 2020).

S.B. v. S.S., No. 74-WDA-2017, 2017 WL 4848400 (Pa. Super. Ct. Oct. 20, 2017), *appeal denied*, 182 A.3d 430 (Pa. 2018).

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In *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), the Court reiterated the most basic principle of First Amendment free speech protections to be that government lacks the power to restrict expression because of its message, ideas, subject matter, or content, subject to a few limited exceptions for historically unprotected speech, such as obscenity, incitement, and fighting words. *Id*. at 790-791. The Court further explained that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Id*. at 791. Furthermore,

> No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from idea or images that a legislative body thinks unsuitable to them."

Id. at 794-795 (citations omitted).

This case challenges the most egregious example of a whole new category of speech restrictions, not enacted by legislatures, but divined by family court judges: sweeping child custody gag orders supposedly premised on *ipse dixit* "best interest of the child" concerns. Although such gag orders have heretofore escaped the Court's review, the time has come for bold constitutional lines to be drawn, and for these First Amendment abuses to be harnessed.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App. 1a-56a) is reported at 243 A.3d 90 (5-2 decision). The opinion of the Pennsylvania Superior Court (App. 59a-73a) is reported at 201 A.3d 774. The opinion and orders of the Court of Common Pleas of Allegheny County, Pennsylvania (App. 74a-80a) are unreported.

JURISDICTION

The Supreme Court of Pennsylvania entered its opinion in this case on December 22, 2020. On March 19, 2020, this Court extended the filing deadline for a petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that **"**Congress shall make no law *** abridging the freedom of speech, or of the press ***."

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall *** deprive any person of life, liberty, or property, without due process of law ***."

STATEMENT OF THE CASE

The issues in this Petition originate in a child custody case in the Court of Common Pleas of Allegheny County, Pennsylvania.

I. The Child Custody Trial

S. S., the child's mother, and S.B., the child's father, are the divorcing adoptive parents of a now 14-year-old son F, who shares neither parent's surname. During their custody trial, on May 20, 2016, then 9-year-old F testified under oath (App. 81a-113a) before Judge Kim Berkeley Clark to S.B.'s anally raping and fondling him, in response to the judge's questioning:

> Q. So how long has it been since you've seen your grandparents?
>
> A. A while.
>
> Q. Do you miss them?
>
> A. No.
>
> Q. Why don't you miss them?
>
> A. Because they don't believe me, and I don't like people who don't believe me.
>
> Q. Why do you think they don't believe you?
>
> A. Because once when I called my grandma, she asked me first thing if I was reading off a script, and I said no. Then I told her that you shouldn't believe what my father is telling you. It's all lies.

App. 91a.

***

> Q. Tell me about where you slept in the house and where [father] slept.
>
> A. I slept in my bed, and he slept in my bed. But he really had his own room, but he would always sleep in mine.

Q. Every night?

A. Like almost like—more than every other night.

Q. More than every other night. So what happened when your dad would sleep in the bed with you?

A. Sometimes he would do things.

Q. Can you tell me some of the things that he did.

A. It's really uncomfortable.

Q. I know it is, but it's important for me to hear from you. You know, this has been going on for a while. I did get to read what you said to Judge Satler, and then I saw your interview with Dr. Rua. Everybody else keeps telling me things that you said, but I haven't heard from you. You're really the most important person in all of this, [F].

A. Well, sometimes he would lay on top of me. He would like pull my pajamas down. He had these like shorty shorts that he would go running in. They didn't need underwear. Well, the first thing is that I was—I acted asleep, but I was really awake when it all happened. He would stick his penis in my butt crack. Into what I call my poop hole. He would do that many times. When under my body he would be squeezing my penis. Sometimes I get really angry with myself because I always say that I could have stopped him.

Q. Do you understand though, [F], you are a child? Do you understand that? Do you understand that none of this is your fault? Do you believe that?

A. Sometimes.

App. 103a-104a.

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Q. Does your mother ever say anything to you about [father] at this time?

A. No. What she tells me to do is to tell the truth.

App. 106a.

Despite this testimony, the judge granted S.B. sole legal and physical custody of the child, ordered S.B. and F's participation in the Family Bridges "reunification program," and enjoined S.S. from having any contact whatsoever with her son.

Attorneys Richard Ducote and Victoria McIntyre enrolled as S.S.'s counsel post-trial. S.S. unsuccessfully appealed the custody judgment, which was affirmed by the Pennsylvania Superior Court on October 17, 2017. *S.B. v. S.S.*, No. 74-WDA-2017, 2017 WL 4848400. The Supreme Court of Pennsylvania denied S.S.'s discretionary appeal on February 22, 2018. 182 A.3d 430. The trial court record has never been sealed.

II. Press Conference and PITTSBURGH CITY PAPER Article

Petitioners, together with other professionals, parents, and a now grown child sharing common concerns and experiences, participated in a February 7, 2018, Pittsburgh press conference discussing child abuse victims and the courts' failure to protect them.[1] Mr. Ducote mentioned only S.S. by name, as a mother who lost custody of her un-named son, despite his testimony, to his un-named father.

Independent of the conference, on February 28, 2018, the PITTSBURGH CITY PAPER published *Parental Inequity*: *Children's Advocates Say Family Courts Unfairly Favor Fathers, Even When They're the Abusers* (App. 114a). The article, which included comments from a Pennsylvania legislator and a George Washington University law school professor, highlighted proposed legal reforms to address

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[1] The conference video is independently maintained online by the George Washington University Law School Domestic Violence Legal Empowerment and Appeals Project on their Facebook page. Domestic Violence Legal Empowerment and Appeals Project (DV LEAP), *Pittsburgh Press Conference on Failure of Family Courts to Protect Kids*, Facebook (Feb. 7, 2018, at 11:10 AM), https://www.facebook.com/dvleap/videos/1621260391289731/?fref=mentions&__xts__[0]=68.ARAZg05huZ_RuD-lvtOqDHLps0KDS-66p75MNjbf7ZVe92pkzkM8k0wJCoUTeCEuo6hdFWvygljLe6VDu3SMeZQjNdppNFwT-i9UKXbm17e6T7j3J_0abM_P0Vz8lUmGBxxw_JEUbSIa&__tn__=K-R.

custody cases with abuse allegations. F's graphic testimony was anonymously quoted to illustrate the alarming nature of this problem. App. 114a.

III. The Gag Order

In response to the conference and article, on March 22, 2018, S.B.'s counsel sought a gag order on Petitioners, plus $200,000 in sanctions, and $10,000 for each future violation of the proposed order. No evidence whatsoever concerning the child was presented at the hearing which resulted in the gag order. It is important to note that Petitioners have never publicly stated F's name or otherwise publicly identified him. On April 19, 2018, over S.S.'s strenuous constitutional objections, Judge Clark first signed an interim gag order preventing all parties and their counsel from publicly speaking or communicating about the case. App. 80a. However, on April 27, 2018, Judge Clark entered a final gag order *prohibiting only S.S., Mr. Ducote, and Ms. McIntyre*—and not S.B., his counsel, or S.S.'s former trial counsel who presented the child's testimony—from speaking about this case in any manner:

> It is hereby **ORDERED** that [S.S.]; Richard Ducote, Esquire; and Victoria McIntyre, Esquire shall NOT speak publicly or communicate about this case including, but not limited to, print and broadcast media, on-line or web-based communications, or inviting the public to view existing on-line or web-based publications. The following is also **ORDERED**.
>
> 1. [S.S.]; Richard Ducote, Esquire; and Victoria McIntyre shall NOT direct or encourage third parties to speak publicly or communicate about this case including, but not limited to, print and broadcast media, on-line or web-based communications, or inviting the public to view existing on-line or web-based publications.
>
> 2. [S.S.]; Richard Ducote, Esquire; and Victoria McIntyre may provide public testimony in the State House and/or Senate and in the United States Congress and Senate about parent alienation, sexual abuse of children in general or as it relates to this case. However,

> in providing such testimony, they shall NOT disclose any information that would identify or tend to identify the Child. [S.S.] shall NOT publically [sic] state her name, the name of the Child, or [S.B.'s] name. Attorney Ducote and Attorney McIntyre shall NOT publically [sic] refer to [S.S.], the Child, or [S.B.] by name or in any manner that would tend to identify the aforementioned parties.
>
> 3. [S.S.] and Counsel shall remove information about this case, which has been publically [sic] posted by [S.S.] or Counsel, including but not limited to, the press release, the press conference on the YouTube site, the Drop Box and its contents, and other online information accessible to the public, **within twenty-four (24) hours.** [S.S.] and Counsel shall download or place the aforementioned information onto a thumb drive, which shall be filed with this court.

App. 78a-79a (emphasis in original).

IV. Federal Court Litigation and State Court Appeals

Petitioners first unsuccessfully challenged the order in federal court. *See Silver v. Court of Common Pleas of Allegheny County*, 802 Fed.Appx. 55 (3d Cir. 2020). Petitioners also appealed to the Pennsylvania Superior Court, which affirmed the gag order on December 24, 2018. App. 59a. Referencing attorneys' "special responsibility" with a cryptic nod to Rule 8.4(c) of the Pennsylvania Rules of Professional Conduct relative to "dishonesty," in a direct threat illustrating the battlelines drawn here,[2] the Superior Court "reminds" Mr. Ducote and Ms. McIntyre "*of their ethical obligations under the Pennsylvania Rules of Professional Conduct*," and alerts them to "*the possibility of disciplinary action*." App. 72a. Ironically, while denying any

[2] Judge Clark, even before entering the gag order, said she found it "tempting to impose monetary sanctions on Mother and her attorney…", and then admitted that she could find no legal authority to support the gag order she was issuing. App. 77a, ¶¶ 16, 19.

"chilling effect" triggered by the gag order, in the same opinion (App. 70a), the appellate judges openly threaten to freeze out two attorneys from the practice of law for no discernable "wrongdoing" other than refusing to quietly go home.[3] Reargument was denied on March 4, 2019. App. 58a. The Supreme Court of Pennsylvania granted allocatur (App. 57a) on September 11, 2019, recasting the issue for consideration as:

> In a child custody case, did the Pennsylvania Superior Court err in affirming the gag order in violation of Appellants' rights under the First and Fourteenth Amendments to the United States Constitution and Article I, §7 of the Pennsylvania Constitution when the order precluded the parent and attorneys from speaking publicly about the case in a manner that would identify the child involved?[4]

On December 22, 2020, in a 5-2 decision, the court below affirmed the gag order, deeming it "content neutral" under *U.S. v. O'Brien*, 391 U.S. 367 (1968), and thus constitutional. App. 1a-34a. The opinion wholly ignored the prior restraint issue and rejected the vagueness claim. Justices Wecht and Donahue filed a compelling dissent harshly criticizing the majority's disregard of clear First Amendment law. App. 35a-56a.

Petitioners unsuccessfully raised all First Amendment issues asserted here in the trial court through opposition pleadings and oral argument at the April 19, 2018, hearing. App. 74-78a. The Pennsylvania Superior Court considered and rejected

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[3] The court suggests without citation that lawyers may need to exercise "*some degree of restraint in revealing details of a case to the general public.*" App. 72a (emphasis added). Petitioners Ducote and McIntyre embrace their defense of the First Amendment in the highest traditions of their profession and dispute the court's position that disagreement with and criticism of this troubling child custody ruling represents some form of "dishonesty."

[4] The recast question misinterprets the gag order to only bar speaking publicly about the case in a manner "that would identify the child involved." App. 57a.

Petitioners' same First Amendment challenges. App. 66a-72a. Finally, the Supreme Court of Pennsylvania likewise rejected these constitutional arguments, as set forth below. App. 34a.

REASONS FOR GRANTING THE PETITION

I. The opinion below squarely conflicts with all other state high court decisions considering such family court gag orders.

The decision below stands alone among state courts of last resort. Seven (7) other state supreme courts have reviewed these restraints, and then declared this type of gag order in family courts creates unconstitutional restrictions on parties' First Amendment free speech rights.[5]

1. The Supreme Court of Ohio in *Bey v. Rasawehr*, 161 N.E.3d 529, 533 (Ohio 2020), vacated a gag order in a civil-stalking protective order case filed against a son by his mother and widowed sister-in-law, which enjoined the son from posting about his relatives on any social media service, website discussion board, or similar outlet or service and ordered him to remove all such postings from the internet. He was also forbidden to post about the deaths of the relatives' husbands in any manner that expresses, implies, or suggests that they are culpable in those deaths. *Id.* Contrary to the Pennsylvania Supreme Court's analysis, the Ohio high court determined the use of the word "about" created a content-based restriction requiring strict scrutiny and that concerns about "mental distress" and controversial

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[5] Also, the Supreme Court of Texas vacated a child custody gag order solely on state constitutional free speech grounds in *Grigsby v. Coker*, 904 S.W.2d 619 (Tex. 1995), as did the Supreme Court of Alaska in *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985).

accusations about family members alleged could not justify "virtually unlimited restraint on the content" of the parties' speech. *Id.* at 538-46.

2. The Supreme Court of Mississippi vacated a gag order issued against a mother in a Youth Court protective custody case involving her newborn son in *In re R.J.M.B.*, 133 So.3d 335, 339-346 (Miss. 2013). The gag order provided that "no one in the hearing this date shall disclose information concerning this case to the Media." *Id.* at 339. The court rejected the same reasoning found in the case at bar.

3. The Supreme Court of Hawai'i in *In Interest of FG*, 421 P.3d 1267 (Haw. 2018), vacated an order prohibiting parents in a family court case from disclosing their children's names and other information about their involvement in the foster care system, wherein one toddler died. The court found that the record could not support such harsh restrictions on parents' First Amendment interests. *Id.* at 1276.

4. The Supreme Judicial Court of Massachusetts in *Care and Protection of Edith*, 659 N.E.2d 1174, 1175-76 (Mass. 1996), vacated an order in a child protection court that the father not "discuss any aspect of the ongoing proceedings with any member of the media … if it is reasonable to believe that the information communicated will lead to the identity of the subject children." The court invalidated the "unlawful prior restraint on the right of the children's father to comment on the judicial proceedings and on the conduct of the department," noting that "[t]he department has not identified a compelling State interest that needs protection" and "[a] general rule that bars any parent from directly or indirectly revealing the names of children subject to a care and protection proceeding will not do." *Id.* at 1177

(citations omitted). More recently, the same court in *Shak v. Shak*, 144 N.E. 3d 274, 278-280 (Mass. 2020), vacated a "non-disparagement" order issued to divorced parents as an unconstitutional prior restraint on the father's freedom of expression. The court found that no compelling state interest was shown, and that the order prohibiting social media postings about the case was not the least restrictive remedy. The court also held that any alleged harm to the child which may stem from the banned communications was speculative. *Id.*

5. The Supreme Court of Washington in *In re Marriage of Suggs*, 93 P.3d 161, 163-66 (Wash. 2004) (en banc), vacated an order enjoining a wife from "knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming [her ex-husband] and for no lawful purpose" as an unconstitutional prior restraint of First Amendment rights.

6. The Supreme Court of Nevada in *Johanson v. Eighth Judicial Dist. Court of State of Nev. ex rel. County of Clark*, 182 P.3d 94, 96-100 (Nev. 2008), vacated as unconstitutional a gag order, apparently implemented to avoid embarrassing the ex-husband in his judicial re-election campaign, which prevented the parties and their counsel from disclosing any documents or *discussing any portion of the case* in a child support proceeding.

7. The Supreme Court of New Hampshire in *In re N.B.*, 146 A.3d 146, 152 (N.H. 2016), reversed an unconstitutional prior restraint of an adoptive grandmother's speech in an atypical context. There, the grandmother intended to file

a tort suit on behalf of her two grandchildren against the state child welfare agency and the child advocates, whose negligence allegedly allowed the children to be sexually abused. *Id.* at 147. The juvenile court ordered all potential future filings in the tort case be sealed and that all allegations of abuse remain confidential. *Id.* at 148. The New Hampshire high court found the order unconstitutional, notwithstanding the children's privacy interests, which could be maintained by pseudonyms. *Id*. at 152.

II. Decisions by the high courts in Michigan and Illinois denying discretionary appeals from intermediate appellate court rulings affirming such gag orders underscore the importance of the Court's definitive resolution of the First Amendment issues presented here, because it can be reasonably predicted that the majority of states without controlling jurisprudence will gravitate to Pennsylvania's erroneous ruling as the most recent and "enlightened" view of First Amendment law.

1. In *In re Daily*, No. 215744, 1999 WL 33429988, *1 (Mich. Ct. App. Nov. 23, 1999) (per curiam), a sweeping gag order was issued in a divorce and child custody case, based on the "best interest of the child," enjoining the parties, their counsel, the employees of the parties or their counsel, the parties' family members, and the guardian *ad litem* from: having contact with the media; commenting "upon the subject matter of the case"; and allowing the child to be photographed. In the local newspaper's appeal, the intermediate appellate court affirmed the gag order 2-1 as "reasonable restrictions on the persons involved." *Id.* at *3. Dissenting Judge Markman in an extensive First Amendment analysis criticized the lack of any evidence concerning the child's best interest and the speculative basis for the order. *Id*. at *3-9. The Supreme Court of Michigan denied leave to appeal because it was

"not persuaded that the question presented should be reviewed by this Court." *In re Macomb Daily*, 620 N.W.2d 10 (Mich. 2000) (4-2 decision). Justice Young concurred, but stated, "However, I think that issues regarding the propriety and scope of gag orders merit further consideration by this Court. Therefore, I support having the Court open an administrative file to address these issues." *Id.* Justice Taylor dissented, agreeing that there was a "colorable argument" that the gag order "implicated First Amendment rights" and "appears overly broad in terms of the people restricted…, [and] the scope of the restrictions." *Id.* He suggested a remand for the trial court to precisely articulate the interests protected and to weigh the effects on First Amendment rights. *Id*.

In a companion case, *In re Detroit Free Press,* No. 210022, 1999 WL 33409948 (Mich. Ct. App. Nov. 23, 1999) (per curiam), involving another custody dispute, the same gag order as in *Macomb* was also affirmed, with essentially the same compelling dissent by Judge Markman. The Supreme Court of Michigan also denied leave to appeal here, because it was "not persuaded that the question presented should be reviewed by this Court." 620 N.W.2d 10 (Mich. 2000) (4-2 decision).

2. In *In Interest of Summerville*, 547 N.E.2d 513 (Ill. App. Ct. 1989), a custody case with sexual abuse allegations, a gag order preventing all parties and attorneys from communicating or discussing matters relating to the case with the media, and later from revealing the name and whereabouts of the child and the status of her placement, in order to prevent potential future harm and embarrassment to the child, was vacated as unconstitutional because the proscribed conduct posed no

serious threat to the integrity of the judicial process. Later, however, in *In re J.S.*, 640 N.E.2d 1379 (Ill. App. Ct. 1994), another sexual abuse allegation custody case, a gag order forbidding parties and their attorneys from discussing facts of the case with the media was affirmed as constitutional. Notably, the appellate court stated, "We fail to see the *necessity* of discussing details of this case with the news media." *Id.* at 1383 (emphasis in original). The Supreme Court of Illinois denied review. 647 N.E.2d 1010 (Ill. 1995). That an appellate court would condition the exercise of free speech rights on the judges' belief that the speech was *necessary*, with tacit approval from the state's high court, is cause for very grave concern indeed.

III. The free speech rights of parents and their attorneys require definitive protection, especially when they question governmental action.

The First Amendment generally forbids the government, including the judicial branch, "from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). These freedoms are essential to our democracy, which depends upon an informed citizenry to hold government officials accountable, and to seek redress and change by lawful means. *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Stromberg v. California*, 283 U.S. 359, 369 (1931). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison*, 379 U.S. at 74-75; *see also Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 567-574 (1968). A primary purpose of the First Amendment is to "protect the free discussion of governmental affairs." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *see Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S.

596, 604 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). This purpose "includes the need: … to protect parties in the free publication of matters of public concern, [including] … any just criticism upon [government officials'] conduct in the exercise of the authority which the people have conferred upon them." *Wood v. Georgia*, 370 U.S. 375, 392 (1962) (citation omitted).

The gag order at issue unconstitutionally prevents Petitioners from personally and professionally commenting on important legal and public policy issues directly relevant to S.S's custody ruling.[6] Absent the ability to reference S.S.'s own court experiences, Petitioners' calls for legal reform lack vital context. S.S.'s loss of her son, despite his graphic testimony, invokes topics generating years of legal and media comment, such as *a priori* judicial skepticism of abuse evidence in custody cases,[7] the

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[6] Of note, the 8th Circuit has held that speech concerning sexual abuse of children, accountability for perpetrators, and healings for victims is protected content-based speech subject to strict scrutiny. *Survivors Network of Those Abused by Priests v. Joyce*, 779 F.3d 785, 789-791 (8th Cir. 2015).

[7] *See, e.g.*, Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311 (2017); *Study Finds Pervasive U.S. Custody Bias in Favor of Abusive Fathers*, 25 (10) NATIONAL BULLETIN ON DOMESTIC VIOLENCE PREVENTION NL 5 (Oct. 2019); Kee MacFarlane*, Child Sexual Abuse Allegations in Divorce Proceedings,* in SEXUAL ABUSE OF YOUNG CHILDREN, 121-150, 149 (Kee MacFarlane, *et al*, eds. 1986) ("[particularly mothers] may automatically be regarded as paranoid, hysterical, or perverted in their thinking for simply suspecting their ex-husbands of … child sexual abuse… For divorcing mothers, the assumptions … serve as an insurmountable barrier to getting help. This bias may be so strong that their reports … of what their children have told them can actually jeopardize their own positions as future custodians…"); John E.B. Myers, A MOTHER'S NIGHTMARE-INCEST: A PRACTICAL GUIDE FOR PARENTS AND PROFESSIONALS 107 (1997) ("There are cases—many, I fear—where a father sexually abuses his child but the child's mother and her lawyer can't prove it in court…she is branded a false

use of so-called guardians *ad litem* in custody cases,[8] sending children reporting parental abuse to dubious "reunification camps" to convince them to recant their allegations,[9] and the tragic rejection of children's abuse reports based on the debunked "parental alienation" defense.[10] "Parental alienation" drove F's fate, as the

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accuser and an hysterical mother. The judge awards custody to the father! … This disaster—loss of the child you are desperately trying to protect—could happen to you."); Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others,* 2 U. CHI. L. SCH. ROUNDTABLE 13 (1995); Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt,* 38 AM. U. L. REV. 491 (1989); Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES' J. 38 (Fall 1997); Michael Gunter, *et al.*, *Allegations of Sexual Abuse in Child Custody Disputes*, 19 MED. & L. 815 (2000); John E.B. Myers, *"Testilying" in Family Court*, 46 MCGEORGE L. REV. 499 (2014); Am. Bar Ass'n., *Mother Seeks Courtroom Reform for Sexually Abused Children and Protective Parents,* 32 CHILD L. PRAC. 94, June 2013; Paula D. Salinger, True or False Accusations? Protecting Victims of Child Sexual Abuse During Custody Disputes, 32 MCGEORGE L. REV. 693 (2001); Thomas D. Lyon & Stacia N. Stolzenberg, *Children's Memory for Conversations About Sexual Abuse: Legal and Psychological Implications*, 19 ROGER WILLIAMS U.L. REV. 411 (2014); John E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. FAM. L. 1 (1989).

[8] *See, e.g.*, Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002); Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998); Amy Halbrook, *Kentucky's Guardian ad Litem Litigation: A Model for Seeking Role Clarity,* 37 CHILD. LEGAL RTS. J. 81 (2017); Kristine Simpson, Comment, *Mississippi's Guardian ad Litem Need Clarification of Their Role and Responsibilities*, 84 MISS. L. J. 1065 (2015); Dale Margolin Cecka, *Improper Delegation of Judicial Authority in Child Custody Case: Finally Overturned*, 52 U. RICH. L. REV. 181 (2017).

[9] *See, e.g.*, App. 128a-155a.

[10] *See, e.g.,* Rebecca M. Thomas & James T. Richardson, *Parental Alienation Syndrome: 30 Years and Still Junk Science*, 54 JUDGES' J. 22 (Summer 2015); National Council of Juvenile and Family Court Judges and State Justice Institute, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE 19 (2006) ("Richard Gardner's theory…of 'parental alienation syndrome' or PAS has been discredited by the scientific community. Testimony that a party to a custody case suffers from the syndrome should therefore be rule inadmissible…'"); Madelyn S. Milchman, Robert Geffner, & Joan S. Meier, *Putting Science and Reasoning Back into the "Parental Alienation" Discussion: Reply to Bernet, Robb, Lorandos, and Garber*, 58 FAM. CT. REV. 375 (2020); Dana E. Prescott, *Forensic Experts and Family Courts: Science or Privilege-By-License*?, 28 J. AM. ACAD. MATRIM. LAW. 521 (2016); Mary Ann Mason, Ph.D., J.D., THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT 171 (1999) ("With the PAS model the voices of children are heard, but they are being used against them. The more fear the child expresses about the other parent the more likely the child will be taken away from his or her mother and placed with that parent."); Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 Fam L. Q. 527 (2001); Kimberly J. Joyce, *Under the Microscope: The*

Superior Court claimed in affirming custody to the father, "The core of this custody case is not allegations of sexual abuse; it is isolation and *alienation*." *S.B.*, 2017 WL 4848400, at *6 (emphasis added). The national media has recently reported critically on Family Bridges and parental alienation claims (App. 128a-155a), including a May 12-13, 2021, *NBC Nightly News* exposé addressing fatal results in misguided child custody rulings (App. 118a). A Michigan judge was publicly censured for her outrageous treatment of three children in one of these punitive custody modification/reunification program cases. *In re Gorcyca*, 902 N.W.2d 828 (Mich. 2017).

IV. The violation of First Amendment rights in family court cases is a recurring problem which will likely further burgeon without the Court's definitive resolution.

1. Judges nationwide have issued similar gag orders in family court cases for decades. *See* Marjorie A. Shields, Annotation, *Provisions of Divorce, Child Custody, or Child Support Orders as Infringing on Federal or State Constitutional Guarantees of Free Speech*, 2 A.L.R.7th Art. 6 (2015); Kelly Kanavy, Comment, *The State and the "Psycho Ex-Wife": Parents' Rights, Children's Interest, and the First Amendment*, 161 U. PA. L. REV. 1081 (2013). Although the number of un-appealed gag orders is not documented, state intermediate appellate courts have routinely reversed

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Admissibility of Parental Alienation Syndrome, 32 J. AM. ACAD. MATRIM. LAW. 53, 86 (2019) ("PAS is an unreliable theory, and it imposes a remedy that could be devastating to children and families."); Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367 (1994).

them when challenged. *See, e.g., Baskin v. Hale*, 787 S.E.2d 785 (Ga. Ct. App. 2017); *Jabr v. Jabr*, No. A07-2003, 2008 WL 1800138 (Minn. Ct. App. Apr. 22, 2008); *In re Marriage of Newell*, 192 P.3d 529 (Colo. App. 2008); *Kinley v. Kinley*, No. A06-865, 2007 WL 2702946 (Minn. Ct. App. Sept. 18, 2007); *In re Paternity of K.D.*, 929 N.E.2d 863 (Ind. Ct. App. 2010); *In re T.T.*, 779 N.W.2d 602 (Neb. Ct. App. 2009); *Delgado v. Miller*, No. 3D20-580, 2020 WL 7050217 (Fla. Dist. Ct. App. Dec. 2, 2020), *aff'd sub nom J.M. v. A.J.D.,* No. 3D20-1118, 2021 WL 1660897 (Fla. Apr. 28, 2021); *Stanfield v. Florida Dept. of Children and Families*, 698 So.2d 321 (Fla. Dist. Ct. App. 1997); *State ex rel. L.M.,* 37 P.3d 1188 (Utah Ct. App. 2001*); Anonymous v. Anonymous*, 612 N.Y.S.2d 887 (N.Y. App. Div. 1994*)*; *Lieberman v. Lieberman*, 88 N.Y.S.3d 234 (N.Y. App. Div. 2018); *Lowinger v. Lowinger*, 695 N.Y.S.2d 127 (N.Y. App. Div. 1999). *See also Karantinidis v. Karantinidis*, 131 N.Y.S.3d 363 (N.Y. App. Div. 2020) and *Adams v. Tersillio*, 666 N.Y.S.2d 203 (N.Y. App. Div. 1997) (unconstitutional gag orders narrowed on appeal).

Another Pennsylvania child custody gag order was attacked in *FOCUS v. Allegheny Court of Common Pleas*, 75 F.3d 834 (3d Cir. 1996). More recent federal court challenges to family court gag orders were brought in *Nichols v. Sivilli*, No. 2:14-3821, 2016 WL 3388296 (D.N.J. June 14, 2016); *Argen v. Katz*, 821 Fed.Appx. 104 (3d Cir. 2020); and *Lindke v. Lane*, No. 19-11905, 2021 WL 807727 (E.D. Mich. Mar. 3, 2021).

2. The new frontier for family court First Amendment intrusions are gag orders controlling what parents can say to their own children. In *J.A.C. v. M.J.C.*, No.

1652-WDA-2018, 2019 WL 2028727 (Pa. Super. Ct. May 8, 2019), the Pennsylvania Superior Court affirmed an order that a mother *not tell her own daughter* that the father was sexually inappropriate with her half-sister, because that *truthful* information "might harm" the child in some way or cause her to shun her father. The Pennsylvania appellate court apparently believes that "experts" should decide when to ax a parent's First Amendment rights. *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006) (discussing problems with and competing approaches to such gag orders).

3. The decision below will trigger a tsunami of similar cases. As Justice Wecht wisely observed in his dissent:

> Today's Majority licenses trial courts to enter vague and overbroad gag orders in any contentious custody case when a judge feels that a parent's speech could be deemed to cause emotional harm. Protection of children from harm is a worthy goal. It can be advanced with a scalpel, rather than a broadsword. It can never be advanced at the expense of our Constitutions and the fundamental rights that they guarantee. The order before us cannot survive strict scrutiny.

App. 55a.

V. On every relevant point of law, the decision below is wrong.

As the gag order prevents Petitioners from speaking publicly or communicating *about* S.S.'s case (which trial court record remains unsealed below) in any manner, it is an overly broad, presumptively unconstitutional prior restraint and content-based speech restriction which cannot survive strict scrutiny.

A. <u>The gag order is a presumptively unconstitutional prior restraint on speech.</u>

This Court has described prior restraints as "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that

such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted). A prior restraint may only be imposed when it furthers "the essential needs of the public order," but not when those needs can be achieved through less restrictive means. *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968); *see also Tory v. Cochran*, 544 U.S. 734, 738 (2005). Even when a prior restraint may theoretically be constitutionally permissible, it must be precisely and specifically tailored to meet the exigencies of the particular case without censoring protected speech.[11] Accordingly, prior restraints must survive the most exacting scrutiny and are "presumptively unconstitutional." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976); *see CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994); *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring).

Gag orders preventing participants from making extrajudicial statements about their own case are unconstitutional prior restraints on speech. *See United States v. Scarfo*, 264 F.3d 80, 92 (3d Cir. 2001), *Johanson*, 182 P.3d at 98; *WXIA-TV v. State*, 811 S.E.2d 378, 383-84 (Ga. 2018); *Twohig v. Blackmer*, 918 P.2d 332, 335-36 (N.M. 1996); *Breiner v. Takao*, 835 P.2d 637, 640-41 (Haw. 1992); *Kemner v.*

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[11] For example, general concern for the best interests of the child will not necessarily allow a court to broadly restrain a parent from making disparaging comments about the other to third parties. *See, e.g., Nash v. Nash*, 307 P.3d 40, 49 (Ariz. Ct. App. 2013); *K.D.*, 929 N.E.2d at 871-72 (reversing as overbroad an order barring mother from talking to "any media source or others" about allegations in custody case); *T.T.*, 779 N.W.2d at 621 (vacating order barring parents from disclosing medical information about their child for lack of evidence "to satisfy the State's heavy burden to justify this prior restraint on free speech").

Monsanto Co., 492 N.E.2d 1327, 1338 (Ill. 1986); *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992). *See also Alexander*, 509 U.S. at 550; *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-97 (4th Cir. 2018); *U.S. v. Salameh,* 992 F.2d 445, 446 (2d Cir. 1993); *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985). Petitioners' gag order is accordingly subject to strict scrutiny, and not intermediate scrutiny as used below. As the dissent acknowledges, "today's Majority avoids this issue [of prior restraint] entirely." App. 43a.

B. The gag order is a presumptively unconstitutional "content-based" restraint on speech.

Content-based speech restrictions attack the idea or message a speaker conveys, such as when the restriction "defin[e]s regulated speech by particular subject matter." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Gag orders warrant the most exacting review because they fester at the intersection of two free speech dead-ends: prior restraints and content-based restrictions. *See Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018). The court below erroneously finds the gag order to be a "content-neutral" restriction on speech because it claims the order "is not concerned with the *content* of Mother and her attorney's speech, but instead with the *target* of the speech, namely, Child, a juvenile whose identity and privacy the court seeks to protect." App. 10a (emphasis added). There simply is no reasonable analysis to avoid the obvious fact that the gag order proscribes the content, *i.e.*, the subject and message of Petitioners' speech. Because only S.S. and her counsel, who disagree with the trial court's custody decision, are muzzled, while

S.B. and his counsel, who celebrate the custody ruling, are unbridled, clearly Judge Clark dislikes Petitioners' message and favors S.B.'s.

The high court's awkward attempt to avoid the content-based label by creating the novel idea that the supposed "target" of Petitioners' future speech, the child F, controls the classification of the gag order, is not only unsupported by any legal authority, but misunderstands what the "target" of speech refers to, *i.e.*, the intended unwilling or captive audience of prohibited speech.[12] F is certainly aware, independently of anything Petitioners say, of his sworn detailed testimony to his father's conduct in the custody trial, of the judge's decision to sever his relationship with his mother, and of his experiences at the controversial California Family Bridges "reunification camp"–all of which occurred prior to any of the events triggering the gag order. As the dissent notes:

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[12]*See, e.g.*, *Hill v. Colorado*, 530 U.S. 703 (2000); *McCullen v. Coakley*, 573 U.S. 464 (2014*); Frisby v. Schultz,* 487 U.S. 474 (1988); *Rowan v. U.S. Post Office Department,* 397 U.S. 728 (1970); *Veneklase v. City of Fargo,* 248 F.3d 738 (8th Cir. 2001). In a First Amendment context, in addition to the captive unwilling audience, the "target" of speech refers to a particular person to which patently harmful speech is directed, such as terroristic threats or child pornography. *See, e.g., State v. Taupier*, 193 A.3d 1 (Conn. 2018) (terroristic threats); *State v. Muccio*, 890 N.W.2d 914 (Minn. 2017) (child pornography); *Dunham v. Roer*, 708 N.W.2d 552 (Minn. Ct. App. 2006) (harassment protection order); *State v. Boettger*, 450 P.3d 805 (Kan. 2019) (true threats directed at particular individuals); *A.S. v. Lincoln County R-III School District,* 429 F.Supp. 3d 659 (E.D. Mo. 2019) (bullying speech targeting one student and substantially disruptive could be disciplined by school officials); *Zimmerman v. Board of Trustees of Ball State University*, 940 F.Supp. 2d 875 (S.D. Ind. 2013) (one target student harassed); *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011) (one student targeted for harassment and ridicule). None of these elements apply in this case, and F is not a "target" of the speech.

> The restriction … was based upon the content of speech. It was based upon a particular subject matter. It was based upon the message. It was directed at the ideas expressed. The first sentence of the gag order categorically bans [Petitioners] from speaking about the custody case; the preclusion extends only to that topic and that message. *This is the very essence of a content-based restriction.*

App. 46a (citations omitted) (emphasis added).

C. The gag order's prior restraint and content-based restriction on Petitioners' speech cannot survive strict scrutiny analysis.

Under *Reed*, to survive strict scrutiny, the restriction must further a compelling interest and be narrowly tailored to achieve that interest, and it must also be the "least restrictive means" of furthering that interest. *Ashcroft*, 542 U.S. at 666. The gag order at issue is the most egregious of its kind, unsupported by facts or legal precedent. At no point has any evidence been presented justifying the prior restraint, and it cannot meet the incredibly high burden constitutionally mandated by this Court.

Although it dodges the strict scrutiny mandate, the court below still sees the gag order as narrowly tailored. Its justification for this conclusion is puzzling. The court claims that, "when read in context," Petitioners can speak freely "as long as [they] do so in a manner that protects Child's identity" and that because the gag order only applies to Petitioners, this is "further evidence that the gag order was narrowly crafted." App. 29a-30a. It cites as additional evidence that the order was "narrowly crafted" the trial court's "precise action" of applying the order only to Petitioners, and not sealing the custody record or imposing any restraints on the press. App. 30a. In other words, the court below mistakenly views it acceptable under the First Amendment to impose unprecedented Draconian content-based prior restraints on

speech, so long as the victims of such orders are few in number. Obviously, "narrow tailoring" applies to the substance of the gag order and not to the census of the throttled.

The court illogically, but assuredly claims—without any evidence whatsoever—that the order "leav[es] open ample alternatives for *communication of the information [Petitioners] wanted to express*, restricting only the manner by which that speech could be conveyed." App. 30a (emphasis added). With all due respect, such paternalistic guarantees of the court below cannot support a finding that the order is narrowly tailored. The dissent succinctly sums up the majority's errors:

> The Majority believes that this order provides ample opportunity for [Petitioners] to express their views. I disagree. In its first sentence, the order categorically prevents [Petitioners] from speaking or communicating about the case publicly. There are only two limited and very specific exceptions for [Petitioners] to express their views, and Mother is precluded in all circumstances from doing so in her own name, ostensibly because this might tend to identify Child. This sweeping gag order all but precludes Mother from speaking about this case to anyone other than Counsel. Moreover, the order is not limited in time … the restriction is essentially endless and it is anything but narrowly tailored.

App. 49a.

While protecting children's "privacy," the parameters of which are *ad hoc*, and avoiding their embarrassment is certainly laudable, it is reasonable to ask: What group of children are to be protected by family court gag orders? Sexual abuse victims? Well, the courts below do not believe F's testimony that it happened. Children who were not abused, but think they were? Children who were abused, but deny it? Children who are not "alienated," but are afraid of a parent for other reasons? Depressed children? Happy children? Children with emotional, physical, substance

abuse, educational, or peer-relationship problems? Shy kids? Disappointed kids? Kids who just defy convention? Adolescents who by nature are embarrassed by any parent? Maybe, every child involved in a custody case? Or, just maybe every child, period? A slippery slope, indeed. But, as this Court has held, First Amendment freedoms do not evaporate simply because the state has in interest in protecting minors—even sex crime victims—from embarrassment. *Globe Newspaper*, 457 U.S. at 608.

D. The gag order is unconstitutionally vague and overbroad.

Where First Amendment interests are at stake, only a precise order "evincing a legislative [or judicial] judgment that certain specific conduct be limited or proscribed" is permissible. *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963). "Vague" restrictions on speech offend the First Amendment; restraints on speech must include "some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1888 (2018). A gag order is unconstitutionally vague if it does not give clear guidance regarding the types of speech for which an individual may be punished. *See Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

The overbreadth doctrine applies if an order is so broad that it encompasses and "prohibits constitutionally protected conduct." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1076 (1991). Courts across the country have held that gag orders preventing parties and their attorneys from disclosing information about their case

are constitutionally overbroad.[13] There is no question that the gag order here requires Petitioners to "guess at its contours." *Gentile*, 501 U.S. at 1048. The limits of the gag order at issue are endless. The dissent explains the overwhelming sweep of this order:

> Without a doubt, Mother and Counsel engage in otherwise protected activity when they speak about this case pending in our courts. As they say, this is America. The trial court could only prohibit as much speech as necessary to protect a compelling state interest, and no more. Instead, the trial court entered a sweeping order that prohibited Mother and Counsel from speaking publicly about this case except in starkly limited form and in two narrow contexts. Even in those two contexts, Mother could not identify herself. That is, she could not speak her own name. That latter restriction is breathtaking. *If that is not an overly broad restriction, nothing is.*
>
> Turning to vagueness, the Majority brushes this argument aside, sculpting and applying this creative and paternalistic gloss: "a person of ordinary intelligence would read the gag order to forbid [Petitioners] from taking this peculiar custody case to the media in a way that would harm the psychological and emotional well-being of Child." *If only the order was so limited.*

App. 51a (emphasis added).

The gag order's vague prohibitions against speaking publicly or communicating in any manner that would "tend to" identify any of the parties, and "directing or encouraging" third parties to speak publicly or communicate "about this case," are too indefinite to inform Petitioners of exactly what speech is prohibited, thereby chilling them from constitutional speech for fear of contempt sanctions. The court below dismisses these concerns as "pedantic," while in the same breath

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[13] *See, e.g., Johanson*, 182 P.3d at 99; *Bey*, 161 N.E.3d at 543; *Kemner*, 492 N.E.2d at 1338; *Ex Parte Wright*, 166 So.3d 618, 632 (Ala. 2014); *Jabr*, No. A07-2003, 2008 WL 1800138, at *1, *5; *Kinley*, No. A06-865, 2007 WL 2702946, at *5; *K.D.*, 929 N.E.2d at 874; *S.N.E.*, 699 P.2d at 880.

misstates the true limitations of the order: "First, we decline to engage in a pedantic dissection of the word 'tend' as used in the language of the gag order precluding [Petitioners] from speaking publicly about the custody case in a manner that would 'tend' to identify Child." App. 32a.

This misinterpretation of the wide net cast by the order underscores its ambiguity. Notably, the gag order does not only preclude Petitioners from speaking publicly in a way that would "tend to" identify F, but it prohibits Petitioners from speaking publicly or communicating about this case—period. It also specifically orders Petitioners, in providing public testimony, to "NOT disclose any information that would identify or tend to identify the Child" and further orders Petitioners to "NOT publically [sic] refer to the Defendant, the Child, or the Plaintiff by name or in any manner that would tend to identify the aforementioned parties." App. 79a.

While the order technically "allows" S.S. and her attorneys to "disclos[e] entry of this order" it is difficult to imagine a scenario in which this could be accomplished without "communicating" about the case, and thus *per se* violating the order. In addition to the ways in which the order muzzles Petitioners from lending their voices to the important discourse surrounding controversial family court decisions, the egregious legal error and constitutional wrong here is exponentially exacerbated by the vague and sweepingly broad terms "including, but not limited to, print and broadcast media, on-line or web-based communications." App. 78a.

The gag order's prohibition on "direct[ing] or encourag[ing] third parties to speak publicly or communicate about this case" and speaking "in any manner that

would tend to identify the aforementioned parties" is a formidable trap. App. 78a. Notably, Petitioners' merely sharing publicly that this petition was filed, and circulating copies seeking *amicus* support, may violate the gag order as a "discussion about the case." How can Petitioners prophesy what might "encourage" an independent third party to speak about this case? Likewise, who knows what serendipitous dot-connecting would "tend to" identify Petitioners, S.B., or the child? Petitioners' only true safe harbor from the contempt snare is a cocoon of silence. Consider the range of talk "about this case" which could land Petitioners in hot water. Are S.S. and her attorneys prevented from even mentioning that they are involved in this custody case? Does the filing of this petition *ipso facto* violate the order? Can S.S. even tell new friends that she has a son, or reminisce about him with old ones? How can S.S. explain to her cohorts, family, professional peers, spiritual congregants, and community contacts why this youngster, the light and joy of her daily life, suddenly and completely evaporated from her universe?

VI. This case is the canary in the constitutional coal mine, and clamors for the First Amendment firewall to be built here.

From every perspective, this case is fraught with constitutional flaws. Yet, if it stands, judges nationwide emboldened by its holdings will likely propagate its First Amendment transgressions into most of the many thousands of child custody cases litigated daily. Embracing the potent control gifted them, judges will enthusiastically push the envelope. The distressing ramifications of the ruling below are legion. To spare children from embarrassment, "privacy invasion," and other ill-defined "harms," judges under the precedent below could bar any parents from complaining

at board meetings about grading policies in their son's school, cheering too wildly at their child's basketball game, meeting with their family's clergy for guidance on a daughter's contraception request, publicly advocating for increased funding for their teen's substance abuse treatment, or joining support groups and speaking out for families with autistic or physically challenged children. Mothers could be banned from campaigning for more humane conditions in detention centers or psychiatric facilities where their children reside. Fathers could be muzzled from publicly decrying institutional indifference to the exploitation of their sons and daughters in scout troops, gymnastic teams, locker rooms, theatrical auditions, or the sanctuary. Any of these developments would be disastrous; recent history has clearly taught us that when children are at risk silence is leaden, not golden.

That some judges in this nation—especially below in America's oldest appellate court—believe that the First Amendment countenances demands that a mother abandon her own name and identity in service of the spectral governmental interest embraced here is bewildering. In this legal quicksand, judges can arguably reach into intact families to control what moms and dads are saying to their kids, should some teacher or social worker take issue with the message. Finally, lawyers who dare question the legality of it all are "reminded" to stay in line or face Kafkaesque "disciplinary" consequences.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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