No. 20-1627

In the Supreme Court of the United States

RICHARD DUCOTE, VICTORIA MCINTYRE, AND S.S.,

Petitioners,

v.

S.B.,

Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE JANE BAMBAUER, RICHARD W. GARNETT, NADINE STROSSEN, AND EUGENE VOLOKH IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 37.2(b) of the Rules of this Court, Jane Bambauer, Richard W. Garnett, Nadine Strossen, and Eugene Volokh respectfully move for leave to file the accompanying brief as amici curiae in support of petitioners. All parties were timely notified of amici's intent to file a brief. Petitioners consented to the filing of this brief, but respondent refused to consent.

Amici are law professors who specialize in the First Amendment. They file this brief to explain that the decision below is egregiously wrong and should be summarily reversed. This amicus brief offers arguments different from those made by petitioners and respondent, so it "brings to the attention of the Court relevant matter not already brought to its attention by the parties" under Rule 37.1.

For this reason, the Court should grant the motion and permit the filing of this amicus brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who specialize in the First Amendment. They file this brief to explain that the decision below is wrong and should be summarily reversed.

Jane Bambauer is a Professor of Law at the University of Arizona.

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor of Law at Notre Dame.

Nadine Strossen is the John Marshall Harlan II Professor of Law Emerita at New York Law School and the former president of the American Civil Liberties Union.

Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA.

SUMMARY OF ARGUMENT

The gag order in this case is astonishingly broad. The trial ended long ago, but the gag order bars petitioners from speaking about it forever.

And the opinion below is egregiously wrong. The Pennsylvania Supreme Court flouted basic First Amendment principles by applying intermediate scrutiny on the theory that the gag order is merely a time, place, or manner restriction. The court should have applied strict scrutiny, for two independent

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified of amici's intent to file this brief. Petitioners consented to the filing of this brief. Respondent refused to consent.

reasons: The gag order is a prior restraint, and the gag order is content based. Under strict scrutiny, the gag order is plainly unconstitutional.

The correct result in this case is so clear that the Court should summarily reverse.

ARGUMENT

I. The gag order is subject to strict scrutiny because it is a prior restraint and because it is content based.

The gag order in this case is subject to strict scrutiny for two independent reasons. First, it is a prior restraint. It suppresses petitioners' speech before they even open their mouths. Second, it is content based. The gag order prohibits speech about a specific topic—the case—but allows speech about all other topics. For both reasons, the gag order is subject to strict scrutiny.

A. The gag order is a prior restraint.

Gag orders are classic prior restraints, because they are "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 and internal quotation marks omitted). Below, the trial court ordered that petitioners "shall NOT speak publicly or communicate about this case." Pet. App. 6a. This was a prior restraint.

Prior restraints are subject to strict scrutiny. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). For this reason,

"[p]rior restraints have been accorded the most exacting scrutiny." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979). To satisfy the First Amendment, a prior restraint "must be 'precis[e]' and narrowly 'tailored' to achieve the 'pin-pointed objective' of the 'needs of the case.'" *Tory v. Cochran*, 544 U.S. 734, 738 (2005) (quoting *Carroll v. President and Comm'rs. of Princess Anne*, 393 U.S. 175, 183-84 (1968)).

The Pennsylvania Supreme Court erroneously refused to apply strict scrutiny because the trial court did not "impose any prior restraints upon the press." Pet. App. 30a. But strict scrutiny applies to all prior restraints, not merely those imposed on the press. *See, e.g.*, *Tory*, 544 U.S. at 738 (applying strict scrutiny to a prior restraint imposed on individual picketers); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (treating a prior restraint imposed on a theatrical promoter the same as restraints imposed on newspapers and book distributors); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (treating a prior restraint imposed on an advocacy group the same as restraints imposed on book distributors). Prior restraints are contrary to our constitutional tradition no matter whose speech is being suppressed. The Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (citation and internal quotation marks omitted).

B. The gag order is content based.

The gag order is also subject to strict scrutiny because it is content based.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). If a speech restriction forbids speech about one subject but allows speech about others, "[t]hat is about as content-based as it gets." *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion); *id.* at 2364 (Gorsuch, J. concurring in the judgment in part and dissenting in part) (agreeing that a restriction that "ban[s] speech on [certain] disfavored subjects" is content based). The gag order is content based, because it forbids petitioners from speaking about one subject, this case, but allows them to speak about all other subjects.

Content-based speech restrictions are subject to strict scrutiny (unless they are limited to speech that falls entirely within a First Amendment exception, which the prohibited speech here certainly did not). *Id.* at 2347; *Reed*, 576 U.S. at 171. To satisfy the First Amendment, the government must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (citation and internal quotation marks omitted).

The Pennsylvania Supreme Court again erred in failing to apply this standard. The court mistakenly concluded that the gag order is not content based because, although the gag order bars petitioners from discussing the custody proceeding, "the gag order in no way silences them from expressing all of their views on important issues relating to the custody

proceeding." Pet. App. 23a. But petitioners' ability to express their general policy views concerning child custody matters does not render the gag order any less content based. The gag order is still a judicial command that petitioners "shall NOT speak publicly or communicate about this case." *Id* at 6a. It is an order not to speak about a particular topic, so it is a content-based restriction.

The Pennsylvania Supreme Court erred further in holding that the gag order is not content based because it was "not motivated by hostility toward [petitioners'] message." *Id.* at 24a. If the gag order was not so motivated, that means the gag order is not *viewpoint* based, but it is still content based. "[I]t is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Reed*, 576 U.S. at 169 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 537 (1980)). "Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 576 U.S. at 169.

The Pennsylvania Supreme Court also erred in classifying the gag order as merely a time, place, or, manner restriction. Pet. App. 24a. Only content-*neutral* restrictions on speech qualify as time, place, or manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Moreover, the gag order is not limited to the time, place, or manner of petitioners' speech. It forbids them from discussing the case at any time, in any place, and in any manner. If

petitioners do discuss the case, no matter when, where, or how, they will violate the gag order.

Nor does it matter that the gag order includes exceptions for anonymous testimony before legislatures and anonymous speech about the judge. Pet. App. 6a. (The exception for speech about the judge essentially requires the speech to be anonymous, since it demands that "such expression shall NOT contain . . . information, which would tend to identify the Child." *Id.* S.S.'s name could tend to identify the Child, at least to those who know the family.) Even with these exceptions, the gag order is still content based, because its scope is still defined by the subject matter of the prohibited speech.

Moreover, even with these exceptions, the gag order remains a grave burden on S.S.'s ability to speak about the case. Anonymous speech is materially less effective than speech to which people sign their names. Listeners are less likely to trust it, because they lack the opportunity to verify the allegations by checking public records, and because they cannot evaluate the speaker's reputation.

II. This case is appropriate for summary reversal.

The Pennsylvania Supreme Court appears to be the only state supreme court or federal court of appeals that mistakenly classifies gag orders as time, place, or manner restrictions. Other courts correctly hold that gag orders are subject to strict scrutiny because they are prior restraints and because they are content based. *See, e.g.*, *Sindi v. El-Moslimani*, 896 F.3d 1, 31-32 (1st Cir. 2018); *United States v. Salameh*, 992 F.2d 445, 446-47 (2d Cir. 1993); *Bailey v.*

Systems Innovation, Inc., 852 F.2d 93, 98-99 (3d Cir. 1988); *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-97 (4th Cir. 2018); *Marceaux v. Lafayette City-Parish Consol. Gov't*, 731 F.3d 488, 493-94 (5th Cir. 2013); *In re Dan Farr Productions*, 874 F3d 590, 593 (9th Cir. 2017); *Arkansas Democrat-Gazette v. Zimmerman*, 20 S.W.3d 301, 306 (Ark. 2000); *Facebook, Inc. v. Pepe*, 241 A.3d 248, 262 (D.C. 2020); *In re F.G.*, 421 P.3d 1267, 1273-74 (Haw. 2018); *Shak v. Shak*, 144 N.E.3d 274, 279 (Mass. 2020); *In re R.J.M.B.*, 133 So. 3d 335, 343-46 (Miss. 2013); *Johnson v. Eighth Judicial District Ct.*, 182 P.3d 94, 98 (Nev. 2008); *Twohig v. Blackmer*, 918 P.2d 332, 335-36 (N.M. 1996); *Bey v. Rasawehr*, 161 N.E.3d 529, 539-43 (Ohio 2020); *Grigsby v. Coker*, 904 S.W.2d 619, 620 (Tex. 1995); *In re Marriage of Suggs*, 93 P.3d 161, 164-66 (Wash. 2004).

The decision below is wrong, it creates a many-to-one conflict among the lower courts, and, as petitioners demonstrate, this issue arises frequently, especially in child custody disputes like this case. Indeed, a Pennsylvania court has already relied on the decision below to uphold a similar gag order in another child custody dispute. *K.G. v. M.T.W.*, 2021 WL 2394799 (Pa. Super. Ct. June 9, 2021). These factors counsel in favor of granting certiorari.

If the Court sets this case for argument, however, there will not be much to argue about. It seems clear that strict scrutiny is the correct standard. Under strict scrutiny, it seems equally clear, for two reasons, that the gag order cannot satisfy strict scrutiny.

First, once a trial is over, the government lacks a compelling interest in prohibiting litigants from

speaking about it. It may sometimes be a different matter *during* the trial, when one litigant's freedom of speech might have to be balanced against the opposing litigant's right to a fair trial. But once the trial ends, the latter side of this balance loses all its weight. The gag order in this case is extraordinarily troubling because it prohibits speech about a trial that has already concluded.

Second, even if there had been a compelling government interest, the trial court failed to consider whether there were any less restrictive alternatives. This gag order has no expiration date. Fifty years from now, if petitioner S.S. decides to write her memoirs, she still won't be allowed to discuss this case. And while the trial court imposed the gag order in reaction to S.S.'s press conference, the order goes far beyond press conferences to ban *all* forms of communication. The gag order prohibits much more speech than is necessary.

Because the correct outcome of this case seems so clear, the case is appropriate for summary reversal. The Court should vacate the gag order.

Alternatively, the Court could reverse summarily just on the standard of review, with a remand to let the lower courts apply strict scrutiny in the first instance. Whether gag orders are subject to strict scrutiny is a more important question than whether this particular gag order can satisfy strict scrutiny. To resolve the conflict created by the decision below, it would be enough to answer the former question and leave the latter to the lower courts.

CONCLUSION

The certiorari petition should be granted and the judgment below should be summarily reversed.

Respectfully submitted,

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