No. _____

In the

Supreme Court of the United States

TRANSPERFECT GLOBAL, INC.,
and PHILLIP R. SHAWE,

Petitioners,

v.

ROBERT PINCUS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

PETITION FOR WRIT OF CERTIORARI

MARTIN PAUL RUSSO
Counsel of Record
RUSSO PLLC
350 Fifth Avenue
Suite 7230
New York, NY 10118
(914) 557-4737
martin@russopllc.com
Counsel for Petitioners

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QUESTION PRESENTED

This case involves the First Amendment freedom to petition, the demands of due process, and courts' contempt powers. Petitioner TransPerfect Global, Inc. ("TPG") was one member of protracted, complex corporate litigation in Delaware. Eventually, TPG, by then a Nevada corporation, filed a lawsuit in Nevada alleging a breach of fiduciary duty by Robert Pincus, whom Delaware had appointed as a director of TPG and as custodian of a judicially enforced sale of half of TPG's shares, and seeking a declaratory judgment on TPG's rights and responsibilities vis-à-vis Pincus. Pincus responded by seeking to hold TPG and its co-founder and owner, petitioner Robert Shawe, in contempt. The Delaware Court of Chancery, relying on several different provisions of different orders whose relationship to one another was not self-evident, held both TPG and Shawe in contempt for TPG's filing of the lawsuit in Nevada. The Delaware Supreme Court reversed the part of the decision holding Shawe in contempt (as he was not a party to the Nevada action), but affirmed the rest of the contempt order against TPG, including the sanctions imposed as a result of having filed a lawsuit in Nevada seeking a judicial declaration of rights.

The question presented is:

Whether holding TPG in contempt because it filed a lawsuit in Nevada unconstitutionally burdened TPG's First Amendment right to petition.

PARTIES TO THE PROCEEDING

Petitioners TransPerfect Global, Inc. ("TPG") and Phillip R. Shawe were appellants in the proceedings before the Delaware Supreme Court and respondents in the proceedings before the Delaware Chancery Court. TPG is an industry-leading translation provider, with offices and employees around the world. Shawe is the co-founder, majority owner, and CEO of TPG.

Respondent Robert Pincus was the court-appointed custodian of a judicially enforced sale of the shares of Elizabeth Elting, TPG's other co-founder. Pincus was also a court-appointed third director of TPG.

CORPORATE DISCLOSURE STATEMENT

TransPerfect Global, Inc. ("TPG") states that it is a corporation whose shares are privately held. TPG is a wholly owned subsidiary of TransPerfect Holdings, LLC.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

TransPerfect Global, Inc. v. Pincus, consolidated appeal involving No. 154, 2021; No. 167, 2021; No. 175, 2021 (Delaware Supreme Court) (judgment entered June 1, 2022, reargument denied June 21, 2022).

In re TransPerfect Global, Inc., C.A. No. 9700-CB, C.A. No. 10449-CB (judgment entered April 30, 2021).

In re TransPerfect Global, Inc., C.A. No. 9700-CB, C.A. No. 10449-CB (judgment entered April 14, 2021).

In re TransPerfect Global, Inc., C.A. No. 9700-CB, C.A. No. 10449-CB (judgment entered October 17, 2019).

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PETITION FOR WRIT OF CERTIORARI

This is a case about courts' contempt power, the right to petition, and due process. "This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). That First Amendment freedom, no less than any other, is sacrosanct in the American legal system. Indeed, in some ways, it is the most fundamental of those freedoms, for on it hinges the courts' protection of all others. Accordingly, "this Court has recognized the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018) (internal quotation marks omitted). Accordingly, while "baseless litigation is not immunized by the First Amendment right to petition," *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983), a broad swath of litigation conduct is. This Court's decisions thus make clear beyond all doubt that non-frivolous litigation efforts are protected by the Petition Clause.

Here, however, petitioner TransPerfect Global, Inc. ("TPG") was held in contempt and ultimately punished with more than a million dollars in fees and expenses for attempting to exercise that fundamental freedom, all because the Delaware Court of Chancery considered the filing of a lawsuit in Nevada to be an affront to its orders and contemptuous conduct. Worse still, the Court of Chancery did so on the basis of an order featuring irreducibly indeterminate language in an exclusive-jurisdiction provision, even though the

order also referenced other agreements with dissimilar jurisdictional provisions. That order hardly gave TPG fair notice that its conduct would be considered unlawful. In punishing TPG for its purported violation of that order, the court ran afoul of this Court's fundamental teachings about the scope of the contempt power. "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *Int'l Longshoremen's Ass'n, Loc. 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). And, not only did the court exceed the bounds of its contempt powers by sanctioning petitioners for protected petitioning (litigation), it did so on the basis of orders not nearly clear enough to satisfy the standards this Court has set for fair notice in the context of contempt. *See, e.g.*, *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) ("Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive *explicit notice of precisely what conduct is outlawed*." (emphasis added)). The court's order here simply did not provide the kind of "explicit notice of precisely what conduct is outlawed" that basic fairness and the Due Process Clause demand. That punishment was imposed nevertheless, and that the Delaware Supreme Court affirmed that decision, shows the scope of the threat posed to the right to petition by the decisions below.

In addition to the constitutional values under threat thanks to those precedents, the fact that it has now set precedent for all of Delaware heightens the importance of this case. "Delaware has been described aptly as 'by far the most important corporate jurisdiction[.]'" *Northstar Fin. Advisors Inc. v.*

Schwab Invs., 779 F.3d 1036, 1059 (9th Cir. 2015), *as amended on denial of reh'g and reh'g en banc* (Apr. 28, 2015) (quoting Melvin Aron Eisenberg & James D. Cox, *Corporations and Other Business Organizations* 1031 (10th ed. 2011)). That is true not simply because of what goes on in Delaware courts, but also because of Delaware's impact on the wider body of corporate law across the country. As courts have routinely observed, "[t]he courts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law." *Mullen v. Acad. Life Ins. Co.*, 705 F.2d 971, 974 n.3 (8th Cir. 1983). On its own terms, precedent from Delaware in this long-running and highly complex corporate litigation that blesses the use of the contempt power to punish TPG for engaging in protected petitioning activity is bad enough. It is made all the worse because it threatens to warp complex corporate litigation far beyond Delaware.

To prevent that outcome, protect the First Amendment right to petition, and promote due process of law, the Court should grant the petition for certiorari and reverse the judgment below.

OPINIONS BELOW

The opinion of the Delaware Supreme Court is reported at 278 A.3d 630 and reproduced at App.1-55.

The opinion of the Delaware Court of Chancery is unreported but is available at 2021 WL 1711797 and reproduced at App.57-194.

JURISDICTION

The Supreme Court of the State of Delaware rendered its decision on June 1, 2022, App.1, and denied petitioners' motion for re-argument on June 21,

2022, App.56. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Factual Background

In 1992, Phillip R. Shawe co-created TPG, a provider of translation, litigation support, and website localization services. From a dorm-room startup, TPG grew over the ensuing two decades into a highly successful, global enterprise. With Shawe and his co-founder Elizabeth Elting at the helm, TPG became an

industry leader with officers in dozens of countries, thousands of employees, and revenues in the hundreds of millions of dollars. *See generally In re Shawe & Elting LLC*, 2015 WL 4874733, at *3-4 (Del. Ch. Aug. 13, 2015).

In 2014, amid business disagreements between Shawe and Elting (who were once engaged and then estranged), litigation ensued. *Id.* at *18. As relevant here, Elting filed a petition with the Delaware Court of Chancery asking that court to appoint a custodian to sell TPG. *Id.* The underlying claim was one of imminent irreparable harm to the company stemming from alleged deadlock between the co-founders, who controlled TPG evenly. Elting controlled 50 percent of TPG's shares, while Shawe held 49 percent and had the support of his mother, who controlled the remaining one percent of the company's shares. *Id.* at *18, *30.

Ultimately, the Court of Chancery appointed Robert Pincus—the respondent here—to serve as custodian of TPG and oversee the sale of the company. *Id.* at *32. The court also named Pincus as the third director of TPG, along with Elting and Shawe. *Id.* In particular, the Court of Chancery instructed that Pincus was to "serve as a third director with the authority to vote on any matters on which Shawe and Elting cannot agree and which rise to the level that he deems to be significant to managing the Company's business and affairs." *Id.*

As relevant to Pincus's role as a custodian, the Court of Chancery provided for indemnification for Pincus when acting in that capacity in a 2015 order. In particular, the court's order provided indemnity for

"fees and expenses incurred by the Custodian and Skadden in defending in any . . . claim, action, suit or proceeding reasonably related to the Custodian's responsibilities [under that order]." Del.App.00751.[1] In that order, the court also "reserve[d] jurisdiction to consider any applications that the Custodian may make for the Court's assistance in addressing any problems encountered by the Custodian in performing his duties hereunder." Del.App.00751-00752.

Recognizing that his role as a director of TPG involved distinct duties, Pincus also required TPG to provide him with indemnification rights for actions taken in that role. Accordingly, his counsel, Skadden, Arps, Slate, Meagher & Flom, LLP ("Skadden"), drafted a Director Indemnification Agreement ("DIA") which detailed Pincus's indemnification rights and his obligations as a director of TPG. Del.App.00753-00764. In addition to the substantive portions of the DIA, the agreement included a clause entitled, "Non-Exclusive Forum; Consent to Jurisdiction." That non-exclusive forum clause provided that "any action arising out of or in connection with this Agreement, *may* be brought in the Delaware Court of Chancery." Del.App.00761-00762 (emphasis added). Other provisions within the DIA recognized that TPG had the option of commencing actions disputing claimed indemnification in any court of competent jurisdiction. *See, e.g.*, Del.App.00753-00764 at §§ 4B, 4C, 5, 8, 10A, 14J, 14N. All parties signed the DIA. *Id.*

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[1] Citations to the "Del.App." refer to the appendix filed with the Supreme Court of Delaware.

In 2016, the Court of Chancery approved a plan proposed by Pincus that entailed a "modified auction" of TPG. Del.App.00766-00771. The gist of the modified auction was that TPG's co-founders could each solicit third-party investors to join as business partners in an acquisition of TPG, while Pincus would solicit potential buyers who were interested in TPG but not necessarily in partnering with existing stockholders (*i.e.*, TPG's co-founders). Del.App.00767.

The ensuing judicially forced and enforced sale of the company resulted in an arduous and expensive process, all supervised by Pincus. Eventually, an entity owned by Shawe—PRS Capital, LLC—won a court-ordered auction for Elting's fifty-percent stake in TPG. Accordingly, Skadden drafted the Securities Purchase Agreement ("SPA"). Del.App.00772-00918. In essence, Shawe agreed to pay $385 million for Elting's shares. Del.App.00785. The SPA also included a provision pursuant to which $5 million from the purchase price was set aside in the "Custodian Escrow Account." DelpApp.00789. That account provided a "non-exclusive source of funds" that could be used to pay Pincus and his advisors' "fees and expenses for services performed prior to or after the Closing." *Id.*

The Court of Chancery entered an order finally approving the SPA on February 15, 2018 ("the Final Order"). Del.App.00919-00936. As relevant here, the Final Order included two provisions limiting and restricting future litigation by Elting, Shawe, Shawe's mother, and their various agents, assigns, representatives, and the like. *See* Del.App.00930-

00932. By its terms, those provisions did not refer to or name TPG. *See id.*

Furthermore, the Final Order addressed indemnification for Pincus in his role as Custodian, providing that TPG would pay his fees and expenses "in defending or prosecuting" any claim reasonably related to the "Custodian's responsibilities" under the above-discussed Sale Order or the Final Order itself. Del.App.00933-00934. Importantly here, the Final Order's discussion of indemnification specifically referred to and incorporated the DIA, stating that "the indemnification obligations of the Company set forth in" various agreements, including the "Director Indemnification Agreement" remained "valid and binding." Del.App.00933-00934.

Lastly, the Final Order addressed the court's jurisdiction going forward:

> Without impacting the finality of this Order and judgment, the Court retains continuing and exclusive jurisdiction over the parties to the Actions for all matters relating to the Actions, including the administration, interpretation, effectuation or enforcement of the Sale Agreement and the Related Agreements, and all orders of the Court in Civil Action Nos. 9700–CB and 10449–CB, and further retains and reserves continuing jurisdiction to consider any applications that the Custodian may make for the Court's assistance in addressing any problems encountered by the Custodian in performing his duties under any order of the Court.

Del.App.00936.

B. Procedural Background

Despite its name, the Final Order did not bring all litigation to a close. As relevant here, a company that had unsuccessfully attempted to partner with Shawe to purchase Elting's shares eventually sued Shawe in New York state court for fees it alleged he owed them; and after the matter was referred to arbitration, the same company subpoenaed Pincus for documents. *See generally* Del.App.02871-02875. Additionally, after learning that a participant in the auction process and the owner of TPG's largest competitor (Lionbridge Technologies, Inc.) had been able to access sensitive information from TPG even after the auction process concluded, TPG filed suit against Lionbridge and its owner. *See TransPerfect Glob., Inc. v. Lionbridge Techs., Inc.*, 2020 WL 1322872, at *1-4 (S.D.N.Y. Mar. 20, 2020) (describing background to litigation). Pincus and his advisors were also subpoenaed in that matter.

Up to around mid-2019, Pincus had requested and received fees from the escrow account created by the SPA and funded evenly by Shawe and Elting. At that time, however, and in relation to the arbitration and litigation described above, Pincus sought $62,203.85 in fees directly from nominal-party TPG, rather than from the escrow account. The Court of Chancery entered orders approving these fee requests (the "2019 Fee Orders"). *See* Del.App.01109 (June 28, 2019, order); Del.App.01117 (July 17, 2019, order).

Shortly thereafter, TPG—by then a Nevada corporation—filed suit against Pincus in Nevada state court. In its complaint, TPG alleged that Pincus had breached his fiduciary duties as a director of TPG, and it sought declaratory relief to make clear that TPG had

no duty to pay fees such as those Pincus sought from it in connection with the arbitration and litigation just described. *See generally* Del.App.01119-01129. The complaint alleged that, as a director and then as a former director of TPG, Pincus had a duty to deal honestly and openly with TPG, and that he breached that duty by seeking from TPG—in a sealed proceeding *and without giving notice to the company*—tens of thousands of dollars in fees for "his own time as a non-custodian witness" in ancillary proceedings. Del.App.01127. TPG also sought a declaratory judgment making clear that it had no duty to indemnify Pincus for such expenses. Del.App.01128. The complaint named TPG as a plaintiff, but not Shawe. Del.App.01119. Instead, the complaint expressly identified Shawe as one of the "Relevant Non-Parties" to the action. Del.App.01120-01121.

Pincus responded to the Nevada lawsuit by moving the Court of Chancery to find TPG and Shawe in contempt and to impose a range of sanctions against them. *See generally* Del.App.01319-01516. Pincus asserted, in relevant part, that by filing the Nevada action, TPG and Shawe had violated the Final Order's jurisdictional provision and violated the 2019 Fee Orders. *See* Del.App.01319-01320. On the jurisdictional argument, Pincus's theory was as follows: The Final Order provides that the Court of Chancery "retains continuing and exclusive jurisdiction over the parties to the Actions for all matters relating to the Actions, including the administration, interpretation, effectuation or enforcement of the Sale Agreement . . . and all orders of the Court"; the Nevada lawsuit "relat[ed] to" the underlying Delaware court proceedings; TPG and

Shawe were thus both in breach of the Final Order. Del.App.01323.

While that motion was pending, TPG—and again, *not Shawe*—filed a first amended complaint in the Nevada action. Del.App.01517-01665. That complaint included a claim against Pincus for having breached the DIA. Del.App.01530. In particular, the amended complaint alleged that Pincus had breached the DIA by seeking indemnification for personal time spent as a potential non-party witness when such costs were not within the scope of the indemnifiable expenses defined and limited by the DIA. Del.App.01530.

On October 17, 2019, the Court of Chancery issued an opinion and order granting in part Pincus's motion for contempt and imposing sanctions on both TPG and Shawe. *See* Del.App.02415-02416 (the "Contempt Order"); 02417-02453 (accompanying memorandum opinion). While it deferred ruling on the fee issue, the Court of Chancery concluded that the filing of the Nevada lawsuit put the interpretation of its orders at issue and did so in violation of the Final Order's jurisdictional provision. Del.App.02440-02443. The Court found both Shawe and TPG in contempt, and, *inter alia*, granted Pincus and his counsel all fees incurred in relation to the Nevada action and contempt motion, set a civil fine of $30,000 *per day* that would kick in on October 21, 2019, unless the Nevada action was dismissed, and imposed an anti-suit injunction that covered the Nevada action. Del.App.02451-02453; Del.App.02146.

Given the per-diem fines set to start accruing after October 21, 2019, TPG voluntarily dismissed the

Nevada lawsuit on that day. Del.App.02567-02570. The same day, the Court of Chancery addressed on the record Pincus's allegations that the 2019 Fee Orders had been violated. The Court denied the contempt motion with respect to those orders and noted that it was "sympathetic" to some of the practical concerns that had been raised by TPG in its opposition papers. Del.App.02506-02509. It also recognized that its second order required modification of the initial contempt order, and thus changed that first order's effect such that the contempt fees awarded would cover just those expenses and fees incurred in relation to the Final Order. Del.App.02513. A subsequent order to the same effect also implemented a modified fee-petition process. Del.App.02630-02647.

Eventually, the Court of Chancery issued an opinion totaling more than 130 pages in which it discussed the contempt order and award as well as certain fee-related issues. As relevant here, the court reiterated that the filing of the Nevada action violated its Final Order's provision concerning the court's jurisdiction. *See* App.86-90. And it explained how its subsequent rulings and order had modified the sanction against Shawe and TPG such that they were required to pay all fees and expenses related to the Nevada action and Pincus's prosecution of contempt proceedings in the Court of Chancery "insofar as such prosecution concerns TPG's and Shawe's contempt of the Final Order." App.92. On that front, the Court of Chancery addressed Pincus's request for over $1 million as a contempt fee award, and, ultimately, granted Pincus $1,148,291 for that purpose. *See* App.162 n.386.

Petitioners appealed to the Delaware Supreme Court, challenging, among other things, the contempt finding and award. The Delaware Supreme Court affirmed in part, but it reversed and vacated the portion of the contempt order and related sanction as applied to Shaw, for the simple reason that he *was not a party to the Nevada lawsuit*. App.33-34, 53. Indeed, despite the significant sanctions inposed on Shawe, the Delaware Supreme Court emphasized that the court below had "never identified a specific action taken by Shawe that personally violated the Final Order." App.29. Vacatur and reversal were therefore necessary, the court ruled, because of the requirement that "the party to be sanctioned must be bound by the order, have clear notice of it, and nevertheless violate it in a meaningful way." App.34.

Yet the Delaware Supreme Court nonetheless affirmed the remainder of the Contempt Order as relevant to TPG. In relevant part, the court concluded that the Final Order's jurisdictional provision was sufficiently clear that contempt and the sanctions that flowed from it were an appropriate response to the Nevada lawsuit. App.24-28. In so doing, the court did not give meaningful attention to the fact that the conduct that precipitated the contempt sanctions was constitutionally protected petitioning activity. And although it cited and relied on the portion of TPG's brief in which the company explained that, before filing the Nevada action, "[a]t least a half a dozen lawyers researched and advised on the issues, read the different orders, and determined that there was nothing inherently sanctionable about filing the Nevada Action," it incredibly held that fact *against* TPG. App.25 n.108. The Delaware Supreme Court

also discounted TPG's amended complaint and its additional allegations concerning the DIA, and instead focused primarily on the initial complaint. App.26-27.

As a result, the Delaware Supreme Court affirmed the contempt finding and sanctions as applied to TPG. App.55.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to protect the First Amendment right to petition and ensure that litigants are not held in contempt for exercising it when both the First Amendment and the Due Process Clause shield their conduct. The decisions below unconstitutionally burdened TPG's exercise of its right to petition and, if left standing, will doubtless chill others in their exercise of the same right. Especially given Delaware courts' unique and central place in American corporate law, its mishandling of the "deadly" contempt power in this complex, long-running litigation threatens to metastasize. This Court should not tolerate those results.

First and foremost, the Court should grant review to protect the constitutional right to petition. The First Amendment holds a special place in the American constitutional order, and among its cherished freedoms, the right to petition is in some ways the most fundamental; without its guarantee of access to the courts, the other First Amendment freedoms may prove to be paper promises only. That is part of why this Court has praised "this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524 (2002) (quoting *United*

Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967)).

TPG exercised that right here in filing its Nevada action, and for doing so, it was found in contempt and ordered to pay more than a million dollars in sanctions. That result cannot be squared with the Constitution or with this Court's precedents enforcing its guarantees. Because "filing a complaint in court is a form of petitioning activity," *McDonald v. Smith*, 472 U.S. 479, 484 (1985), and because TPG's Nevada lawsuit was not remotely akin to the sort of "baseless litigation" that falls outside the Petition Clause's broad protections, *Bill Johnson's Restaurants*, 461 U.S. at 743, the contempt finding and sanctions here ran afoul of the First Amendment, and cannot stand.

The harm done to TPG is made all the more apparent when one considers the complexity of the circumstances giving rise to the contempt finding. In considering the scope of the Final Order and its interaction with various agreements between and among the parties, and after consulting with counsel, TPG reached the conclusion that filing suit in Nevada was a legitimate option—and, indeed, that filing suit in its new state of incorporation was the only way to get out from under the thumb of the Delaware courts, which had forced Shawe to buy his own company at an inflated value and work with an external director unconnected to the business. Even assuming that conclusion was mistaken, a misunderstanding about the meaning of an order with indeterminate language and its relationship to an agreement between the parties that expressly contemplates suits in other jurisdictions should not give rise to contempt,

especially when the conduct underlying the contempt order is, as here, protected petitioning activity. The contempt power, when founded on a "vague" order, can be a "deadly" one. *Int'l Longshoremen's Ass'n, Loc. 1291*, 389 U.S. at 76. So it was here. And because "basic fairness" requires a party subject to a court's contempt power to have fair notice "of precisely what conduct is outlawed," *Schmidt*, 414 U.S. at 476, TPG's conduct should have been protected by the Due Process Clause too. This Court should grant the petition to provide the protection that the Constitution guarantees but the Delaware courts failed to recognize at every turn.

Compounding the harm done to petitioner's First Amendment right is the obvious and palpable chilling effect the decisions below will have going forward. There can be no doubt that the Delaware court's imposition of contempt in this litigation will inevitably chill others' exercise of their right to petition. As this Court has explained, the "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). And in light of the sanctions imposed in this case, any rational litigant in Delaware courts will think twice before exercising the right to petition (at least when it comes to going outside Delaware) when there is any possibility that a Delaware court might conclude that such petitioning activity is without constitutional protection. "First Amendment freedoms need breathing space to survive," *id.*, but the approach taken here puts the right to petition in a chokehold. That is not a tenable state of affairs.

Additionally, the Court should grant plenary review in this case because this is an exceptionally important case implicating one of the most fundamental freedoms protected by the Constitution. "The right of access to the courts is indeed but one aspect of the right of petition," *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), but it is a most crucial one—because without it, the other aspects of that right (and all others) will be without the protection of the courts. *Cf.* Federalist No. 78 (recognizing that without independent courts to guard constitutional rights, "all the reservations of particular rights or privileges would amount to nothing."). Likewise, the basic ideals of due process—particularly the values of fair warning for citizens and the prevention of arbitrary enforcement by government officials and those cloaked with government power—are threatened by the decisions of the courts below to sanction TPG for its litigation in Nevada state court based on a vague, imprecise order. This case thus implicates fundamental freedoms that should concern any and all litigants.

That is especially so because the decision below now sets precedent for courts in Delaware, and by and through them, may well become a model for courts across the country. Of course, these precedents would be bad enough were they simply contained to Delaware courts, as a disproportionate share of high-stakes corporate litigation takes place in Delaware, but an even greater portion of complex commercial litigation is shaped by and with reference to Delaware's jurisprudence. Having seen the contempt power wielded as it has been in this case, absent this court's intervention it is no hyperbole to say that

Delaware courts will consider themselves free to similarly impinge on the right to petition—and other courts may well too. Litigants in Delaware and beyond would be foolish to not consider whether they too might be subject to contempt based on a simple mistake or confusion about the scope of some order.

The decisions challenged here and their chilling effect on protected petitioning activity are antithetical to the First Amendment, and provide another reason to grant the petition.

I. The First Amendment's Petition Clause Protected Petitioner's Litigation Conduct In Nevada, And The Delaware Court's Contempt Order Fell Well Short Of Constitutional Standards.

The Delaware courts' decisions in this case impinged on petitioners' constitutionally protected right to petition. That right is an ancient and precious one, and though "baseless litigation" is not a protected form of petitioning, *Bill Johnson's Restaurants*, 461 U.S. at 743, valid litigation efforts like the Nevada suit here fall well within the First Amendment's protective embrace. Moreover, when an individual is subject to the court's awesome power of contempt, that individual must be forewarned of precisely what conduct is off-limits and out-of-bounds. By holding TPG in contempt, the Court of Chancery undercut both the First and Fourteenth Amendment's promises; this Court should grant certiorari to protect the same.

A. The Constitution Protects TPG's Litigation Conduct In Nevada.

The First Amendment protects the right to petition the government for redress of wrongs,

including by filing a complaint in court. That freedom is fundamental to our system: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907). Furthermore, due process and basic principles of fairness require a court to spell out precisely what conduct may be punished on pain of contempt. The decisions of the Delaware courts cannot be reconciled with either of those constitutional provisions, and they will inevitably chill protected petitioning activity. Each of those provides a reason to grant the petition and reverse, and collectively, they require it.

1. The Contempt Order and Award Unconstitutionally Burdened Petitioning Activity Protected by the Petition Clause.

The First Amendment's Petition Clause protects an ancient right. In the Anglo-American legal order, the right to petition dates to at least 1215 and the Magna Carta, with some arguing that the Great Charter itself was a response to the barons' petition of the king. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 596 & n.135 (1999). Over time, the nature of that right grew to include not merely petitions to the king, nor petitions solely concerned with grievances against the government, such that by the fourteenth century, petitions might address general concerns—and thus result in something like legislation—or particular

individual's problems, and thus lead to judicial relief. By 1689, the right to petition was so deeply ingrained and highly valued that it became one of a few individual rights protected by the English Bill of Rights. *Id.* at 597-600.

The Framers were well aware of this history. "By 1789, the right to petition had long been seen as a cornerstone of Anglo-American jurisprudence . . . ." James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 901 (1997). And, notably, though James Madison's initial draft had limited the right to petition to the ability to petition the legislature, that limitation was removed from the text that was proposed and ratified by the people. That change suggests that the right to petition protected the right to petition courts as well as the executive and the legislative branches. Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment*, *supra*, at 611-22.

Following the Framers' design, decisions from this Court have made clear beyond all doubt that this right extends to the right to file lawsuits and is incorporated against the states. In *United Mine Workers of America*, for instance, this Court has explained that "[t]he freedoms protected against federal encroachment by the First Amendment are entitled under the Fourteenth Amendment to the same protection from infringement by the States." 389 U.S. at 222 n.4. The same decision also held that "the freedom of speech, assembly, *and petition* guaranteed by the First and Fourteenth Amendments gives

petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221-22 (emphasis added; footnote omitted)). And this Court's decisions more broadly have made clear that the right to petition includes the right to "to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea*, 564 U.S. at 387 (collecting cases); *see also Cal. Motor Transp. Co.*, 404 U.S. at 510 ("The right of access to the courts is indeed . . . one aspect of the right of petition.").

The right also reaches a broad swath of litigation conduct. To be sure, "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants*, 461 U.S. at 743. But all other litigation conduct—which is to say all but the most frivolous lawsuits and filings—is fully protected. *See, e.g.*, *McDonald*, 472 U.S. at 484 (explaining that right to petition generally includes "filing a complaint in court"). As all those cases make clear, the First Amendment protects the right to petition by filing a lawsuit, so long as that litigation is not "baseless."

TPG exercised that right here by filing suit in Nevada, and the contempt finding and sanctions unconstitutionally burden that right. In concluding that TPG's lawsuit in Nevada was so far beyond the pale as to be contemptible, the courts below gave short shrift to the protections granted by the Constitution to petitioning activity.

First, the Delaware courts ignored the confusion and varied readings that might result from the indeterminate language used in the Final Order. In particular, the Delaware Supreme Court placed great

weight on the Final Order's use of the phrase "related to" in its jurisdictional provision, concluding that that language supported a determination that the Nevada suit was sufficiently "related to" to those actions before the Court of Chancery as to bring it within the Final Order's exclusive-jurisdiction provision. App.25-26. But that phrase is not so clear in context—and nowhere near clear enough to support contempt for core petitioning activity.

In cases of statutory interpretation, this Court has recognized that materially identical language can be unclear and create confusion. *See, e.g.*, *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If "relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." (internal quotation marks and brackets omitted)); *see also California Div. of Lab. Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else"). So while hardly anyone would deny that the phrase "related to" is a broad one, "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013). Because that kind of language is irreducibly indeterminate, it inevitably raised questions about the degree of relatedness between the claims in the Nevada action and the actions before the Delaware Court of Chancery. Put simply, a litigant should not be

required to guess at the appropriate degree of relatedness before being subject to contempt. And the fact that TPG arrived at a different conclusion about how closely "related" an action must be to implicate the Final Order—even after consulting a half-dozen lawyers—only shows that the order in question did not provide the kind of clarity needed for a contempt order or sanctions for constitutionally protected activity.

That is especially true given the context here, which necessarily informs the overall understanding of the Final Order's language. Importantly, the Final Order made clear that TPG retained indemnification obligations under the DIA. Del.App.00934. And the DIA, as detailed above, included a clause entitled, "Non-Exclusive Forum; Consent to Jurisdiction," which provided that "any action arising out of or in connection with this Agreement, *may* be brought in the Delaware Court of Chancery." Del.App.00761-00762 (emphasis added). Elsewhere, the DIA also recognizes that TPG could commence actions disputing claimed indemnification in any court of competent jurisdiction. *See, e.g.*, Del.App.00753-00764 at §§ 4B, 4C, 5, 8, 10A, 14J, 14N. And TPG's amended complaint made pellucidly clear that the DIA's language—in particular, its non-exclusive jurisdictional provision—impacted its understandings of its litigation options. *See, e.g.*, Del.App.01527-31. As the Final Order referenced the DIA and made clear that TPG's responsibilities under that agreement continued, the notion that it also maintained rights pursuant to the DIA was not an unreasonable one.

The courts below denied the relevance of the DIA in part by collapsing Pincus's distinct roles as

custodian and a TPG director. The Court of Chancery, for instance, stated that "Pincus' service as a tie-breaking director on the Company's board . . . was one of the purposes for which he was appointed as the Custodian," and thus assumed that even when his work "relates to his role as a former TransPerfect Director[,] . . . that role would fall within the scope of his rights to indemnification as the Custodian[.]" Del.App.02444. The Delaware Supreme Court also concluded that the Nevada action was really about Pincus's work as a Custodian because "Pincus would not have petitioned for these fees had the court not named him Custodian." App.26. But that ignores the very reason for the DIA's existence in the first place—the recognition that the roles of custodian and director were distinct, and that indemnification for the one would not always and everywhere be subsumed within the other.

The Delaware Supreme Court also diminished the relevance of the DIA by largely ignoring the amended complaint. That was in contravention of the well-established "general rule" that "when a plaintiff files an amended complaint, the amended complaint supersedes the original, the latter being treated thereafter as non-existent." *Ramirez v. Collier*, 142 S. Ct. 1264, 1276 (2022) (quoting *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010)). The Delaware Supreme Court offered no reason from departing from that general rule here, and its conclusory dismissal of the relevance of the DIA in a footnote, *see* App.27 n.116, is a terribly thin reed on which to hang contempt.

What is more, the Final Order and the DIA's jurisdictional provisions were not the only ones in play here. The Final Order also expressly approved of the SPA, Del.App.00919, which contained its own indemnification provision and jurisdictional clause, *see* Del.App.00831-00832 (indemnification); Del.App.00845-00846 (jurisdictional provision). That jurisdictional clause, in turn, expressly contemplated the possibility that litigation might arise in which the Court of Chancery lacked subject matter jurisdiction because, *e.g.*, it was filed elsewhere. Del.App.00845. Because the Final Order approved of and incorporated by reference another agreement that reserved the possibility of litigation in other fora added to the complexity of the situation faced by TPG and militates against finding that the Final Order provided the clear notice of proscribed conduct necessary for contempt.

In sum, TPG engaged in protected petitioning activity and was punished for it on the basis of an irreducibly indeterminate provision in one order that existed in a complex web of interrelated agreements and orders. Especially in light of the indeterminate language of the Final Order and its express incorporation of the DIA, the filing of the Nevada action should not have been treated like unprotected "baseless litigation," and in no case should it have resulted in a million-dollar contempt award.

2. The Fourteenth Amendment's Due Process Clause Demands Fair Notice in Cases of Contempt, and that was Lacking Here.

When a court "prohibits conduct under threat of judicial punishment, basic fairness requires that those

enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). That is because punishing a person for conduct not clearly prescribed is antithetical to the rule of law. For that reason, "[i]n our constitutional order, a vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). And that principle holds fast, and applies in full, in the context of contempt. *See Int'l Longshoremen's Ass'n*, 389 U.S. at 76; *see also Matter of Grand Jury Proc. Empanelled May 1988*, 894 F.2d 881, 886 (7th Cir. 1989) ("Certainly the due process clause is applicable to civil contempt.").

TPG should have received that protection here. That it did not underscores the errors in the result and reasoning in the courts below.

In holding TPG in contempt and in affirming that decision, respectively, the courts below ignored the indeterminacy of the "related to" language in the Final Order; ignored the complexity created by the Final Order's incorporation of other agreements with other jurisdictional provisions, particularly in the DIA; discounted the importance of TPG's amended complaint; and collapsed the distinction between Pincus's role as custodian and his role as a director—the very distinction that gave rise to the DIA in the first place. For TPG to have anticipated each of those choices demands extraordinary foresight. But the Due Process Clause does not allow courts to make litigants play such guessing games on pain of contempt. Instead, parties subject to a court's contempt power must "receive explicit notice of *precisely* what conduct is outlawed." *Schmidt*, 414 U.S. at 476 (emphasis

added); *cf. Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (explaining that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"). The order here fell well short of that standard.

That standard exists with good reason. To start, "contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct." *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885). Where an underlying order is unduly complex or vague, as this one was, that remedy is inappropriate. And, as with any vague legal imposition, a vague court order backed by contempt creates both problems of fair notice for those governed and problems of "arbitrary and discriminatory application" by those governing. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Thus, explicit notice of the conduct prohibited by an order protects litigants and prevents judicial overreach.

For both those reasons, the Due Process Clause demands more notice than TPG was given here. At the very least, any party punished with contempt and hit with a million-dollar-plus contempt fee award must be given notice of precisely what conduct is proscribed.

3. The Lower Court's Contempt Order Will Chill Others' Exercise of Their First Amendment Freedom.

The harm done by the decisions below is only compounded by the chilling effect they are sure to

have on a First Amendment freedom. This Court has previously recognized the chilling effect that litigation restrictions can have on protected petitioning activity. *See, e.g., BE & K Const. Co.*, 536 U.S. at 528-29 (acknowledging party's argument that "broad immunity is justified in the antitrust context because it properly balances the risk of anticompetitive lawsuits against the chilling effect on First Amendment petitioning that might be caused by" features of antitrust law (internal quotation marks omitted)). And it has made clear beyond debate that First Amendment freedoms need breathing room.

But the decisions below deny the right to petition exactly that sort of breathing room and will inevitably chill others' protected petitioning activity. What is more, the vague nature of the order underlying the contempt finding compounds that problem. "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (cleaned up). What is true of statutes that abut First Amendment freedoms is likewise true of similarly situated court orders—they must clearly mark the line between lawful First Amendment activity and unlawful conduct, or citizens will inevitably "steer far wider of the unlawful zone" than they would otherwise. Unfortunately, that did not happen here.

In this case, the message sent to parties litigating in Delaware is a chilling one. And they can take little comfort in the opinion of counsel, given that a half-

dozen lawyers advised TPG before its filing of the Nevada action and none saw the problems so readily apparent to the Delaware courts. As such, the imposition of a million-dollar contempt award on these facts will doubtless discourage others from engaging in their own protected petitioning activity.

II. The Particular Constitutional Freedoms Implicated, Combined With Delaware's Unique Place In American Law, Make This An Exceptionally Important Case.

This is an exceptionally important case that merits this Court's review, two primary reasons. First, the right to petition is a fundamental freedom, and allowing courts to impermissibly burden that freedom with sanctions based on a vague order will, for the reasons outlined above, chill others in their exercise of these rights. Second, Delaware occupies a unique position within the American legal system, as the home of a great many corporations (and, as a result, the forum for a great deal of complex commercial litigation). Thus the precedent set by these decisions—which would be dangerous in any state—poses a greater threat to the freedom of litigants to fully and fairly exercise their right to petition free of the fear of sanctions for conduct that is constitutionally protected.

To start, the importance of the right in question clearly weighs in favor of granting the petition. The right to petition, in all its aspects, has formed a "cornerstone" of the Anglo-American legal tradition from which it stems for centuries. *See* Pfander, *supra*, at 901. The Founders and Framers knew how important that right was and protected it in the First

Amendment. And this Court's cases have made clear that the right remains a vital one today. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018) ("[I]t must be underscored that this Court has recognized the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights.") (internal quotation marks omitted)). Given that the right to petition, including filing lawsuits, is protected activity and ranks "high in the hierarchy of First Amendment values," *id.* at 1955, it cries out for this Court's protection.

That this case implicates the right to due process heightens its importance. This Court has often paid tribute to "the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 121 (1991). In accord with that principle, parties subject to contempt must be given fair notice of what conduct is prescribed by whatever order(s) they may be sanctioned under. And, because *ex ante* clarity in the demands of the law also acts as a constraint on those who enforce the law, that same requirement provides an important restraint on the arbitrary enforcement of laws.

Both those concerns are doubtlessly implicated as much by judicial orders giving rise to contempt as they are by legislation. After all, as this Court has explained, contempt is always "a potent weapon," and if "it is founded upon a decree too vague to be understood, it can be a deadly one." *Int'l Longshoremen's Ass'n*, 389 U.S. at 76. Exactly that sort of problem is at issue here, where the order on which contempt was founded left too much too vague

about the rights and responsibilities TPG had. The affront to the First Amendment right to petition here is thus compounded by the due process problems raised by the Delaware courts' approach.

Likewise, that the Delaware courts have now set (and reaffirmed) a precedent hostile to such vital rights only amplifies the constitutional and practical concerns at play here. The high concentration of large companies that are themselves Delaware corporations provides considerable grist for the mill. *See generally* E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. Pa. L. Rev. 1399, 1403 (2005) ("Nearly sixty percent of the Fortune 500 companies and nearly the same proportion of those listed on the New York Stock Exchange are Delaware corporations."). Many of America's largest companies have Delaware ties. As such, the litigation that takes place in that forum is often of national consequence. *See, e.g.*, Lauren Hirsch, New York Times, *Elon Musk Seems to Answer to No One. Except for a Judge in Delaware*, (Oct. 26, 2022) https://nyti.ms/3NrREOT (profiling a single Delaware judge who was simultaneously handling Twitter and Tesla litigation). Accordingly, in cases on which many major issues of national importance hinge, the parties will be forced to litigate under the specter that some misunderstanding or disagreement about the interpretation of a contractual provision and/or the meaning of a less than pellucid order will lead to them being held in contempt.

Making matters worse, it is unlikely that such harm will be confined to Delaware, as other courts follow Delaware courts' lead on how to handle complex commercial litigation. It is widely recognized that Delaware caselaw plays a significant role in shaping the rest of the country's approach to corporate law and complex commercial litigation. *See, e.g.*, *Tow v. Bulmahn*, 2016 WL 1722246, at *14 (E.D. La. Apr. 29, 2016) ("Delaware occupies a unique position as the Mother Court of corporate law." (internal quotation marks omitted)). State and federal courts throughout the country have recognized Delaware's pervasive influence in matters of corporate law. *See, e.g.*, *In re L. Scott Apparel, Inc.*, 615 B.R. 881, 889 (C.D. Cal. 2020) ("California and many jurisdictions therefore look to Delaware for standards in unsettled areas of corporate law."); *Balsamides v. Protameen Chemicals, Inc.*, 160 N.J. 352, 372, 734 A.2d 721, 732 (1999) ("In analyzing corporate law issues, we find Delaware law to be helpful."); *In re Regions Morgan Keegan Sec., Derivative, ERISA Litig.*, 694 F. Supp. 2d 879, 884 (W.D. Tenn. 2010) (in absence of controlling law from Maryland, court "examine[d] the law of Delaware, a lodestar for corporate law, for guidance on this issue"); *In re Aguilar*, 344 S.W.3d 41, 47 (Tex. App. 2011) ("Courts throughout the country look to Delaware for guidance on matters of corporate law.").

Put simply, what happens in Delaware is unlikely to stay there. Courts in other jurisdictions may well look to the example of the Delaware courts here for guidance in managing complex corporate litigation, a reality which puts others at risk of suffering the same harms TPG has here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

MARTIN PAUL RUSSO
Counsel of Record
RUSSO PLLC
350 Fifth Avenue
Suite 7230
New York, NY 10118
(914) 557-4737
martin@russopllc.com
Counsel for Petitioners

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