No. 24-

IN THE

Supreme Court of the United States

JEANNE TAMAGNY,

Petitioner,

v.

JOHN SCOTT TAMAGNY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the guise of protecting a 17½-year-old child, a New Jersey family court judge placed a blanket prohibition upon petitioner Jeanne Tamagny's ability to speak to *anyone* about her pending divorce action. In so doing, the trial court violated Ms. Tamagny's free speech and parental rights, in conflict with decisions of this Court and multiple federal courts of appeals. The question presented is:

> Whether a court's prior restraint on speech must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication to satisfy the First Amendment.

STATEMENT OF RELATED CASES

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PETITION FOR WRIT OF CERTIORARI

Jeanne Tamagny is the mother of two adult children and one minor (17 ½ year old) child. She is also Defendant in a divorce action. Ms. Tamagny respectfully asks this Court to grant review and hold that the Free Speech Clause of the First Amendment prohibits a court from silencing in advance her speech with third parties about her divorce without considering narrow tailoring or leaving open ample alternatives for communication. Even if there is a compelling governmental interest in prohibiting Ms. Tamagny from speaking to her 17 ½-year-old daughter, the lower courts did not even consider a least-restrictive-means analysis. At a bare minimum, the Court should summarily reverse and remand with instructions for the New Jersey trial court to consider whether an outright speech ban was the least restrictive means of advancing the government's interest.

OPINIONS BELOW

The decision by the New Jersey Superior Court, Family Court, is memorialized in an Order dated June 28, 2024. 4a-6a. *Tamagny v Tamagny*, Docket Number FM-02-220-22. The New Jersey Appellate Court denied leave to appeal. 2a-3a. *Tamagny v Tamagny*, Docket Number AM-000595-23T4, App Div 2024. (No official citation available.) The New Jersey Supreme Court denied leave to appeal on January 17, 2025. 1a *Tamagny v. Tamagny*, 259 N.J. 495, 328 A.3d 433 (2025)

JURISDICTION

Jeanne Tamagny's Motion for Leave was denied by the New Jersey Supreme Court on January 17, 2025. Mrs. Tamagny invokes this Court's jurisdiction under 28 U.S.C. Sect 1257, having timely filed this petition for writ of certiorari within ninety days of the New Jersey Supreme Court's Order.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. I

> 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. XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

STATEMENT OF THE CASE

Jeanne Tamagny has a 17 ½-year-old daughter MT[1] as well as two adult daughters, ages 19 and 21. Ms. Tamagny is also the Defendant in a divorce action and seeks to restore her First Amendment right to Free Speech.

A New Jersey trial court entered a blanket order that prohibits Ms. Tamagny from speaking to "any third party"[2] about her divorce. 12a, 41a. Accordingly, it is a prior restraint that also interferes with her right to parent her children—not to mention her ability to speak freely with family members and friends about what she is going through. The trial court's Order states specifically that Ms. Tamagny cannot discuss "this matter with any third parties including but not limited to the adult children and espesically [sic] with [MT] or within her hearing range. (Including any discussion of what occurs in court)". 41a, 42a. Ms. Tamagny filed an Order to Show Cause seeking to vacate the trial court Order, but the trial court denied the request to vacate the gag order and stated "[S]o the court certainly has the authority to enter an order, which I believe is a very reasonable order, to not discuss this litigation with third parties." 12a The trial court stated, "I have no other recourse to protect these children from what I'm very concerned about which is inappropriate discussions in that household." 9a

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1. The child's initials have been used to preserve her identity as a minor at this time.

2. The trial court amended the restriction to allow Jeanne Tamagny to speak with her attorney and therapist which amendment is inconsequential to the issues herein.

Such an order is content-based, unnecessarily restrictive, and substantially broader than necessary to achieve any governmental interest. Under the guise of protecting a 17 ½-year-old from alleged harm from "inappropriate discussions in the household", the trial court completely eviscerated Ms. Tamagny's constitutional rights. Yet at no point did the trial court consider barring discussion about the divorce in the household nor did it consider any options such as barring Ms. Tamagny from speaking about the divorce within earshot of her minor child to forestall a risk of psychological or emotional trauma or distress. That neglect was egregious error under this Court's precedents frowning on prior restraints. Instead, the trial court took a blanket approach and barred discussions about the divorce to anyone in the world. Correction is urgent.

This is hardly an isolated incident. The trial court admitted entering censorship orders like this one on a regular basis. The trial court stated generally and without any specifics: "there are many situations where this court has been faced with high-conflict divorce situations where orders precisely like this one are entered to protect the children." 10a. The trial court did not consider any least restrictive means such as, for example only, barring Ms. Tamagny from speaking about the divorce either to or in the presence of Ms. Tamagny's nearly adult child (or something similar). In fact, the trial court did not consider tailoring its censorship order at all. There are no compelling state interests sufficient to allow a blanket, prior restraint on free speech. And if this family court routinely enters such unconstitutional speech-suppressing orders, others likely do the same.

This Court presumes that Ms. Tamagny will suffer irreparable harm as a result of this constitutional violation. Indeed, the trial court's order will have a chilling effect on all litigants in divorce actions, lest they, too, be ordered to stay silent about the divorce proceedings without consideration of lesser restrictive means.

This Court's immediate intervention is needed to prevent that irreparable harm and to clarify that family law proceedings are no excuse for lower courts to play fast and loose with the Free Speech Clause and parental rights. Reversal is essential to preserving Constitutional protections.

PROCEDURAL HISTORY

The trial court entered an order that states that Ms. Tamagny cannot discuss "this matter with any third parties including but not limited to the adult children and espesically [sic] with [MT] or within her hearing range. (Including any discussion of what occurs in court)". 41a Ms. Tamagny filed an Order to Show Cause seeking to vacate that Order which was denied by Order dated June 28, 2024. 4a Then, Ms. Tamagny filed a Motion for Leave to Appeal with the New Jersey Appellate Division. 2a. In that Motion for Leave, Ms. Tamagny argued violations of her First Amendment Right to Free Speech and Due Process Right to Parent. 40a-42a The Appellate Division of New Jersey denied the Motion for Leave to Appeal by Order dated September 9, 2024. 2a Ms. Tamagny filed a Motion for Leave to Appeal with the New Jersey Supreme Court appealing the ruling of the Appellate Division. 1a The New Jersey Supreme Court denied the Motion for Leave to Appeal by Order dated January 14, 2025. 1a

REASONS FOR GRANTING THE WRIT

A. The Court should grant the petition and resolve the conflict between New Jersey's prior-restraint regime and numerous precedents of this Court and the federal courts of appeals.

By entering what amounts to a judicial injunction prohibiting certain speech, the New Jersey trial court—with the tacit approval of New Jersey's higher courts—engaged in an extraordinarily overbroad and disfavored prior restraint on speech. There is a "heavy presumption" against the validity of such a prior restraint on speech. *E.g.*, *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150–51 (1969); *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its validity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). Courts must presume that prior restraints are unconstitutional because Courts fear "communication will be suppressed ... before an adequate determination that it is unprotected by the First Amendment." *Pitts Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390 (1973).

And it makes no difference that this prior restraint came from a court rather than a legislative body or executive branch official. *E.g.*, *United States v. Quattrone*, 402 F.3d 304 (6th Cir. 2005) (invalidating prior-restraint order that prohibited the publishing of juror names during the pendency of a trial); *United States* v. *Brown*, 250 F.3d 907 (5th Cir. 2001) (same); *United States* v. *Salameh*, 992 F.2d 445 (2d Cir. 1993) (invalidating gag order barring defense counsel from publicly discussing any aspect of

a criminal case); *Columbia Broadcasting Sys., Inc.* v. *U.S. Dist. Court for Cent. Dist. of Ca.*, 729 F.3d 1174 (9th Cir. 1984) (invalidating district court order restraining a television network from disseminating government surveillance tapes).

As this Court has held, a prior restraint can survive judicial scrutiny only if the restraint is "narrowly tailored to serve a significant governmental interest, and [leaves] open ample alternatives for communications." *Forsyth Cty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 130 (1992) (citing *United States* v. *Grace*, 461 U.S. 171, 177 (1983)). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't, Inc.*, 529 U.S. 803, 813 (2000).

Numerous federal courts of appeals have so recognized. *E.g.*, *Int'l Outdoor, Inc.* v. *City of Troy, Michigan*, 974 F.3d 690, 697 (6th Cir. 2020) ("To be constitutional, a prior restraint must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.") (citation omitted); *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016) (a prior restraint must be "narrowly tailored and provide[ ] the least restrictive means to achieve the Government's goal") (citation omitted); *CAMP Legal Defense Fund, Inc.* v. *City of Atlanta*, 451 F.3d 1257, 1280 (11th Cir. 2006) ("To be constitutional," a prior restraint "must be (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of the information.") (citation omitted).

The trial court's order here violates these principles. Aside from her attorney and her therapist, Ms. Tamagny is prohibited from talking with *anyone* in the world about her divorce: her children, her other family members, her friends, her co-workers, a pastor or priest, or strangers at the grocery store. She cannot speak to *anyone*. This is obviously not narrowly tailored to serve the alleged government interest: protection of Ms. Tamagny's nearly adult child or to avoid, in the trial courts language, " . . . inappropriate discussions in that household." 9a

And the trial court did not even go through the motions of conducting a least-restrictive means analysis, which would be the bare minimum required before instituting such an across-the-board speech prohibition. "The First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' . . . and likely to cause 'anguish' or 'incalculable grief.'" *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 586 (2023). Here, the trial court's order is not only "substantially broader" than necessary, but it is also a complete ban on communication necessary to cope with the stressors of divorce litigation.

The right to express oneself enjoys the fullest and firmest protection. *In re Hinds*, 90 N.J. 604, 613-14 (1982). In considering any limitation on free speech rights, a court "must weigh the gravity and probability of the harm caused by freely allowing the expression against the extent to which free speech rights would be inhibited or circumscribed by suppressing the expression." *Id.* at 614. The trial court did no such thing here, and the New Jersey appellate courts stood idly by and allowed it to happen. This Court should grant review or reverse summarily.

B. The Court should also grant review because the New Jersey courts have flagrantly violated Ms. Tamagny's constitutionally protected parental rights.

The trial court's order also implicates Ms. Tamagny's parental rights. As this Court held in *Troxel* v. *Granville*, 530 U.S. 57, 72-73 (2000) "the Due Process Clause does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

Here, Ms. Tamagny cannot speak about her divorce with her adult or minor children. That violates her right to parent and causes her irreparable injury. If the trial court was concerned about Ms. Tamagny's parenting having a negative impact on her children, it could have limited its gag order to preventing Ms. Tamagny from disparaging her ex-husband, not talking to members of her household about her ex-husband, or something similar. Instead, the court ordered Ms. Tamagny not to talk to her children—or anyone else—about any aspect of her divorce. Preposterously, even if Ms. Tamagny wanted to explain that the divorce has nothing to do with her love for her children, the order would prevent even that kind of comforting.

The problem is not the trial court's attempt to protect (even adult or nearly adult) children. It is the means to the end that violates the Constitution. "But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible." *Stanley* v. *Illinois*, 405 U.S. 645, 652, (1972). In *Stanley*, this Court

determined that the child's right to have a parent from whom she seeks love and support cannot be curtailed.

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed **'essential,' . . . 'basic civil rights of man,' . . . and '(r)ights far more precious . . . than property rights**,' . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Stanley, 405 U.S. at 651 (emphasis added).

In weighing the importance of the family unit against the need to prevent harm to a 17 ½-year-old child, it is constitutionally indefensible to bar Ms. Tamagny from speaking to anyone about her divorce because it forces her to be silent or incur sanctions for speaking her mind. The trial courts order should be summarily reversed as unfaithful to the First Amendment and this Court's jurisprudence that is almost a century old.

CONCLUSION

The petition should be granted.

Dated this 11th Day of April, 2025.

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY, FILED JANUARY 17, 2025

SUPREME COURT OF NEW JERSEY
M-344 September Term 2024
089900

JOHN SCOTT TAMAGNY,

Plaintiff-Respondent,

v.

JEANNE TAMAGNY,

Defendant-Movant.

ORDER

It is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 14th day of January, 2025.

/s/ Heather J. Baker
CLERK OF THE SUPREME COURT

APPENDIX B — ORDER ON MOTION IN THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FILED SEPTEMBER 9, 2024

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: AM-000595-23T4
MOTION NO.: M-006251-23
BEFORE: PART G
JUDGE(S): JESSICA R. MAYER
LISA A. PUGLISI

JOHN SCOTT TAMAGNY

V.

JEANNE TAMAGNY

MOTION FILED: 07/18/2024
BY: JEANNE TAMAGNY

ANSWER(S) 08/12/2024
BY: JOHN SCOTT TAMAGNY
FILED:

SUBMITTED TO COURT: September 09, 2024

Appendix B

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 9th day of September, 2024, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT/JEANNE TAMAGNY

MOTION FOR LEAVE TO APPEAL DENIED

SUPPLEMENTAL:

Appellant has not demonstrated sufficient justification to overcome the strong policies disfavoring piecemeal review of litigation. *Brundage v. Estate of Carambio*, 195 N.J. 575, 599 (2008).

Any interlocutory rulings by the trial court may be appealed by either party within a plenary appeal of an eventual final judgment.

FOR THE COURT:

/s/ Jessica Mayer
JESSICA R. MAYER, P.J.A.D.

FM-02-220-20
FM-02-220-22 BERGEN
ORDER - REGULAR MOTION
MC

APPENDIX C — ORDER TO SHOW CAUSE AS TO FREE SPEECH IN THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION: FAMILY PART, BERGEN COUNTY, FILED JUNE 28, 2024

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: FAMILY PART
BERGEN COUNTY

DOCKET NO.: FM-02-220-22

JOHN SCOTT TAMAGNY,

Plaintiff,

-vs-

JEANNE TAMAGNY,

Defendants.

Filed June 28, 2024

Civil Action

ORDER TO SHOW CAUSE AS TO FREE SPEECH

THIS MATTER having been opened to the court upon application by Demetrios K. Stratis, Esq, attorney for the Defendant Jeanne Tamagny, on notice to the Plaintiff John Tamagny through his attorney Helene C Herbert, Esq and to Evelyn F. Nissirios, Esq., Guardian *ad litem* for the minor child, and it appearing from the reading of the

Appendix C

Certification of the Defendant that immediate, substantial and irreparable harm will result to the Defendant and the parties' unemancipated minor child before notice can be served and a hearing held thereon; and for good and sufficient cause having been shown;

IT IS on this 28th day of June 2024, hereby

~~**ORDERED** that Plaintiff appear and show cause before the Superior Court at the Bergen County Justice Center in Hackensack, New Jersey at ____o'clock in the noon or as soon thereafter as counsel can be heard, on the ____ day of ____, 2023 why Judgment should not be returned as follows:~~

~~1. The provisions barring the parties from speaking with third parties concerning the litigation be and hereby are vacated.~~

~~2. Granting such further relief as the court may deem just and equitable.~~

~~And it is Further Ordered~~

~~1. A copy of this Order to Show Cause, Defendant's supporting Certification, and letter memorandum of law, shall be made upon Plaintiff via service through his counsel within _____ days of the date hereof. The aforesaid substitute service shall constitute good and sufficient service for all purposes.~~

Appendix C

~~2. Any written responses to the Order to Show Cause must be served and filed by _____.~~

~~3. Any reply to the opposition of the Order to Show Cause must be filed by _____.~~

ORDERED that Defendant's order to show cause is Denied for the reasons stated on the Record.

/s/ Jane Gallina-Mecca
Honorable JANE GALLINA-MECCA, P.J.F.P.

APPENDIX D — NEW JERSEY TRIAL COURT TRANSCRIPT, FILED JUNE 28, 2024

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
BERGEN COUNTY

DOCKET NO. FM-02-220-22
A.D. #

JOHN SCOTT TAMAGNY,

Plaintiff,

v.

JEANNE TAMAGNY,

Defendant.

TRANSCRIPT

OF

ORDER TO SHOW CAUSE

Filed June 28, 2024

Place: Bergen County Courthouse
10 Main Street
Hackensack, NJ 07601

Appendix D

BEFORE:

HONORABLE JANE GALLINA MECCA, J.S.C.
TRANSCRIPT ORDERED BY:

DEMETRIOS K. STRATIS, ESQ.

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6/28/24

* * *

[29]burning of the flag to me is offensive, absolutely offensive. Yet, guess what? The Supreme Court has declared that it is free speech. Westboro Baptist Church, what they did outside of that – that funeral was offensive. But, yet, it's free speech. There are many things that we find offensive. But, yet, it is deemed to be free speech. And that's what our country was founded on. What you may think is offensive, it's not offensive to me, or vice versa. But, yet, we have the right to express that.

Appendix D

Now, plaintiff may not like some of the things my client says. And he's got recourse. And he can take those actions. But to take preventive measures and say you cannot talk at all, that's wrong. And it's an impermissible restraint on her free speech rights in the First Amendment.

MS. HERBERT: Your Honor, if I may –

THE COURT: No. I've heard more than enough, folks. We've gone well over an hour. And I have a very dense calendar today. And I've had to let other attorneys sit in my waiting room while we've addressed this very important issue. We're going to put it to rest and I'm going to make my decision. I've heard more than enough. Thank you.

So this is a very interesting academic [30]argument regarding the First Amendment and Ms. Tamagny's right to free speech, and about flags and churches.

That we've lost sight of, folks, is that this is about children. And it is my responsibility, my parens patriae responsibility to protect these children. And that is exactly what I am doing. And to suggest that Ms. Tamagny's rights woudl trump those of the well-being of her children points exactly to the harm which I am trying to prevent.

Least-restrictive means? This is the least - restrictive means, folks. I have no other recourse to protect these children from what I'm very concerned about, which is inappropriate discussions in that household. I don't know how else to do that in a way that's going to be effective. So this is certainly the least-restrictive means, number one.

Number two, this order is going to exist until this litigation ceases. This is not a permanent order. It is a temporary order. Again, least-restrictive means.

The right to talk to one's children, of course, every parent has the right to talk to one's children, provided – provided that speech is appropriate and not harmful to the children. And that [31]is my concern because I have no confidence that any discussions between a parent involved in this particular litigation and the children is not going to be potentially very, very seriously detrimental to their mental health and their well-being. And that is what I'm seeking to protect.

So I'm not here to discuss Ms. Tamagny's First Amendment rights that would trump the rights of the children to have peace in their own home. And we're not here to discuss Mr. Tamagny's exercise of what Ms. Tamagny projects as coercive control. This is my control. This is my control over this litigation and my control over these parents and my control over the children. It has nothing to do with coercive control by Mr. Tamagny.

And just to ally anyone's concerns, this is not an extraordinary order. There are many situations where this Court has been faced with high-conflict divorce situations where orders precisely like this are entered to protect the children. It's very simple.

And this Court certainly has the authority to protect the children and there is ample authority which states that the rights of the parents may be – have to succumb to a

certain extent, or cede in [32]instances where the Court needs to protect the best interests of the children.

So while this has been a very interesting academic argument, it really has no place in a situation where we're dealing with Meredith and the adult children and Mom. And to the extent Ms. Tamagny feels that she needs to be able to air her difference – or have a support, that support is exactly her therapist. And I will amend the order because I was thinking about that as the presentation was unfolding, that certainly Ms. Tamagny needs to have an avenue to discuss her issues, and those issues are discussed with her professionals, her therapist and her attorney, certainly not her children. Certainly not her children. It is a burden to children to be placed in a situation where they have to essentially take sides between parents.

And notwithstanding – you know, I know this isn't a typical situation where, typically, I would discuss with the parents how, you know, placing the children in that middle is so untenable because they love both parents equally. I'm not so sure that analysis would necessarily be applicable here. But in any event, it is an untenable position to have adult discussions even with adult children because no matter [33]how old they are – and maybe they're – even if they're 30 or 40, having discussions about – with one parent about the other parent is hurtful and harmful. No two ways about it.

So let's focus on the harm to Meredith. And that is what I'm trying to avoid.

I'm not going to speak about what my other concerns are with respect to this matter. We will address the sealing of this record on a motion in the ordinary course.

But the fact that we're here having this conversation gives me tremendous concern regarding Ms. Tamagny's judgment and her profound lack of insight. And that's very, very concerning to me.

So the Court certainly has the authority to enter an order, which I believe is a very reasonable order, to not discuss this litigation with third parties. And if Ms. Tamagny is concerned that she doesn't know how to approach Meredith if Meredith should broach a subject, then she should speak to Ms. Romeo and get some direction as to how best to respond to that question if she feels she's not equipped to respond to her daughter in an appropriate way when that issue may come up.

But as I said, I have an obligation to [34]protect these children, particularly Meredith, and I am extraordinarily concerned that there will be very serious detrimental harm to this young woman should I vacate this order. I need to protect her. And she should not be having discussions with her mother regarding this litigation, regarding her father, and vice versa, nor should she be having discussions with her father regarding this litigation or her mother or her sisters, period. Hopefully, that time will come when she'll have an opportunity to discuss with her dad. Right now, yes, unfortunately, because of this situation, this order pertains more to Ms. Tamagny than to Mr. Tamagny because he has had no contact with his children in a very

significant period of time. But it doesn't mean that this is targeted at Ms. Tamagny. It means that it is intended to protect these children. And that is my responsibility, my paramount responsibility, in this matter is to protect these children. And I feel that this order is absolutely unequivocally 100 percent necessary in order to accomplish that goal.

And as I said, it's not a permanent order. It is a temporary one. And, therefore, I'm denying the application with respect to – I don't think I need to go into irreparable harm. I don't think that [35]there will be any irreparable harm to Ms. Tamagny for the reasons that I've just expressed. She doesn't have a likelihood of success on the merits for the reasons that I have just expressed. And let's weigh the (indiscernible) – the fact that there might be harm to one parent over the other. The only prejudice, should I vacate this order, is the unqualified prejudice to Meredith and the adult children if I should vacate the order. That would be nothing short of irresponsible on my part.

So for those reasons, I'm denying that order to show cause.

With respect to – sorry. I know I didn't give you any time to discuss the other application with respect to the therapist. You know, if you feel that you need to put something on the record with respect to that, I'll allow you. But I really think that perhaps we can all agree that this is really a matter that needs to be addressed as a motion in the ordinary course, just as the application that Ms.

Herbert has filed on behalf of Mr. Tamagny that we just received a few short moments ago.

MR. STRATIS: Judge, we can do that. We can convert that to a motion, if you'd like. And I'll accept Ms. Herbert's I guess cross-motion and then

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APPENDIX E — PRELIMINARY STATEMENT OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY

APP. DIV. #AM-000595-23T4

JOHN SCOTT TAMAGNY,

Plaintiff,

-vs-

JEANNE TAMAGNY,

Defendant.

Sat Below:
Hon. Jessica R. Mayer, J.A.D
Hon. Lisa A. Puglisi, J.A.D

Civil Action

BRIEF IN SUPPORT OF APPELLANTS MOTION TO THE SUPREME COURT FOR LEAVE TO FILE INTERLOCUTORY APPEAL ON SHORT NOTICE

Demetrios K. Stratis, Esq on the brief

PRELIMINARY STATEMENT

Appellant[1] seeks to restore her First Amendment Right to Free Speech and Association. The gag order

1. Mother shall be referred to as Appellant, Defendant or Mother interchangeably and likewise, Father shall be referred to as Respondent, Plaintiff or Father interchangeably.

entered by the trial court interferes with those rights and her Constitutional right to parent her 17-year-old daughter MT as well as her two emancipated daughters, ages 19 and 21, who live with her and MT. The Trial Court has gagged Mother by ordering that Mother cannot discuss "this matter with any third parties including but not limited to the adult children and espesically [sic] with [MT][2] or within her hearing range. (Including any discussion of what occurs in court)". Da29

This prohibition bars Mother from discussing her divorce with anyone, including her own parents, her sister, her adult emancipated children, as well as her unemancipated daughter who relies on her for love and support, as well as any of her friends and anyone who may show her comfort, guidance and support. Such an order is unnecessarily restrictive and contrary to the First Amendment and contrary to the public policy of the United States and this State. It is also a matter of public importance as it affects all similarly situated litigants and waiting until final order will moot this essential right which is causing irreparable harm and should be reversed immediately.

Under the guise of *parens patriae*, the trial court completely dismissed the Constitution and its core protections and admittingly does so on a regular basis. The trial court stated generally and without any specifics: **"there are many situations where this court has been faced with high-conflict divorce situations where**

2. The child's initials have been used to preserve her identity as a minor at this time.

orders precisely like this one are entered to protect the children." T31-17. The trial court did not consider any least restrictive means and did not consider that a 17 year old child, emancipated or not, may want to, and need to, talk with their Mother as may the emancipated children. There are no compelling state interests sufficient to disregard the Constitution as to a parents' fundamental right to parent and a child's fundamental right to be parented or to their Freedom of Speech. No actual harm was even articulated, and no hearing was held.

This is a matter of public importance. The trial court has overreached its authority. The irreparable harm that will be suffered by the Appellant and anyone whose speech is suppressed is presumed. Appellant comes before this Court under the provisions of Rule 2:2-2 asking this Court to grant an interlocutory appeal from the Appellate Division's denial, to prevent irreparable harm and injury to Appellant and to prevent a chilling effect on all litigants in divorce actions who are barred from speaking, especially absent a hearing where good cause is shown and the least restrictive means explored. And to avoid continued and future use of such blanket gag orders that suppress speech with "any third parties".

This Court may grant leave to file an interlocutory appeal "when necessary to prevent irreparable injury." Rule 2:2-2(a). As stated by our Supreme Court, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976). This Court's intervention is needed to prevent that irreparable harm and manifest injustice. And, First Amendment activity can

be especially time-sensitive. Id. at 374 n.29. Hence, this matter cannot wait until the conclusion of the underlying action.

STATEMENT OF FACTS & PROCEDURAL HISTORY

Respondent Father filed a Complaint for Divorce on July 28, 2021. Da1. Appellant, Mother filed an Answer and Counterclaim on September 17, 2021. Da12. There were several case management conferences over the course of this matter. The court has referred to this matter as a high conflict divorce. T31-18. On January 2, 2024, a provision appeared in a Case Management Order that states: "Neither parties shall discuss this matter with any third parties including but not limited to the adult children." Da26. Thereafter, new counsel was retained and appeared in this matter. Then, at the next Case Management Conference on June 3, 2024, the Free Speech prohibition and inability to parent became understood by Mother. It specifically bars Mother from "discussing this matter with any third parties including but not limited to the adult children and espesically [sic] with [MT] or within her hearing range. (Including any discussion of what occurs in court)." Da29 MT is the parties 17-year-old child and the subject of the custody litigation. The parties have three children born of the marriage. The older two daughters are emancipated ages 19 and 21. Da37

All three daughters have accused their father of molestation. The divorce case therefore involves issues of physical and sexual abuse, and the case is emotionally

draining and extremely stressful. Da38 The case has been ongoing for over three years. Father theretofore never sought to restrain mother's right to free speech nor to seal the matter. His job has not changed. The accusations against him have not changed. Yet the court entered the order after over three years of "high conflict litigation" and as a result of the Order, Mother has no supports in her life and is completely isolated. She is prohibited from speaking with anyone about things all three daughters have told her about being molested by their father. Da38 In addition, MT is prohibited from being parented by her Mother in this potentially devastating area of her life even when MT raises the issue to her Mother. Da38

Appellant filed an Order to Show Cause to vacate the provision of the Order which was denied. Da166. In an oral decision, the trial court found that the prohibition to free speech was the least restrictive means and that the minor child will suffer harm if Mother is allowed to exercise her Free Speech. T29-18 to T35-12. The Court provided no specific harm to this almost adult person, MT, or the older daughters or anyone else and no hearing occurred. The court stated generally and without any specifics: "**there are many situations where this court has been faced with high-conflict divorce situations where orders precisely like this one are entered to protect the children**." T31-17. The court, therefore, acknowledges that many cases have these blanket gag orders entered without hearing and which solidifies the need for this court to review this matter as a matter of public importance. It goes to the children's welfare to be safe and secure with their parent and the parent's right to parent. No actual or even speculated harm is articulated by the court.

Appendix E

Noteworthy in this matter is the intense issue that all three daughters have accused their Father of sexually molesting them and Father accused Mother of Munchausen by Proxy. Therefore, there is even more compelling stress as a result of the complete gag order on Mother. In fact, Father sought to have

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The absolute bar on a Mother's speech is irreparable harm. It infringes on her free speech and her ability to parent her emancipated children and her 17 year old child and infringes on the minor child's right to receive the love and nurture of her Mother, when the child comes to her distressed about what abuse she says she has suffered by her father. As stated before, our United States Supreme Court held, "The loss of First Amendment freedoms, for even minimal periods of time, **unquestionably constitutes irreparable injury**." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976). And, "a chilling effect on free expression" is irreparable. *Dombrowski v. Pfister,* 380 U.S. 479, 487 (1965). It is the "direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury." *Cate v. Oldham,* 707 F.2d 1176, 1188 (11th Cir.1983); *see Wooley v. Maynard,* 430 U.S. 705 (1977). The trial courts order here is a direct penalization of Free Speech rights and chills Freedom of Expression. Appellant has thus satisfied her burden that irreparable injury will be sustained and is being sustained with each passing day.

Significantly, "In First Amendment cases the initial burden [of proof] is flipped." *Greater Phila. Chamber of*

Com. v. City of Phila., 949 F.3d 116, 133 (3d Cir. 2020). Thus, it is for the State to prove that the least restrictive means were used to satisfy a compelling governmental interest. No real or actual governmental interest has been shown here. Further, ***no*** least restrictive means were considered or implemented. The Court did not consider restricting the Mother speech to the press, or on social media, or in front of the 17 year old child. Nothing was considered. Instead, an overreaching ban on any communication with "any third parties". Da31. (The Court did amend such restriction to permit Appellant to be allowed to speak with her attorney or her therapist only, both of whom are paid professionals and not her personal support system. T32-9 to 14. Appellant submits this restriction discriminates against indigent persons who cannot afford a therapist or are self-represented.)

Under the guise of *parens patriae*, the trial Court dismissed the Constitution. The trial court did not consider any least restrictive means and did not consider that a child, emancipated or not, may want to, and need to, talk with their Mother. There are no compelling state interests to completely disregard the Constitution to a parents' fundamental right to parent and a child's fundamental right to be parented or to Freedom of Speech. Further, no harm was even articulated. There was pure speculation and mere generalizations about harm as can be seen in the Court transcript. No plenary hearing was held.

This is a matter of public importance given the overbreadth of the restrictions on Appellant and the infringement on her Constitutional Rights and the

irreparable harm that will be suffered by the Appellant in this case as well as to anyone whose speech is suppressed. The public importance is furthered by the trial courts statement that: "**there are many situations where this court has been faced with high-conflict divorce situations where orders precisely like this one are entered to protect the children." T31-17.** Hence, the court itself acknowledged its practice to regularly enter orders suppressing free speech. This court must grant leave to review and insure that Constituional safeguards were satisfied.

Appellant now comes before this Court under the provisions of Rule 2:2-2 asking this Court to allow an interlocutory appeal from the Appellate Division's denial, in order to prevent irreparable harm and injury to Appellant and others similarly situated, to direct the courts the specific circumstances and manner in which gag orders of any type may be entered. Review is necessary at this time to prevent a chilling effect on all litigants in divorce actions who are barred from speaking without a hearing and without least restrictive means being considered. This Court may grant leave to file an interlocutory appeal "when necessary to prevent irreparable injury." Rule 2:2-2(a). This Courts intervention is needed to prevent such irreparable injury and manifest injustice.

Justice calls for this Court's action in this matter. The Supreme Court should intervene, uphold the Constitution to prevent grave damage with the deprivation of Mother's Constitutional rights. If any prohibition on speech is

appropriate the court must use the least restrictive means to do so. "If a less restrictive alternative would serve the Government's purpose, the legislature **must** use that alternative." *United States v. Playboy Entm't, Inc.*, 529 U.S. 803, 813 (2000) (emphasis added).

Here, the trial court did not even consider least restrictive means. The court did not have a hearing to determine what, if any, harm will be realized by the child. See *Dorfman v Dorfman*, 315 NJ Super. 511, 518 (App. Div 1998). The court did not speak with MT or hear from any experts. In summary fashion, the trial court referred to "harm" to the child without articulating any specified harm nor exploring any less restrictive means[3]. A finding that a parent's conduct is inconsistent with his or her constitutionally protected parental status must be supported by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982). See *Dunn v. Covington*, 846 S.E.2d 557 (N.C. App. 2020). No due process procedure was applied by this trial court.

The trial court also failed to consider the impact on the child and the right of the child to the love and care from her Mother and the Mothers right to parent her child, which are both of constitutional proportion and policy. As stated in *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) "the Due Process Clause does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better'

3. The trial court did amend the Order to allow Mother to speak with her paid therapist and paid attorney only which discriminates on the basis of social status.

decision could be made." Here, that right was infringed and irreparable injury exists.

Based on deprivation of her rights, Mother has established "irreparable injury" and "grave damage" and that the "interests of justice" require her Motion for permission to file an interlocutory appeal be granted and an overturning of the trial court Order. Moreover, the trial court failed to consider what truly is in the child's best interest which our Courts have established must focus on the "safety, happiness, physical, mental and moral welfare" of the child. *Beck v Beck*, 86 NJ 480, 497 (1981). That includes the ability to speak with her Mother for guidance, support and love.

POINT TWO: APPELLANT WAS AND IS ENTITLED TO EMERGENT RELIEF BASED UPON THE LEGAL STANDARD AS SET FORTH IN CROWE V. DIGIOIA

New Jersey *Rule* 4:52-1 sets forth the standard for an Order to Show Cause. See Pressler, *Current New Jersey Court Rules, R.* 4:52-1 at 1738 (2010). However, where the OTSC has been denied, the Appellate court must use the applicable standards set forth in detail in *Crowe v. DiGioia,* 90 N.J. 126 (1982) to ascertain whether movant meets the standards set forth in Court Rule 2:22(b) and sets forth that a "preliminary injunction should not issue except where necessary to prevent irreparable harm." *Id*. The Court in Crowe defines irreparable harm as that which "cannot be redressed adequately by monetary damages." *Id*. Here, no monetary award can compensate

a child not having the love and support of her mother nor Mother's right to Free Speech. This is especially true where a child has accused the other parent of serious sexual abuse.

An injunction should issue when (1) it is necessary to prevent irreparable harm; (2) the legal rights underlying Plaintiff's claims are settled; (3) the material facts are not controverted; and (4) the relative hardship to the parties by entering the injunction is non-existent or outweighed by the equitable need to enter injunction. *Id*. at 132-34.

Appellant meets the standard. The legal rights of Mother's claims are clear and settled as further explained below. There are no material facts in controversy. Neither father nor the court has delineated any hardship by entering an injunction from the court entering this gag order. This is critical and equitable relief. As the court noted, this divorce matter has been contentious for over three years without a gag order. There is no harm to anyone other than the Mother and the children and there is no governmental interest to preserve.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod at* 373–74 (1976). Likewise is the right to parent. The U.S. Supreme Court has recognized "the fundamental right of parents to make child-rearing decisions." *Troxel,* 530 U.S. 72-73 (2000). Violation of such right to parent, and a child's right to the nurture and care of her Mother is also irreparable and interferes with a fundamental liberty interest. "The fundamental

liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky* 455 U.S. at 753.

The harm to the Defendant is neither speculative nor incidental: A child has the right to be parented and the parent has both an obligation and a right to parent. "A parent's right to enjoy a relationship with his or her child is constitutionally protected." *In re Guardianship of K.H.O.*, 161 N.J. 337, 346 (1999). Mother desires to exercise her right to Free Speech and to parent and any infringement thereof is unconstitutional and irreparable. The harm to the child is immeasurable where she alleges great harm to her by her other parent.

The legal rights of the Appellant to exercise her Free Speech rights are well settled. See arguments herein. Even under the doctrine of *parens patriae,* a Court must balance Constitutional mandates. As one judge stated,

> [W]hen States use their *parens patriae* powers to protect the best interests of the child, they do so because the parents cannot agree [such as in a divorce proceeding] or because the child has no parents at all . . . But I am aware of **no authority** . . . to suggest States can use their *parens patriae* powers to impose blanket prohibitions on parental choices simply because the government does not trust an otherwise-present-and-fit parent to choose wisely. (Emphasis added)

Appendix E

Raskin on behalf of JD v. Dallas Ind. School Dist., 69 F4th 280, 295 (Fifth Cir. 2023).

Critically, the material facts are not controverted. The Orders of the Court speak for themselves. The prohibitions infringe on Mother's right to Free Speech, right to association and right to parent. Da29 Finally, there are no hardships to the other party. The equitable need to enter the injunction is great. Noteworthy, MT is free to speak with others and whomever else she chooses about what she states her Father did to her: her friends, her teachers, her siblings, but not her Mother who should be permitted to give her guidance, love, and support. Barring Mother from speaking with her own adult and 17 year old child also has no effect on the Respondent. Mother's ability to associate with others has no effect on Respondent. Appellant's right to parent her children and the child's right be parented by the Appellant has no ill effect on the other party but has great consequence to the Appellant and the child.

Not only is there no harm to the other party, but the Court's action is a sword creating an order that prohibits Appellant from speaking with those persons closest to her. It is precisely that behavior that our statutes prohibit of others and should apply to this court as well. N.J.S.A. 2C:25-29 defines coercive control: "Coercive control may include, but shall not be limited to: (a) isolating the person from friends, relatives, transportation, medical care, or other source of support. . .". The trial court is essentially isolating Mother from her friends, relatives . . .and other sources of support." Appellant has met the standards of *Crowe* and her application should be granted.

Appendix E

Respondent may argue that no interlocutory hearing is necessary, but the case of *Brundage* is instructive as it makes clear that the exercise of its "considerable discretion" turns on whether leave to appeal will "prevent the court and the parties from embarking on an improper or unnecessary course of litigation." *Id.* Here, the Constitutional rights of a litigant are suppressed by a Court Order and cannot wait until they are mooted at the conclusion of the case. Here, it is obvious that "the desired appeal has merit and that 'justice calls for [an appellate court's] interference in the cause". Id. In this case justice calls for Supreme Court's intervention on an interlocutory basis to avoid continued infringement on the Free Speech Rights, interference with the right to parent and the right of free association. The Order also infringes on the child's right to have a parent from whom she seeks love and support which cannot be curtailed.

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed **'essential,' . . . 'basic civil rights of man,' . . . and '(r)ights far more precious . . . than property rights**,' . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Stanley v. Illinois, 405 U.S. 645, 651 (1972) (emphasis added).

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POINT THREE: APPELLANTS PARENTAL RIGHTS CANNOT BE INFRINGED

Parents have a protected interest in controlling the upbringing of their children. The Fourteenth Amendment states that no "state shall deprive any person of life, liberty, or property, without due process of law." See *U.S. Const. amend. XIV, § I.* In 1923, the Supreme Court of the United States recognized in *Meyer v. Nebraska 262 US 390 (1923)* that "the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children'" *Troxel*, 530 US at 65; *Stanley v Ill.* 405 US 645, 651 (1972).

Parents' interest in controlling the upbringing of their children has been interpreted as creating a barrier around the family that cannot be breached without substantial government interest. Id at 65-66. This recognition has led courts to give parents a great deal of deference in deciding what care is appropriate for their children in conjunction with the manner in which they should be raised. Any order barring Mother from speaking infringes upon the right to parent.

The unemancipated children and the minor child have been found by experts to have been sexually abused by their Father. They need the love and support of their Mother. Parental authority is a consequence of state law, which grants parents broad power and discretion over the lives of their minor children. *Thompson v. Thompson*, 484 U.S. 174, 186 (1988). The Court held that a "presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68.

It has also been recognized that natural bonds of affection lead parents to act in the best interests of their children. Id. Here, those natural bonds of affection have been thwarted by the Courts Order barring any communication between Mother and any of her children, including adult children who are not parties in the divorce and not under the control of the court in the divorce action. The trial court order prevents Mother from providing care to her children and from providing the best interests to MT and the emancipated children.

POINT FOUR: APPELLANTS FIRST AMENDMENT RIGHT CANNOT BE INFRINGED

As to Free Speech, the First Amendment provides: "Congress shall make **no law . . . abridging the freedom of speech**, . . .". U.S. Const. Amend. I. Here, the Court issued an order barring Appellant from speaking to anyone about this litigation. The court suppressed Appellant's Free Speech and censored what she says and to whom she can speak. Appellant asks this Court restore her First Amendment Right to Free Speech and to not unconstitutionally infringe upon her rights, both those protected under the US and State Constitutions. *U.S. Const.* amend. I., *N.J. Const.* art. I, ¶ 6. By placing a "gag order" on Appellant, it is impermissibly barring the exercise of her constitutional rights. "The First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' and likely to cause 'anguish' or 'incalculable grief.'" *303 Creative LLC v Elenis*, 143 S. Ct. 2298, 2312 (2023).

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By prohibiting the Appellant from speaking to any third parties, the state, via the Court, is requiring the Appellant to either speak the state's message, or remain silent, or face sanctions. That was rejected in *303 Creative* where the Supreme Court stated:

> Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs . . . that 'is enough,' more than enough, to represent an impermissible abridgement of the First Amendment's right to speak freely. *Id*, at 2313.

The First Amendment "does not tolerate the government forcing a citizen to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so." *Id* at 2314.

The gag order constitutes a prior restraint on the Defendant's speech. As set forth below, prior restraints on speech are ***presumptively*** unconstitutional. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its validity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). More expressly stated, there is a "heavy presumption" against prior restraints on speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). And, First Amendment activity can be especially time-sensitive. *See Elrod* 427 U.S. at 374 n.29. This matter cannot wait until the conclusion of the underlying action. The Courts presume that prior restraints are

unconstitutional because Courts fear "communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pitts Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390 (1973). For these reasons, Mothers First Amendment Rights here must be adjudicated on Interlocutory appeal and immediately protected.

The order barring Mother from speaking to anyone is also void for vagueness. As further set forth below, due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

By Order of the Court, Mother cannot speak with her parents, friends, sister, or loved ones who may offer support during this very difficult divorce. Further, she cannot speak with her own adult and emancipated children. The emancipated children are adults. They are not under the authority of the Court. The Order isolates Mother from her loved ones. The Order is unconstitutionally overbroad because chills the Appellant's Constitutional Free Speech and parental rights.

The trial court suggests the "speech" will be harmful without providing how it will be harmful or delineating the harm. Yet, our US Supreme court has held that even

harmful, derogatory, demeaning, or even discriminatory or harassing, speech is protected. Offensive, disagreeable, and even hurtful speech is exactly the sort of speech that the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v Irish-American Gay Lesbian and Bi-sexual Group of Boston*, 515 U.S. 557 at 574 (1995) (noting that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v Johnson*, 491 U.S. 397 at 414 (1989) (stating that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

There has been no compelling interest shown or given by the court to override and set aside our First Amendment. In our constitutional democracy, the right to express oneself enjoys the fullest and firmest protection. *In re Hinds*, 90 N.J. 604, 613-14 (1982). In considering any limitation on free speech rights, a court "must weigh the gravity and probability of the harm caused by freely allowing the expression against the extent to which free speech rights would be inhibited or circumscribed by suppressing the expression." *Id.* at 614.

In *In re Marriage of Newell*, 192 P.3d 529 (Colo. App. 2008), the court found that the court's limitation on the Defendant's speech concerning the child was a "content-based restriction of his speech" that could only be constitutional if it promoted a compelling state interest and was the least restrictive means of promoting that interest. The court then went on to hold that, even

if there was a compelling state interest sufficient to justify a restriction on his First Amendment free speech rights such as harm to a child, the "harm" standard is "a demanding standard when properly applied [and] 'Not every type or degree of actual or threatened physical or emotional harm will suffice; to constitute a compelling state interest the harm must be 'substantial.'"

"In addition, 'harm to the child . . . should not be simply assumed or surmised; it must be demonstrated in detail.'" *In re Newell*, at 535-536. In *Newell*, the court found that just because the Appellant had rarely agreed with the mother's decisions for the child and that he had "used his joint decision-making power to the child's detriment" that was insufficient to support the court's invasion of the Defendant's rights because no "real" harm was proven. The Courts authority to enter orders in divorce proceedings is not unfettered and cannot ignore the mandates of the Constitution. Indeed, in *Barros v. Barros*, 72 A.3d 367 (Conn. 2013), the court held that a parent has a liberty interest in the custody, care, and control of his or her child and that a parent is entitled to due process of law before he or she can be deprived of that liberty interest. *Id.* at 373.

Appellant submits that there is not finding of harm. It is speculated and not real. Speculation can never serve as a basis to override our Freedom of Speech.

POINT FIVE: THE TRIAL COURT FAILED TO MAKE A FINDING OF HARM

To consider ANY restrictions on a Constitutional Right the trial court must find that if the orders infringing

on the Defendant's constitutional rights are not granted, the child will suffer "actual" "substantial" physical or emotional harm. See *Newell*, supra. There is no basis for such a finding in this record. Further, the court would have to show that the alleged harm must be demonstrated in detail, not merely alleged. Id. It cannot be assumed nor can it be estimated or speculative. It must be actual harm. There is nothing in the record or even alleged to show that. The Court only made a blanket statement as to "harm" to the 17 year old child without any basis or details nor a hearing held thereron. T34-1 to 4.

The harm to the children are the expert opinions saying the children suffered harm at the hands of Father. See reports of Dr. Randall Alexander and Dr Steven Gold, Da105 Da157. To show harm to the 17 year old child if the Mother speaks to her directly would require expert testimony. Certainly, there could be no showing of actual harm to the minor child if the Mother spoke to her friends, her parents (maternal grandparents), clergy, sister, or her emancipated children and hence, least restrictive means were not considered by the court. It is merely self-serving assertions of the Respondent to seek to prohibit Free Speech. Incidentally, the child is almost the age of majority. She is not of tender years or young and impressionable years. She is 17 and will be an adult in less than 12 months.

Since the infringement on the Appellant's constitutional rights must serve a compelling state interest and be the restrictive to serve that interest, this would require a hearing at the very least as due process mandates. There are numerous other less restrictive alternatives the Court could implement if it was convinced that harm would come

to the child if the Appellant speaks with her such as speech outside the presence of the child or speech initiated by the Mother with the child. What cannot be tolerated is prior restraints on speech which "are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska* 427 U.S. at 559.

POINT SIX: THE TRIAL COURTS ORDER IS A PRIOR RESTRAINT WHICH CANNOT WITHSTAND CONSTITUTIONAL CHALLENGE

As set forth above, prior restraints on Free Speech are unconstitutional. For a prior restraint on speech to pass constitutional muster, it must satisfy strict scrutiny – meaning that the prior restraint must serve a compelling state interest to protect against a serious threat of harm and be narrowly tailored to be no greater than is necessary to protect the compelling state interest asserted as justification for the restraint. *Shak v. Shak*, 484 Mass. 658, 663 (Mass. 2020).

Here, the trial court alleged that the compelling governmental interest is the protection of harm to the child. The trial court suggests that this blanket prohibition – barring Mother from speaking to any third party[4] – is the least restrictive means. However, even if that were true – there needs to be a hearing and there is no possible harm that could come to the child if the Mother is permitted to speak with her parents, her sister, or her friends or clergy, or even her unemancipated children. The trial court did not even consider an order barring Mother

4. As stated earlier, the trial court modified the prohibition to allow her to speak with her paid therapist and her paid attorney which is discriminatory.

from initiating any discussions about the litigation with the minor child, or not speaking with the press, or not posting on social media or other similar least restrictive means. Such restrictions are less intrusive and can, arguably, be connected to a compelling governmental interest if, indeed, real harm can be established.

Some courts have held that there is a compelling state interest in protecting minor children from exposure to their parents' disparagement of one another. See, for example, *Shak v. Shak*, supra, at 663. Here, however, the trial court did not apply such restrictions as "in the presence of the child" as in *Shak*. The trial court had a blanket restriction that the Mother could talk to **no third parties.** Such blanket restrictions are presumptively invalid as prior restraint on free speech. Appellant merely seeks for the child to be able to speak with her as a parent as any young child would want to do and to give her love and support and to speak with adult children as well as with others unrelated to the litigation such as friends and her own parents.

In order to pass constitutional muster, a non-disparagement order must also be supported by evidence that the prohibited speech will actually harm the children that the order is intended to protect, and the court may not simply assume or surmise that harm. No harm was established here and as such, the Order is constitutionally defective. This Mother has not spoken to the press or on social media and has not "aired" her grievances for public dissemination. She wants the right to speak to, for example, her sister. No one should bar that right.

Appendix E

In *Shak*, the court struck down as an unconvstitutional prior restraint where it found that "[n]o showing was made linking communications by either parent to any grave, imminent harm to the child. *Id* at 664. That is exactly so here as well. There is no link or proof that communications between Mother and minor child would cause imminent harm to that minor child and no link or proof that communications between Mother and emancipated children would cause imminent harm to the minor child, nor communications with Mother's parents, Mother's friends, sister etc.

Shak establishes that a court may **not** prohibit by prior restraint even shockingly disparaging speech made in the presence of the children unless there is detailed evidence that such speech will actually harm the children the order is intended to protect. Harm cannot be assumed or surmised. Here, no such harm was established. Indeed, the harm is to the child who cannot speak with her own Mother which violates our Courts focus on the best interest of the child which is the "safety, happiness, physical, mental and moral welfare" of the child. *Fantony v Fantony* 21 N.J. 525 at 536 (1956). The harm is also to the Mother who cannot speak with anyone and to the child who cannot speak to her mother.

POINT SEVEN: THE COURT ORDER IS VOID AS OVERBROAD

Assuming arguendo that the Trial Court Order is clear and precise – thereby avoiding a vagueness challenge – it

is nevertheless unconstitutionally overbroad if it prohibits constitutionally protected speech. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned v City of Rockford*, 408 U.S. 104 at 114-15 (1972).

The overbreadth doctrine is designed precisely to protect citizens from having their speech chilled by overbroad laws. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.) For these reasons, an order that restricts a party's speech is unconstitutional – even if otherwise serving a compelling state interest such as to protect a child from actual harm – if the order is unconstitutionally vague or overbroad.

CONCLUSION

This Court should reverse the trial court order and restore the Mother's right to free speech and right to parent her child.

Respectfully submitted,

/s/ Demetrios K. Stratis
Demetrios K. Stratis, Esq.

APPENDIX F — NEW JERSEY
APPELLATE COURT BRIEF EXCERPTS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: FM-02-220-22

JOHN SCOTT TAMAGNY,

Plaintiff/Respondent,

-vs-

JEANNE TAMAGNY,

Defendant/Appellant.

On Appeal from:

CHANCERY DIVISION – FAMILY PART
BERGEN COUNTY

Hon Jane Gallina-Mecca

DOCKET NO.: FM-02-220-22

Civil Action

BRIEF IN SUPPORT OF APPELLANTS
MOTION FOR LEAVE TO FILE INTERLOCUTORY
APPEAL ON SHORT NOTICE

Demetrios K. Stratis, Esq on the brief

Appendix F

PRELIMINARY STATEMENT

Appellant[1] seeks to restore her First Amendment Rights to Free Speech and Association and her right to parent her almost 17-year-old daughter, all of which are prohibited in the existing Order of the Trial Court which states that Mother cannot discuss "**this matter with any third parties including but not limited to the adult children and espesically [sic] with [MT][2] or within her hearing range. (Including any discussion of what occurs in court)".** Da29

The trial court order bars Appellant Mother from confiding in or discussing with any person about these "events" including her parents, her adult emancipated children, her unemancipated daughter who relies on her for love and support as well as any of her friends and her own sister. Such an order is contrary to the U.S. Constitution, the public policy of the United States, and the State of New Jersey and as such, should be reversed immediately.

The absolute bar on a Mother's speech infringes on the First Amendment and on her ability to parent her emancipated children and her minor child and infringes on the minor child's right to receive the love and nurture of her Mother. Under the guise of *parens patriae*, the trial Court completely dismissed the Constitution and its

1. Mother shall be referred to as Appellant, Defendant or Mother interchangeably and likewise, Father shall be referred to as Respondent, Plaintiff or Father interchangeably.

2. The child's initials have been used to preserve her identity as a minor at this time.

protections. The trial court did not properly consider any least restrictive means and did not consider that a child, emancipated or not, may want to, and need to, talk with her Mother. There are no compelling state interests sufficient to disregard the Constitution to a parents' fundamental right to parent and a child's fundamental right to be parented or to Freedom of Speech. Further, no actual harm was found or articulated, only speculated and no hearing was held to so determine.

STATEMENT OF FACTS & PROCEDURAL HISTORY

Respondent Father filed a Complaint for Divorce on July 28, 2021. Da1. Appellant, Mother filed an Answer and Counterclaim on September 17, 2021. Da12. There were case management conferences. On January 2, 2024, a provision appeared in a Case Management Order that states: "Neither parties shall discuss this matter with any third parties including but not limited to the adult children." Da26. Thereafter, new counsel was retained and appeared in this matter. Then, at the Case Management Conference of June 3, 2024, the Free Speech prohibition and inability to parent became understood by Mother. The Case Management Order of June 3, 2024 specifically bars her from "discussing this matter with any third parties including but not limited to the adult children and espesically [sic] with [MT] or within her hearing range. (Including any discussion of what occurs in court)." Da29 MT is the parties minor child about to turn 17 years of age on September 30, 2024. The parties have three children born of the marriage. The older two daughters are emancipated. Da37

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The divorce involves issues of physical and sexual abuse and child molestation, and the divorce is emotionally draining and extremely stressful. Da38 As a result of the Order, Mother has no support group as she is prohibited from speaking with anyone about things all three daughters have said about being molested by their father. Da38 And, MT is prohibited from being parented by her Mother in this potentially devastating area of her life. Da38

Appellant filed an Order to Show Cause to vacate the provision barring Mother from speaking with any third parties, which was denied. Da166. In an oral decision, the trial court found that the prohibition to free speech was the least restrictive means and that the minor child will suffer harm if Mother was allowed to exercise her Free Speech. The Court provided no specific harm and no hearing to so determine or find. Her decision is contained in the hearing transcript. Tr pg 29, ln 18 to pg 35, ln 12.

Noteworthy in this matter is the intense issue that all three daughters have accused their Father of sexually molesting them and Father accused Mother of Munchausen by Proxy. Therefore, there is even more compelling stress as a result of the complete gag order on Mother, especially because Father sought to have reunification therapy begin to "reunify" him with the parties' minor child MT. Da39 Therefore the OTSC included reports of evaluations of the

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Appellant meets that burden. Justice calls for the appellate court's action in this matter because of the absolute bar to Mother's speech, which bar infringes on her rights under the First Amendment Free Speech clause, on Mother's ability to parent both her emancipated children and her minor child, and on the child's right to receive the love and nurture of her Mother. The court did not consider any least restrictive means and did not consider that a child, emancipated or not, may want to, and need to, talk with her Mother. There was no hearing. There are no compelling state interests sufficient to completely disregard the Constitution and a parent's fundamental right to parent and a child's fundamental right to be parented. The Appellate Court must intervene and uphold the Constitution because grave damage in the form of deprivation of Constitutional rights will occur.

Stated another way, the preservation of Constitutional rights is paramount. If any prohibition on speech is appropriate the court must use the least restrictive means to do so. "If a less restrictive alternative would serve the Government's purpose, the legislature **must** use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). The trial court did not do so. The court did not have a hearing to determine what, if any, harm will be realized by the child. See *Dorfman v Dorfman*, 315 NJ Super. 511, 518 (App. Div 1998). The court did not speak with MT or hear from any experts. In summary fashion, the trial court referred to "harm" to the child without speculating and without articulating real harm nor exploring less restrictive means[3].

3. The trial court did amend the Order to allow Mother to speak with her paid therapist and paid attorney only.

A finding that a parent's conduct is inconsistent with his or her constitutionally protected parental status must be supported by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982). See also *Dunn v. Covington*, 846 S.E.2d 557 (N.C. App. 2020).

No such due process procedure was applied by this Trial Court. It failed to consider the right of the child to the love and care of her Mother and the Mothers right to parent her child, which are both of constitutional proportion and policy. As stated in *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) "the Due Process Clause does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

Based on deprivation of her rights, Mother has established "irreparable injury" and "grave damage" that the "interests of justice" require her Motion for permission to file an interlocutory appeal be granted and an overturning of the Order. Moreover, the trial Court failed to consider what truly is in the minor child's best interest which our Courts have established must focus on the "safety, happiness, physical, mental and moral welfare" of the child. *Beck v Beck*, 86 NJ 480, 497 (1981).

POINT TWO: APPELLANT WAS AND IS ENTITLED TO EMERGENT RELIEF BASED UPON THE LEGAL STANDARD AS SET FORTH IN CROWE V. DIGIOIA

New Jersey *Rule* 4:52-1 sets forth the standard for an Order to Show Causee. See Pressler, *Current New Jersey Court Rules*, *R.* 4:52-1 at 1738 (2010). However, where

the OTSC has been denied, the Appellate court must use the applicable standards set forth in detail in *Crowe v. DiGioia*, 90 N.J. 126 (1982) to ascertain whether movant meets the standards set forth in Court Rule 2:2-2(b) and sets forth that a "preliminary injunction should not issue except where necessary to prevent irreparable harm." *Id.* The Court in *Crowe* defines irreparable harm as that which "cannot be redressed adequately by monetary damages." *Id.* An injunction should issue only when (1) it is necessary to prevent irreparable harm; (2) the legal rights underlying Plaintiff's claims are settled; (3) the material facts are not controverted; and (4) the relative hardship to the parties by entering the injunction is non-existent or outweighed by the equitable need to enter injunction. *Id.* at 132-34. In this matter, Appellant meets the above delineated standard. Overturning this Order is necessary to prevent irreparable harm to both the Mother and child MT. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976). Likewise is the right to parent. The U.S. Supreme Court has recognized "the fundamental right of parents to make child-rearing decisions." *Troxel,* 530 U.S. 72-73 (2000). Violation of such right to parent, and a child right to the nurture and care of her Mother is also irreparable and interferes with a fundamental liberty interest. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky* 455 U.S. at 753.

The harm to the Defendant is neither speculative nor incidental: A child has the right to be parented and the

parent has both an obligation and a right to parent. "A parent's right to enjoy a relationship with his or her child is constitutionally protected." *In re Guardianship of K.H.O.*, 161 N.J. 337, 346 (1999). Mother desires to exercise her right to Free Speech and to parent and any infringement thereof is unconstitutional and irreparable. The harm to the child is also immeasurable where she alleges great harm to her by her other parent.

The legal rights of the Appellant to exercise her Free Speech rights are well settled. See arguments herein. Even under the doctrine of *parens patriae,* a Court must balance Constitutional mandates. As one judge stated,

> [W]hen States use their *parens patriae* powers to protect the best interests of the child, they do so because the parents cannot agree [such as in a divorce proceeding] or because the child has no parents at all . . . But I am aware of **no authority** . . . to suggest States can use their *parens patriae* powers to impose blanket prohibitions on parental choices simply because the government does not trust an otherwise-present-and-fit parent to choose wisely. (Emphasis added)

Raskin on behalf of JD v. Dallas Ind. School Dist., 69 F4th 280, 295 (Fifth Cir. 2023).

Critically, the material facts are not controverted. The Orders of the Court speak for themselves and state specifically that Defendant cannot discuss "this matter with

any third parties including but not limited to the adult children and especsically [sic] with [MT] or within her hearing range. (Including any discussion of what occurs in court)". Such prohibition infringes on Mother's right to Free Speech, right to association and right to parent. Da29

Finally, there are no hardships to the other party. The equitable need to enter the injunction is great. Noteworthy, MT is free to speak with whomever she chooses about what she states her father did to her: her friends, her teachers, her siblings but not her Mother who should be permitted to give her guidance and love. Barring Mother from speaking with her own adult and minor children has no effect on the Respondent, as it does not maintain his privacy interest or any other interest as the 3 siblings can freely speak with other. Mother's ability to associate with others has no effect on Respondent. Appellant's right to parent her children and the child's right be parented by the Appellant has no ill effect on the other party but has great consequence to the Appellant and the child. It serves no interest and furthers no interest here.

Not only is there no harm to the other party, but the Court's action is a sword creating an order that prohibits Appellant from speaking with those persons closest to her. It is precisely that behavior that our statutes prohibit by others and should apply to this court as well. N.J.S.A. 2C:25-29 defines coercive control: "Coercive control may include, but shall not be limited to: (a) isolating the person from friends, relatives, transportation, medical care, or other source of support. . .". Appellant has met the standards of *Crowe* and her application should be granted.

Respondent may argue that no interlocutory hearing is necessary, but the case of *Brundage, supra,* 195 *N.J.* at 599, is instructive as it makes clear that the exercise of its "considerable discretion" turns on whether leave to appeal will "prevent the court and the parties from embarking on an improper or unnecessary course of litigation." *Id.* The issue of abuse by Father here has not yet been tried and adjudicated by the court. The order does not prevent litigation of that issue. Here, it is obvious that "the desired appeal has merit and that 'justice calls for [an appellate court's] interference in the cause". Id. In this case justice calls for appellate intervention on an interlocutory basis to avoid continued infringement on the Free Speech Rights, interference with the right to parent and the right of free association. The Order also infringes on the child's right to have a parent from whom she seeks love and support which cannot be curtailed. "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed '**essential**,' . . . '**basic civil rights of man**,' . . . and '(r)ights far more precious . . . than property rights,' . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (emphasis added).

POINT THREE: APPELLANTS PARENTAL RIGHTS CANNOT BE INFRINGED

Parents have a protected interest in controlling the upbringing of their children. The Fourteenth Amendment

states that no "state shall deprive any person of life, liberty, or property, without due process of law." See *U.S. Const. amend. XIV, § I.* In 1923, the Supreme Court of the United States recognized in *Meyer v. Nebraska* that "the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children'" *Troxel*, 530 US at 65, *Stanley* 405 US at 651.

Parents' interest in controlling the upbringing of their children has been interpreted as creating a barrier around the family that cannot be breached without substantial government interest. Id at 65-66. This recognition has led courts to give parents a great deal of deference in deciding what care is appropriate for their children in conjunction with the manner in which they should be raised. The court order barring Mother from speaking with any third party infringes upon the right to parent.

The unemancipated children and the minor child have been found by experts to have been sexually abuse by their Father. They need the love and support of their Mother. Parental authority is a consequence of state law, which grants parents broad power and discretion over the lives of their minor children. *Thompson v. Thompson*, 484 U.S. 174, 186 (1988). The Court held that a "presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68. More importantly, historically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children. Id.

Here, those natural bonds of affection have been thwarted by the Courts Order barring any communication

between Mother and any of her children, including adult children who are not parties in the divorce and not under the control of the court in the divorce action. The trial court order prevents Mother from providing care to her children and from providing the best interests to MT and the emancipated children.

POINT FOUR: APPELLANTS FIRST AMENDMENT RIGHTS CANNOT BE INFRINGED

As to Free Speech, the First Amendment provides: "Congress shall make **no law . . . abridging the freedom of speech**, . . .". U.S. Const. Amend. I. Here, the Court issued a protective order barring Appellant from speaking to anyone about this litigation. The court suppressed Appellant's Free Speech and censored what she says and to whom she can speak. Appellant asks this Court restore her First Amendment Right to Free Speech and to not unconstitutionally infringe upon her rights, both those protected under the US and State Constitutions. *U.S. Const.* amend. I., *N.J. Const.* art. I, ¶ 6. By placing a "gag order" on Appellant, it is impermissibly barring the exercise of her constitutional rights. "The First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' and likely to cause 'anguish' or 'incalculable grief.'" *303 Creative LLC v Elenis*, 143 S. Ct. 2298, 2312 (2023).

By prohibiting the Appellant from speaking to any third parties, the state, via the Court, is requiring the Appellant to either speak the state's message, or remain silent, or face sanctions. That was rejected in

303 Creative where the Supreme Court stated: "Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs . . . that 'is enough,' more than enough, to represent an impermissible abridgement of the First Amendment's right to speak freely." *Id*, at 2313. The First Amendment "does not tolerate the government forcing a citizen to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so." *Id* at 2314.

The gag order constitutes a prior restraint on the Defendant's speech. As set forth below, prior restraints on speech are ***presumptively*** unconstitutional. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its validity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). More expressly stated, there is a "heavy presumption" against prior restraints on speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). And, First Amendment activity can be especially time-sensitive. *See Elrod* 427 U.S. at 374 n.29. The Courts presume that prior restraints are unconstitutional because Courts fear "communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pitts Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390 (1973). For these reasons, Mothers First Amendment Rights here must be adjudicated on Interlocutory appeal and immediately protected.

The order barring Mother from speaking to anyone is also void for vagueness. As further set forth below,

due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

With respect to this order, the question must be asked as to why she cannot speak with her parents, friends, sister, or loved ones who may offer support during this very difficult divorce. Further, she cannot speak with her own adult and emancipated children. The emancipated children are adults. They are not under the authority of the Court. The Order isolates Mother from her loved ones. The Order is unconstitutionally overbroad because chills the Appellant's Constitutional free speech and parental rights.

Indeed, even harmful, derogatory, demeaning, or even discriminatory or harassing, speech is protected. Offensive, disagreeable, and even hurtful speech is exactly the sort of speech that the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557 at 574 (1995) (noting that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v Johnson*, 491 U.S. 397 at 414 (1989) (stating that "If there

is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

There has been no compelling interest shown or given by the court to override and set aside our First Amendment. In our constitutional democracy, the right to express oneself enjoys the fullest and firmest protection. *In re Hinds*, 90 N.J. 604, 613-14 (1982). In considering any limitation on free speech rights, a court "must weigh the gravity and probability of the harm caused by freely allowing the expression against the extent to which free speech rights would be inhibited or circumscribed by suppressing the expression." *Id.* at 614.

In *In re Marriage of Newell*, 192 P.3d 529 (Colo. App. 2008), the court found that the court's limitation on the Defendant's speech concerning the child was a "content-based restriction of his speech" that could only be constitutional if it promoted a compelling state interest and was the least restrictive means of promoting that interest. The court then went on to hold that, even if there was a compelling state interest sufficient to justify a restriction on his First Amendment free speech rights such as harm to a child, the "harm" standard is "a demanding standard when properly applied [and] 'Not every type or degree of actual or threatened physical or emotional harm will suffice; to constitute a compelling state interest the harm must be 'substantial.'" "In addition, 'harm to the child . . . should not be simply assumed or surmised; it must be demonstrated in detail.'" *In re Newell*, at 535-536. In *Newell*, the court found that just because the Appellant

had rarely agreed with the mother's decisions for the child and that he had "used his joint decision-making power to the child's detriment", that was insufficient to support the court's invasion of the Defendant's rights because no "real" harm was proven.

That the parties are involved in what has been referred to a "contentious litigation" is not relevant to the issue. Parties are able to be in litigation and not discuss litigation. Not discussing litigation is different than discussing a child's feelings and experiences or one's own feeling and experiences with others. Likewise it is different and less restrictive than barring any and all communication with third parties which is what this Court has ordered. The Courts authority to enter orders in divorce proceedings is not unfettered and cannot dismiss the Constitution.

Barros v. Barros, 72 A.3d 367, 373 (Conn. 2013) held that a parent has a liberty interest in the custody, care, and control of his or her child and that a parent is entitled to due process of law before he or she can be deprived of that liberty interest. This is a procedural, not a substantive, due process right. And the particular nature and extent of the procedural due process required is flexible and calls for such procedural protections as the particular situation demands. *Barros*, supra, at 373.

POINT FIVE: THE TRIAL COURT FAILED TO MAKE A FINDING OF HARM

To consider ANY restrictions on a Constitutional Right the trial court must find that if the orders infringing

on the Defendant's constitutional rights are not granted, the child will suffer "actual" "substantial" physical or emotional harm. See *Newell*, supra. There is no basis for such a finding in this record. Further, the court would have to show that the alleged harm must be demonstrated in detail, not merely alleged. Id. It cannot be assumed nor can it be estimated or speculative. It must be actual harm. There is nothing in the record or even alleged to show that. The Court only made a blanket statement as to "harm" to the child without any basis or details. Tr pg 34 ln 11-ln 21.

The only proofs of harm to the children are the expert opinions saying the children suffered harm at the hands of Respondent. See reports of Dr. Randall Alexander and Dr Steven Gold, Da105 Da157. To show harm to the minor child if the Mother spoke to her directly would require expert testimony. Certainly, there could be no showing of actual harm to the minor child if the Mother spoke to her friends, her parents (maternal grandparents), clergy, sister, or her emancipated children. It is merely self-serving assertions of the Respondent to seek to prohibit Free Speech.

Since the infringement on the Appellant's constitutional rights must serve a compelling state interest and be the restrictive to serve that interest, this would require a hearing at the very least as due process mandates. There are numerous other less restrictive alternatives the Court could implement if it was convinced that harm would come to the child if the Appellant speaks with her such as speech outside the presence of the child or speech initiated by the Mother with the child. What cannot be tolerated is prior

restraints on speech which "are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska* 427 U.S. at 559.

POINT SIX: THE TRIAL COURTS ORDER IS A PRIOR RESTRAINT WHICH CANNOT WITHSTAND CONSTITUTIONAL CHALLENGE

As set forth above, prior restraints on Free Speech are unconstitutional. For a prior restraint on speech to pass constitutional muster, it must satisfy strict scrutiny – meaning that the prior restraint must serve a compelling state interest to protect against a serious threat of harm and be narrowly tailored to be no greater than is necessary to protect the compelling state interest asserted as justification for the restraint. *Shak v. Shak*, 484 Mass. 658, 663 (Mass. 2020).

Here, the trial court alleged that the compelling governmental interest is the protection of harm to the child. The trial court suggests that this blanket prohibition – barring Mother from speaking to any third party[4] – is the least restrictive means. However, there is no possible harm that could come to the child if the Mother is permitted to speak with her parents, her sister, or her friends or clergy, or even her unemancipated children. The trial court did not even consider an order barring Mother from initiating any discussions about the litigation with the minor child. Arguably, such

4. As stated earlier, the trial court modified the prohibition to allow her to speak with her paid therapist and her paid attorney.

restriction is less intrusive and can be connected to a compelling governmental interest if, indeed, real harm can be established.

Some courts have held that there is a compelling state interest in protecting minor children from exposure to their parents' disparagement of one another. Thus, orders prohibiting parents from making disparaging comments about the other *in the presence of the children* are oftentimes found to be constitutionally valid. See, for example, *Shak v. Shak*, supra, at 663. Here, however, the trial court did not apply such restrictions as "in the presence of the child" as in *Shak*. The trial court had a blanket restriction that the Mother could talk to **no third parties**, including the minor child and the unemancipated children. Such blanket restrictions are presumptively invalid as prior restraint on free speech and not the least restrictive means of achieving a compelling governmental interest provided harm to the minor child is proven. Orders that prohibit disparagement outside the presence of the children, or in circumstances where there is no evidence that the prohibited disparagement will be harmful to the children even if made in their presence, are unconstitutional. However, in this matter, Appellant merely seeks for the child to be able to speak with her as a parent– as any young child would want to do and to give her love and support and to speak with adult children as well as with others unrelated to the litigation such as friends and her own parents.

Many courts believe that the constitutional infirmities of a non-disparagements order are overcome if the non-disparagement order only prohibits disparaging speech uttered in the presence of the children. That does not

apply here because harm was never established. In order to pass constitutional muster, a non-disparagement order must also be supported by evidence that the prohibited speech will actually harm the children that the order is intended to protect, and the court may not simply assume or surmise that harm. No harm was established here and as such, the Order is constitutionally defective.

In *Shak v. Shak*, supra, the court struck down as an unconstitutional prior restraint where it found that "[n] o showing was made linking communications by either parent to any grave, imminent harm to the child. *Shak*, supra, at 664. That is exactly so here as well. There is no link or proof that communications between Mother and minor child would cause imminent harm to that minor child. Further removed is that there is no link or proof that communications between Mother and emancipated children would cause imminent harm to the minor child, likewise communications with Mother's parents, Mother's friends, sister etc.

The Colorado Court of Appeals came to a similar conclusion in *In Newell*, 192 P.3d 529 (Colo. App. 2008). In *Newell* the court found that a family court order prohibiting the father from speaking with his son's caregivers was an unconstitutional infringement of the father's free speech rights because it was a content-based speech restriction and there was no evidence showing that the father's exercise of his free speech rights in speaking with his son's caregivers actually "threatened the child with physical or emotional harm, or had actually caused such harm" and that "'harm to

the child . . .should not be simply assumed or surmised; it **must be demonstrated in detail**.'" (emphasis added) *Id* at 536.

Shak and *Newell* establish that a court may **not** prohibit by prior restraint even shockingly disparaging speech made in the presence of the children unless there is detailed evidence that such speech will actually harm the children the order is intended to protect. Harm cannot be assumed or surmised. Here, no such harm was established. Indeed, the harm is to the child who cannot speak with her own Mother which violates our Courts focus on the best interest of the child which is the "safety, happiness, physical, mental and moral welfare" of the child. *Fantony v Fantony* 21 N.J. 525 at 536 (1956). The harm is also to the Mother who cannot speak with anyone and to the child who cannot speak to her mother.

POINT SEVEN: THE COURT ORDER IS VOID FOR VAGUENESS AND OVERBROAD

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. The lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project,* 561 U.S. 1, 19 (2010).

Vague laws present several due process problems. First, such laws trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and

subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Here, the Trial Court has entered an Order that bars Appellant from speaking to "any third party" about "this matter". This is vague because the Court did not truly seek to prohibit her from speaking about anything related to this matter. Presumably it is to avoid disparaging comments or remarks. However, as stated above, non-disparagement orders may suffer the infirmity of unconstitutional vagueness because such orders often prohibit the parties from engaging in speech that is defined in merely general and vague terms – "derogatory", "demeaning", "denigrating", or "harmful" speech to or concerning the other spouse. Courts have found such terms unconstitutionally vague. *Greenberg v. Goodrich*, 593 F.Supp.3d 174, 224-25 (E.D. Pa. 2022).

Assuming arguendo that the Trial Court Order is clear and precise – thereby avoiding a vagueness challenge – it is nevertheless unconstitutionally overbroad if it prohibits constitutionally protected speech. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned*, 408 U.S. at 114-15

The overbreadth doctrine is designed precisely to protect citizens from having their speech chilled by overbroad laws. *Massachusetts v. Oakes*, 491 U.S. 576,

584 (1989)(overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.) For these reasons, an order that restricts a party's speech is unconstitutional – even if otherwise serving a compelling state interest, such as to protect a child from actual harm – if the order is unconstitutionally vague or overbroad.

CONCLUSION

This Court should reverse the trial court order and restore the Mother's right to free speech and right to parent her child.

Respectfully submitted,

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