No. 20-1627

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

BRIEF IN OPPOSITION

Elisabeth Pride, Esq.
Pride Law LLC
4607 Library Road
Suite 220, #438
Bethel Park, PA 15102
Voice & fax: 412-343-3183
epride@pride-law.com
Counsel of Record
Counsel for Respondent

STATEMENT OF QUESTION FOR REVIEW

Did the Pennsylvania Supreme Court err in affirming the trial court's tailored restriction on speech that was harmful to a child?

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PARTIES TO THE PROCEEDINGS

To clarify from Petitioners' statement of the parties, Petitioners Richard Ducote, Esq. and Victoria McIntyre, Esq. were *not* counsel in the Allegheny County, Pennsylvania, Court of Common Pleas custody case until after conclusion of that case and appeal to the Pennsylvania Superior Court.

RELATED PROCEEDINGS

Petitioners omit from their statement of related proceedings cases filed by them in the U.S. District Court for the Western District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit:

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

2. *Susan Silver, MD; Richard Ducote, Esq.; Victoria McIntyre, Esq., v. Court of Common Pleas of Allegheny County and the Honorable Kim Berkeley Clark, in her official capacity*, D.C. No. 2-18-cv-00494.

TABLE OF AUTHORITIES

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE[1]

The parties in the underlying case are the legal parents of a son (hereinafter "Child"), who was born on August 14, 2006, in Guatemala. When he was one week old, Child was identified for adoption by the Respondent and his wife and was brought home by them upon finalization of his adoption when he was six months old. Less than a year later, Child's mother was terminally ill and his father, Respondent, was his primary caregiver. Child's mother died when he was two years old, after almost 20 years of marriage to Respondent. Respondent raised Child alone for more than four more years, staying close to Child's maternal grandparents and aunts and uncles. Petitioner[2] married the Respondent in September of 2012 and moved into his house the following year. Immediately following Petitioner's hasty adoption of Child in April 2013, Petitioner undertook to push Respondent out of Child's life and soon moved out of Respondent's home, taking Child with her.

A few days after Respondent received an interim order increasing his custody time with Child pending trial on his Complaint in Custody, Petitioner

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[1] Respondent takes liberties with his Counterstatement of the Case as the underlying facts of this case are not part of this record but were known to the state courts and largely recited in the trial court's findings, and it should be noted that Petitioners have taken the same liberties in their Petition. The facts of the custody case were established therein, and reference may be made to Respondent's brief and the Reproduced Record in that case, decided against Petitioner by the Pennsylvania Superior Court at No. 74 WDA 2017.

[2] Respondent refers herein to the individual litigant in the underlying custody case as "Petitioner" and to her and her counsel collectively as "Petitioners."

filed a Protection From Abuse ("PFA") Petition against Respondent claiming sexual abuse of Child[3], triggering an automatic termination of Respondent's custody. Petitioner's PFA petition was dismissed after five (5) days of trial over two and a half months, but succeeded in isolating Child from Respondent, his extended family, friends, school, rabbi, and everyone else in his former life, as Petitioner worked tirelessly to sever his attachments to Respondent and the rest of his family and former life.[4] After a total of twenty-two (22) days of trial, including the incorporated record of the lengthy PFA proceeding, Respondent was awarded sole custody of Child for ninety (90) days to permit reunification while Petitioner took steps to ameliorate her damaging behaviors. Petitioner unsuccessfully appealed that order to the Pennsylvania Superior Court[5], and the Pennsylvania Supreme Court declined to review the case. Petitioner refused to take any steps toward reunification with Child and has voluntarily foregone all contact with him since December 12, 2016.[6] She has, however, continued to compulsively litigate the case and to flout Orders for her economic support of

[3] The principal accusation in the first PFA petition was that Respondent had touched Child's penis while changing his diaper when he was a baby. Serious allegations were not raised until Petitioner filed a second Petition for PFA claiming rape of the child after dismissal of the first Petition following a 5-day trial and shortly after a trial date was set in the custody case. By that time Respondent and the rest of Child's family had not seen or spoken with him for months.

[4] By the time the PFA Petition was dismissed, Petitioner insisted Child was refusing all contact with Respondent and the rest of his family and the trial court declined to enforce *any* contact pending resolution of the custody matter, which didn't happen for another year.

[5] Petitioner unsuccessfully sought Kings Bench intervention by the PA Supreme Court during the Superior Court appeal.

[6] Petitioner claims that the Court terminated her custody of Child but in fact she was given a straightforward path to resume custody after 90 days, which she refused to take.

Child, leading to hearing after hearing and argument after argument and appeal after appeal, including this one, with the apparent twin goals of attracting media attention and impoverishing Respondent.

In addition, Petitioner and her counsel ("Petitioners") have undertaken a publicity campaign to smear Respondent and air their view of the case and the issues under consideration therein, analogizing the silencing of victims of sexual abuse with the judicial findings of the trial court after a twenty-two-day custody trial. In doing so, as in the Petition for Writ of Certiorari herein, they carefully cherrypicked from among the hundreds of exhibits and twenty-two days of testimony (including the child's contradictory testimony)[7] that led to the trial court's custody decision that it is not Respondent but *Petitioner* who poses a danger to the child, and publicly posted brief graphic excerpts of Child's testimony and forensic interview (which, incidentally, resulted in a finding that the abuse allegation was "unfounded"), with identifying information about Child. That

[7] Petitioner carefully selects out-of-context salacious excerpts from Child's statements but omits that Child's sexual descriptions were delivered cheerfully by rote without suggestion of trauma, resembled not actual sex acts but a child's imagination thereof, were accompanied by dozens of highly bizarre non-sexual accusations, were highly inconsistent and evolved and escalated precisely in tandem with Petitioner's litigation needs, were delivered only after many months of isolation by Petitioner from all who loved him, and were accompanied in evidence by a shocking audiotape of the child weeping privately to Petitioner that he *could not remember* the abuse Petitioner insisted he had endured, and Petitioner's assurance that he would eventually remember it if he continued to describe it. In fact, most of the abuse Petitioner claimed Child had endured was reported through *her*, and both Petitioner's and Child's reports were almost uniformly fanciful and bizarre. Child was examined by two different forensic evaluators, and the case included a custody evaluator, a psychological evaluator and guardian *ad litem* (requested by Petitioner) who recommended Child's *immediate* removal from Petitioner many months before it actually happened. Virtually all of *Petitioner's* witnesses gave testimony favorable to Respondent, including Petitioner's psychological expert, who ratified the phenomenon of parental alienation with accompanying false reports of sexual abuse, that Petitioner, with new counsel, now denies. *See* the Pennsylvania Superior Court Reproduced Record at 74 WDA 2017 and Respondent's Superior Court brief in that case, thoroughly reviewing the evidence, with references thereto.

included placing a story with the news media and holding a press conference which was posted online with Dropbox access to selected graphic and misleading materials from the case. Finding that it would be harmful to Child, the trial court precluded Petitioners' dissemination of information that could tie their statements to Child, but expressly permitted them to exercise their First Amendment rights so long as the child's identity was protected. Tellingly, and typically, Petitioners reproduce a portion of the trial court's order in their Statement of the Case, but *omit without acknowledgement of the omission* that portion of the trial's order found most relevant by the Pennsylvania courts to understanding it:

> This Order does not prohibit any party or counsel from publicly speaking or expressing an opinion about the Judge, including disclosing the entry of this Order of Court, ***after*** the [Dropbox] information has been removed as set forth, above. However, such expression shall NOT contain the name of the Child or other information, which would tend to identify the Child.

Petition at 6-7, citing Appendix to Petition (hereinafter "Appendix"), page 78a-79a (emphasis original).[8]

Petitioners unsuccessfully appealed the trial court's order to the Superior Court and the Supreme Court of Pennsylvania while also filing suits against the trial court judge and the Court of Common Pleas of Allegheny County in the U.S.

[8] Note that Petitioners' Table of Contents erroneously places the trial court's findings and order at page 73a but it does not begin until the following page.

District Court for the Western District of Pennsylvania and the Third Circuit Court of Appeals, which refused jurisdiction. *See* Related Proceedings herein, *supra* at ii.

REASONS FOR DENYING THE PETITION

1. The Petition fails to conform to Supreme Court Rules.

Initially, it must be observed that the Petition for a Writ of Certiorari (hereinafter "Petition") fails to comply with Supreme Court Rules in numerous respects and serves primarily as a vehicle for the airing of Petitioners' extreme discontent with the trial court's underlying custody order which is not at issue here. Supreme Court Rule 14(1)(a) requires that questions presented for review "should be short and should not be argumentative or repetitive" and that the page should contain no further information. By contrast, Petitioners' question presented for review is accompanied on the page by an argument. Petition, p.i. Rule 14(1)(g) directs "[a] concise statement of the case setting out the facts material to consideration of the questions presented," in contrast to Petitioners' statement, the first three pages of which largely comprise short out-of-context salacious excerpts from Child's testimony in the custody matter and illuminate Petitioners' *primary* position that *that* case was wrongly decided.[9] Rule 14 sets out the contents of the Petition, making no allowance for Petitioners' insertion of

[9] It does not escape Respondent's notice that his responsive brief sets forth his own recitation of facts from the underlying case, primarily to correct Petitioners' breathtaking misrepresentation of the record of that case. The Court may, however, permit the Petition to help illuminate the social and psychological danger to the child posed by his identification in connection with Petitioners' speech.

an argument between their Table of Authorities and statement of Opinions Below (Petition at 1-2), and Rule 14(2) specifically precludes argument outside the Argument section of the Petition. Finally, Rule 14(1)(h) mandates a "direct and concise argument amplifying the reasons relied on for allowance of the writ," and references Rule 10. In particular in their third and fourth reasons (Petition, p.14 *et seq*.), Petitioners argues that there can be *no* restriction ("definitive protection") on the speech of parents and their lawyers in relation to custody trials, by way of a protracted primal scream citing dozens of articles purporting to support Petitioners' perspective that Petitioner is a victim of family courts that exist to prey on children and protect abusers,[10] *all* of which, of course, are utterly irrelevant to the First Amendment question raised by the Petition. *See esp*. Petition n.6-10 and pp.vii-ix.

2. Petitioners' objection to the decision of the Pennsylvania court rests not on the First Amendment but on construction of the trial court's order.

By Supreme Court Rule 10, a "petition for a writ of certiorari will be granted only for compelling reasons" and is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id*.

[10] These irrelevant materials, listed as "other authorities," take up more than *two full single-spaced pages* of Petitioners' Table of Authorities, and Petitioners include the full text of seven more in the Appendix itself at pp.113a *et seq*. along with a transcript of Child's testimony after isolation of many months from Respondent and the rest of his family but not his contrary testimony in the consolidated PFA hearing after only two weeks of isolation (and many more contrary statements made to abuse evaluators and others), which testimony is also irrelevant herein but does illuminate Petitioners' actual goal in seeking to bring this matter before this Court. Appendix, pp. 81a *et seq*.

Here, the Pennsylvania Superior and Supreme Courts engaged in a conventional and straightforward workmanlike analysis of the First Amendment issues presented by the trial court's order and found that the order was content neutral because the only restriction was on the *connection of the speech to the child*, and not on the message. In making this determination, the courts looked at the entirety of the order, not just the portions disingenuously extracted by Petitioners, and found that the trial court had expressly limited application of the order to information that could identify the child and expressly noted that the order would not preclude Petitioners' testimony on the subject or declaration of their dissatisfaction with the court or its rulings, or *any other speech* aside from direct or indirect identification of the child.

> A careful review of this language reveals that, contrary to Appellants' assertions, the gag order in no way silences them from expressing all of their views on important issues relating to the custody proceeding. . . . The *only limitation* on Appellants' speech lies in the manner of communication, as they are precluded from conveying such public speech in a way that exposes Child's identity and subjects him to harm. . . . As noted, once Appellants remove from the public domain the enumerated information found to be harmful to Child, they are free to criticize the trial court's decision, assuming they do so in a manner that does not disclose Child's identity.

S.B. v. S.S., 243 A.3d 90, 107 (2020).

Review of *every word* of the Petition reveals that it is *not* the Pennsylvania courts' First Amendment review of the order that troubles Petitioners, it is the

courts' *construction and interpretation* of the language of the order.[11] That issue they have not raised here nor *ever* raised. Instead, they petition this Court and argue with vigor as though the Pennsylvania courts had read the order just as they do, even going so far as to *omit* in their Petition the trial court's language *most central* to the Pennsylvania courts' review.[12] As Petitioners have not addressed the Pennsylvania courts' construction of the order, much less objected to it in this Court or below, they should be stuck with it. Unless this Court *sua sponte* overrules the construction of both Pennsylvania courts, the argument of Petitioners unravels entirely.

The Pennsylvania court began by acknowledging the applicable standards of review for content-based and content-neutral speech as set forth by this Court. S.B., p.105, *citing Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Having found that the order restricts only identification of the child, the court examined whether that restriction is content-based to ascertain the standard of review. The Pennsylvania courts relied on this Court's analysis in *Reed, supra*, which provides

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[11] One might think that if Petitioners believed the order proscribed *all* speech as they argue, they would be relieved to hear from the Pennsylvania courts that only their identification of the child was restrained and to happily rely on that limitation, but, as evidenced by their conduct throughout this case, their goal has never been to vindicate their First Amendment rights, but to create opportunities to air their grievances about the underlying custody order, ideally with press attention, as an appeal to this Court would afford.

[12] Outrageously, in their Statement of the Case (Petition, pp.6-7), Petitioners reproduce the portion of the order that is more convenient for their argument but *omit without acknowledgement thereof* the language from the trial court's order that is principally relied upon by the appellate courts. Appendix, p.74a ("This Order does not prohibit any party or counsel from publicly speaking or expressing an opinion about the Judge. . . However, such expression shall NOT contain the name of the Child or other information, which would tend to identify the Child.") (emphasis original). The Petition simply pretends this language does not exist, and that the Pennsylvania Courts had not found the restraint on their speech to be limited thereby.

that "[g]overnment regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed." (*S.B.* at 105, quoting *Reed* at 163), and "[a] restriction is content based if either the face of the regulation or the purpose of the regulation is based upon the message the speaker is conveying." (*Id.*) As pointed out by the Pennsylvania courts, this Court has explained that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *S.B.* at 106, quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). "So long as the regulation of speech is not a means, subtle or otherwise, of exercising content preference, it is not presumed invalid." *S.B.* at 105, *citing Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622 (1994).

From the express limitation stated in the trial court's order to speech tending to identify the child, the court determined that it is not the message or topic that underlay the court's action, much less the trial court's disagreement with it, but the connection of that message to the *child* and the harm to the child that was likely to result.[13] Petitioners are unfettered to proclaim their considerable dissatisfaction with the underlying custody order, regardless of the truth of their factual assertions, so long as they shield the minor child from the

[13] It's not difficult to imagine the profound stigma suffered by a child whose peers and their parents had been falsely led by Petitioners to believe he has been anally raped since infancy by his father, with whom he continues to reside, and likely has an ongoing sexual relationship with him. Who would permit their children to associate with him, much less come to his home? Who would permit their child to date him? And who would *want* to befriend a child so surely and deeply damaged?

harm that would result by exposure of his identity in connection with their speech.

Having found the order to be content-neutral, the state court compared the applicable standards of review articulated by this Court in *U.S. v. O'Brien,* 391 U.S. 367 (1968)[14] and *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984),[15] and pointed out that this Court has noted that the two standards differ little, if at all. *S.B.* at 106, citing *Community for Creative Non-Violence* at 298. The Pennsylvania court found that all four *O'Brien* factors were met. There is no question that the trial court had the power to enter the order. The restriction, as limited to severing the connection between Petitioners' speech and Child but not otherwise restraining Petitioners' speech, was no greater than essential to protect the child. As already determined, the order was not entered in order to suppress the content of Petitioners' speech, but to protect Child, and that protection is undoubtedly an important government interest, as this Court has acknowledged in *Sable Communications of Cal. v. FCC,* 492 U.S. 115, 126

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[14] A content-neutral regulation of speech passes constitutional muster if it satisfies the following four-part standard set forth by the High Court in *United States v. O'Brien, supra*: (1) the regulation was promulgated within the constitutional power of government; (2) the regulation furthers an important or substantial governmental interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
S.B. at 105, citing *O'Brien* at 377.

[15] Time, place and manner restrictions are valid, provided that they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant governmental interest unrelated to speech;12 and (3) leave open ample alternative channels for communication of the information.
S.B. at 105, citing *Community for Creative Non-Violence* at 293.

(1989) ("there is a compelling interest in protecting the physical and psychological well-being of minors"). *S.B.* pp.107-111.

Next the court examined the order for vagueness, pointing out that this Court does not require an exhaustive and specific list of proscribed actions but that so long as an "ordinary person exercising ordinary common sense can sufficiently understand and comply with" an order, it is not impermissibly vague. S.B. at 111-112, citing *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972); *Minn. Voters Alliance v. Mansky,* 138 S.Ct. 1876 (2018), and *Broadrick v. Okla.,* 413 U.S. 601, 608 (1973). The court found the trial court's order not to be impermissibly vague inasmuch as Petitioners[16] should be capable of anticipating the meaning of not speaking "publicly about the custody matter in a manner that will disclose Child's identity," or "direct[ing] or encourag[ing]" others to do so. *S.B.* at 112.

3. The opinion below is in harmony with First Amendment jurisprudence of other states.

Petitioners raise a number of bases for intervention by this Court, but each is colored by tortured misapplication and/or misrepresentation of the law and the decisions of the Pennsylvania and other state courts.

Petitioners claims that "the opinion below squarely conflicts with all other state high court decisions considering such family court gag orders." Petition, p.9. By this argument, Petitioners attempt to segregate family court orders limiting

[16] Petitioners are two attorneys and a medical doctor who can be assumed to have at least ordinary intelligence.

speech from other First Amendment jurisprudence, as though courts cannot apply constitutional standards absent a decision of this Court with an identical fact pattern. Next, they misrepresent dissimilar decisions of state courts to attempt to create the illusion of disagreement among state courts of last resort on the central question. This case creates no confusion among state courts as to whether speech *can* be limited, nor as to how to determine whether a particular order *has* done so permissibly under the Constitution. Petitioners' litany of "conflicting" decisions is a red herring.

First, Petitioners reference *Bey v. Rasawehr*, 161 N.E.3d 529, 533 (Ohio 2020), arguing that the Ohio Supreme Court's decision to vacate an order proscribing online harassment of an adult conflicts with this case, but *Bey* is distinguishable. Petitioners argue that the use of the word "about" designates the restriction herein as content-based as the Ohio court found it did in that case. However, both of the Pennsylvania appellate courts found that regardless of selected individual words in the trial court's order, the overall language of the order firmly establishes that it is *not* the *topic* of Petitioners' speech that is constrained; it's the connection of it to the child. It's true that Petitioners are not precluded from disclosing the identity of the child in discussion of matters *not* "about" their allegations of abuse since the Order was properly tailored to protect the child from a specific identified harm, but they are also *not* precluded from airing their allegations "*about*" abuse, just from connecting them to the child. Further, according to Petitioners, *Bey* establishes that psychological harm to

adults cannot justify a restraint on content-based speech. This is disingenuous, as Child is not an adult, and the protection of *children* is undeniably a compelling government interest. *See Sable Communications, supra at* 126. *See also D.P. v. G.J.P.,* 636 Pa. 574 (2016); *Hiller v. Fausey,* 904 A.2d 875, 886 (Pa.2006) ("the compelling state interest at issue in this case is the state's longstanding interest in protecting the health and emotional welfare of children").

Next, Petitioners argue that the decision under consideration herein conflicts with *In re R.J.M.B.*, 133 So.3d 335, 339-346 (Miss. 2013), wherein the Supreme Court of Mississippi examined the constitutionality of a gag order on participants in ongoing legal proceedings in youth court. The interest at issue in that case was the integrity of the legal process, and no question was raised as to whether the restriction was content-based. Accordingly, this case is simply not analogous.

Third, Petitioners argue that the Pennsylvania decision conflicts with the decision of the Supreme Court of Hawaii in *In Interest of FG*, 421 P.3d 1267 (Haw. 2018) which precluded disclosure of the names of children in the foster care system. However, the decision in that case was overturned not because it violated the First Amendment, but because the lower court failed to adequately consider that question as the Pennsylvania court did. The Hawaii case is inapposite.

The same is true of *Care and Protection of Edith*, 659 N.E.2d 1174, 1175-76 (Mass. 1996), in which the Massachusetts Supreme Court vacated an order because the lower court had not held a hearing and entered findings or identified

a state interest for protection, as the Pennsylvania court did in this case. There is no parallel to this case where a full constitutional analysis was undertaken. Petitioners also reference *Shak v. Shak*, 144 N.E. 3d 274, 278-280 (Mass. 2020), which concerns an order proscribing disparagement by parents of one another. Petitioners' argument suffers the same deficiency with regard to this case, in which the court did not find such speech cannot be limited, but only that no findings had been made that could underlie such a limitation in that case.

In re Marriage of Suggs, 93 P.3d 161, 163-66 (Wash. 2004), referenced by Petitioners, concerned an order forbidding harassment of one divorcing spouse by the other. The only similarity between that case and this is the invocation of the First Amendment. Notably, while the Washington Supreme Court found that the order before them was impermissibly vague, they noted that they "*can* conceive of circumstances where a trial court could draft a constitutionally sound antiharassment order restraining the speech that appears implicated in the order here." *Id*. at 166 (emphasis supplied).

Next Petitioners invoke 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). There a judge, *sua sponte* and without notice, sealed a case and issued a universal gag order as to *all* information about a divorce case to protect one of the parties, a former fellow judge, in his effort to get reelected. The court found the order to be impermissibly vague and overbroad, and that it was an unconstitutional abridgement of content-based speech. In that case, there was

no dispute as to whether the proscription was content-based, and there was no overlap between the interests at issue in that case and this one. Accordingly, again, Petitioners attempt to distract this Court with an inapposite case.

Finally, Petitioners cite *In re N.B.*, 146 A.3d 146 (N.H. 2016), wherein the trial court restrained an adoptive grandmother from disclosure of information relating to the abuse and neglect of the children while in the care of child protection services, and directed that any future lawsuits by her relating to these matters must be filed under seal. She *did not appeal* that portion of the order that might be analogous to this case, but the New Hampshire court noted that the trial court had balanced the grandmother's "right to free speech against the children's right to privacy and the State's interest in protecting that privacy," (*Id.* at 148), and acknowledged that "the asserted interests of [the agencies] in guarding the identities and privacy of the children . . . are compelling". *Id.* at 151.

Petitioners provide not a single example of a state court decision that *actually* conflicts with the decision they seek to bring before this Court, nor can they. State courts are in harmony in their consideration of the relevant First Amendment jurisprudence, which was properly applied in this case.

4. The opinion below offers nothing new to other courts.

The next reason for Certiorari put forth by Petitioners is that this Court must head off the 'gravitat[ion] to Pennsylvania's erroneous ruling as the most recent and "enlightened" view of First Amendment law.' Petition at 12. For this,

they inexplicably present decades-old refusals to hear intermediate state appellate court rulings in Michigan and Illinois with no precedential importance. Petitioners cite *In re Macomb Daily*, 620 N.W.2d 10 (Mich. 2000) and *In re Detroit Free Press,* No. 210022, 1999 WL 33409948 (Mich. Ct. App. Nov. 23, 1999), both concerning a single gag order that had not been appealed by the parties at the time it was entered, and was later *consented* to by all parties but challenged by the *press* before the Michigan Supreme Court declined to hear it. Petitioners' reference to this case about press freedom appears to be rooted in a false idea that *any* reference to the First Amendment is analogous, but there is no nexus to this case.

Petitioners' invocation of 33-year-old *In Interest of Summerville*, 547 N.E.2d 513 (Ill. App. Ct. 1989) is more mysterious still. In that case, the Illinois Court of Appeals found a gag order to be impermissible because the lower court had not entered appropriate findings as to the potential harm of the proscribed speech. That case was reversed and remanded to the trial court, with no holding that supports Petitioners' enigmatic argument herein.

Having claimed that "the opinion below squarely conflicts with all other state high court decisions considering such family court gag orders" (Petition, p.9), Petitioners reference their *first* case that is *actually* similar to this case, wherein the Illinois Court of Appeals in 1994 upheld a speech restriction far broader than the one here. The facts of that case are strikingly similar to the facts herein:

> Following a hearing on the father's custody petition and the State's petition for adjudication, the trial court ruled on August 17, 1993, that J.S. was a neglected minor and awarded the father sole custody of J.S. The court's written order specifically found that the mother had caused the child's emotional environment to be injurious "through her obssession [sic] with proving that the minor's father * * * has sexually abused the minor. * * * Mother physically[17] abused the minor * * * for the purpose of attempting to prove that * * * [the father] sexually abused the minor." The court also found that "the evidence establishes overwhelmingly that the father * * * did not sexually abuse" J.S.

In re J.S., 640 N.E.2d 1379, 1381 (Ill. App. Ct. 1994). In *J.S.*, the Illinois Court of Appeals completed a comprehensive balancing of the competing interests involved in restricting the mother's speech by reference to Illinois precedent, and upheld the order. There, the challenged order was far broader than the one in this case which precludes only dissemination of information tending to identify the child. In *J.S.,* in answer to the mother's *request* that the restraint on her speech be limited as the Pennsylvania court limited the speech of Petitioners herein, the court noted

> We fail to comprehend how the mother could discuss with the news media the scandalous, horrendous details of sexual abuse that she alleges occurred while keeping confidential the identity of the alleged victim.

Id. at 1385. Petitioners make much of the court's observation that "We fail to see the necessity of discussing the details of this case with the news media" (*Id.* at 1383) as though it was central or even *material* to its findings. It was not. This, again, is a red herring, despite the eerie similarity in facts, as there is no conflict

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[17] It should be noted that Respondent has not alleged that Petitioner physically abused Child, but, as the custody evaluator in the underlying custody case testified, Petitioner's conduct was a particularly egregious form of emotional abuse.

between the First Amendment analysis of this intermediate state court and this case or other sound First Amendment jurisprudence, nor does it support or explain in any way Petitioner's argument that courts will somehow be attracted to this Pennsylvania case. Petitioners' smoke and mirrors cannot obscure their failure to establish a "gravitational" pull by this conventional, properly decided Pennsylvania case.

5. The free speech rights of custody litigants are not extraordinary nor unlimited.

Next Petitioners argue that "[t]he free speech rights of parents and their attorneys require definitive protection, especially when they question governmental action." Petition, p.14. By "definitive," Petitioners appear to argue that *no* restraint can *ever* be placed on the speech of the special category of aggrieved custody litigants and their counsel when they disagree with a custody court's decision, regardless of competing interests. This is a patently ludicrous argument that barely merits consideration, but if such a holding is not what Petitioners actually hope to receive from this Court, it serves as the blanket under which Petitioners smuggle into their Petition the real cargo: They are extremely unhappy about the underlying custody decision, and they have an agenda.

6. There is no special First Amendment problem in family courts.

Having smuggled in their cargo, Petitioners proceed to unpack it with their next argument, that a failure to provide "definitive protection" to "[t]he free speech rights of parents and their attorneys" is a great big problem this Court

must solve. Although they argue that the speech of custody litigants and their counsel should be afforded truly extraordinary protection, Petitioners offer no rationale for why these cases should be treated differently than other cases about the restraint of speech under the First Amendment. On the contrary, Petitioners point out that "[a]lthough the number of un-appealed gag orders is not documented, state intermediate appellate courts have routinely reversed them when challenged" (Petition, pp.17-18), highlighting that proper consideration of First Amendment principals *yields protection* of speech where it is not outweighed by other important interests. That is, by Petitioners' own argument, *this is not a problem that needs fixing*. Nor is the specter raised by Petitioners of gag orders relating to speech *to* children by parents a problem that has *anything* to do with this case at all. Instead, it appears, Petitioners hope to ensnare this Court's attention by tossing out keywords designed to incite rage.

One of these keywords is "tsunami," as Petitioners caution that the Pennsylvania decision will fling open the doors to courts trampling the First Amendment rights of unhappy custody litigants like overzealous Black Friday sale shoppers. For this, they cite Justice Wecht's dissent from the Pennsylvania decision.[18] However, as the Petition illustrates, whether and how to curtail

[18] In his dissent, Justice Wecht declared that the trial court order would not survive strict scrutiny, but his assessment rests on a reading of the order, like Petitioners', that ignores the trial court's express limitation of the proscription to information tending to identify the child, as there can be little doubt that the order as so limited is the most narrowly tailored proscription available to advance the compelling government interest in protecting Child from harm. That is, although the Pennsylvania court properly found content-neutral speech to be subject to intermediate scrutiny, the trial court's order, *as read by the Pennsylvania courts*, also survives *strict* scrutiny inasmuch as there is *no limit* on Petitioners' speech except the absolute minimum necessary to serve a compelling governmental interest.

harmful speech for the protection of children is a question that is already frequently entertained by courts, and the Pennsylvania decision does nothing to suggest a change in how that question must be answered. Petitioners, and for that matter Justice Wecht, fail to offer any reason at all to worry that this Pennsylvania decision will increase the number of trial courts presented with this question, or encourage them to abandon careful consideration of whether speech is content-based, and how to balance the competing interests under the First Amendment. They may disagree with how the Pennsylvania courts construed the order, but they cannot claim the appropriate First Amendment *analysis* was not undertaken. *See* Supreme Court Rule 10 (certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

7. The Pennsylvania courts properly and conventionally applied appropriate First Amendment precedent to the trial court's order.

Finally, the Petition simply takes universal issue with the Pennsylvania court's decision, arguing that it is wrong on every point. To do this Petitioners again ignore the language of the order that limits the restriction to identification of the child and the Pennsylvania courts' findings thereof, having omitted that language from their reproduction of the order in the Petition. *See* note 12 *supra*. Petitioners offer no discussion or alternative analysis of how to construe the language, and no support whatsoever for their preferred interpretation. In fact,

Petitioners make no argument at all that does not rest nakedly on simply ignoring the express limitation in the order, and the Pennsylvania courts' findings thereof.

First, Petitioners argue that the trial court's order is a prior restraint on speech, but in fact, the Pennsylvania court found there *was* no restraint on the *content* of Petitioners' speech. Second, Petitioners argue that the order is content-based, insisting "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." Petition, p.21. That is, of course, except the language of the order itself, which concludes with the clarification that "This Order does not prohibit any party or counsel from publicly speaking . . . [except that] such expression shall NOT contain the name of the Child or other information, which would tend to identify the Child." Appendix, p.77a. Perversely, Petitioners argue that the fact that they, and not Respondent, were subject to the order, which would of course *broaden* the restraint, proves their point. However, Respondent and his counsel have never spoken publicly about this case *at all*, much less in a way that might be harmful to Child. Contrary to Petitioners' assertion, the order does not show a preference for Respondent's message. Respondent doesn't have one.

Petitioners take issue with the finding of the Pennsylvania court that the order concerns the "target" of the speech rather than the content. By this argument, Petitioners equate "target" to "intended recipient," but that is clearly not the meaning of the Pennsylvania court and Petitioners surely know it, given

that it is only the child's identity that is protected by the order. Rather, the Pennsylvania court concerned itself with the recipient of the harm, not the intended recipient of the speech, notwithstanding Petitioners' specious argument.

Petitioners argue that the order cannot survive strict scrutiny because the court did not identify *which* children it sought to protect.

> What group of children are to be protected by family court gag orders? Sexual abuse victims? Well, the courts below do not believe [Child]'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?

Petition at 24-25. This argument appears to be purely rhetorical, and is difficult to unpack except as another expression of Petitioners' dissatisfaction with the findings in the custody case that Respondent had not abused Child as Petitioner alleges. In answer to Petitioners' oblique inquiry, the court sought to protect *this child*. Petitioners cite *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982) for the proposition that "First Amendment freedoms do not evaporate simply because the state has in interest in protecting minors—even sex crime victims—from embarrassment" (Petition at 25) but in fact this Court *acknowledged* in that case about press freedom that "the State's interest in

protecting minor victims of sex crimes from further trauma and embarrassment" *is a compelling one*. *Globe* at 597.

Petitioners' next argument, that the order is impermissibly vague and overbroad, *again* rests on ignoring an important portion of the text of the trial court's order. While the order does appear expansive initially, it concludes with a *clear explanation* of what it does *not* do: It does not limit *any speech* by Petitioners except speech that would tend to identify Child. As noted by the Pennsylvania Supreme Court, the order is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden . . ." *S.B.* at 111, citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Any person of ordinary intelligence can discern that this includes the child's name and other information that would indirectly identify him. As Child has no siblings, identification of his parents would qualify, as would a combination of other information that would reveal his identity. An order is not overbroad because it is vague, nor is it vague because it does not include an exhaustive list of specific information that must be kept private. Whether or not they are willing to admit it, Petitioners are of ample intelligence to discern the limit of their conduct, and it is as narrow as the trial court was able to make it and still accomplish Child's protection.

Petitioners conclude their overwrought Petition with a warning that

> judges nationwide emboldened by [the Pennsylvania court's] 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.

Petition at 28-29. The irony of this argument, in light of the fact that it is *Petitioners' speech* that puts this child at risk, is undoubtedly unintentional. Petitioners are arguing that this Pennsylvania case, with its conventional workmanlike First Amendment analysis by reference to longstanding precedent of this Court leading to an outcome with which they disagree, is somehow so *special* that this Court's failure to overturn it ensures a constitutional apocalypse. But there *is* nothing special about this case. It does not announce new law. The Pennsylvania court enunciated no "holdings" that depart in any way from other proper review of a restriction of speech under the First Amendment by this Court or other state courts. Petitioners disagree with the state courts' *construction* of the trial court's order, but they have never raised *that* question and they do not argue it here. Nevertheless, Petitioners appear to

be claiming that the Pennsylvania Supreme Court has announced an important new rule that parents simply may *never* talk about their children to *anyone*, which unscrupulous custody judges all across the country have been waiting impatiently to exploit. Whether or not this is the most hyperbolic argument this Court has ever entertained, Petitioner's claims aren't credible just because they're breathless.

This case is unexceptional. The Pennsylvania court was tasked with understanding the trial court's order, and they elevated the language therein that clearly limited its application to speech that would tend to identify the child, contrary to Petitioners' insistence on ignoring that language. Petitioners may disagree with their construction, but it hardly shatters the earth. The Pennsylvania courts conventionally applied established precedent of this Court to determine whether the restrained speech was content based and then conventionally applied established precedent of this Court to determine whether the restraint was permissible under the Constitution. They found that an order that limited Petitioners' right to *identify* a child in conjunction with dissemination of misleading and dangerous information about him was narrowly tailored for the protection of the child and permissible under the First Amendment. That is all. There is nothing to see here, much less an impending apocalypse to avert, and this Court has important things to do.

CONCLUSION

Accordingly, and for the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Elisabeth Pride, Esq.
Pride Law LLC
4607 Library Road
Suite 220 #438
Bethel Park, PA 15102
412-343-3183
epride@pride-law.com
Counsel of Record
Counsel for Respondent