IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 24-0099

IN THE MATTER OF

H.K.,

A YOUTH IN NEED OF CARE.

EMERGENCY MOTION FOR STAY

***** IMMEDIATE RELIEF REQUESTED BY FEBRUARY 20, 2024 *****

On Appeal From an Order Granting an Injunction in *In the Matter of H.K.*, Cause No. DN-2023-03, Montana Seventeenth Judicial District, Valley County
The Honorable Yvonne Laird, Presiding

APPEARANCES:

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Attorney for Appellants

INTRODUCTION

Pursuant to M. R. App. P. 22(2), Appellants T.K. and K.K., the father and stepmother of 14-year-old H.K. (hereinafter, the "Parents"), hereby move for an immediate stay of the contempt hearing scheduled to occur in the District Court on February 21, 2024. The hearing arises from a prior restraint issued by the District Court on January 18, 2024. "[I]f a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review. Absent such review, the State must instead allow a stay." *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44 (1977).

As explained below, the District Court's prior restraint against the Parents is patently unconstitutional. And though the court has not (yet) jailed them for violating the restraint, it has expressly threatened to do so. This threat is, itself, a violation of the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963) ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around"); *Biden v. Knight First Amend. Inst*., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) ("[t]he government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly"). The Parents are thus entitled to an immediate stay of the contempt hearing while their appeal is pending.

COMPLIANCE WITH M. R. App. P. 22(2)

The Parents filed a motion for stay in the District Court on February 15, 2024. **Exhibit 9**. Undersigned counsel called the clerk of the District Court on February 16 at 3:00 p.m.; the clerk said no order on the motion had been filed. Declation of Counsel, *infra*, p. 10. At 3:25 p.m. on February 16, undersigned counsel notified the other parties via email that the Parents intended to file a motion for stay in this Court. *Id.* Counsel for DPHHS and counsel for the Youth have stated that they oppose the motion. *Id.* Counsel for the birthmother has not responded. *Id.* Undersigned counsel called the District Court clerk again at 4:50 p.m., on February 16, but was told that the motion to stay had been ruled on. *Id.*

Given that February 19, 2024, is a court holiday, and given that the hearing the Parents seek to have stayed is scheduled for the morning of February 21, 2024, the Parents respectfully submit that "extraordinary circumstances" exist under M. R. App. P. 22(4) for this Court to entertain this motion.

BACKGROUND FACTS

On January 17, 2024, counsel for the Youth filed a motion to enjoin the Parents from "disclosing any further records or reports, or making any statements, in any social media or news media (electronic, print, video), in any authorized manner regarding [the youth], the youth's physical or mental health, state of mind, or involvement in the above reference dependency and neglect matter, absent

express permission from this Court." **Exhibit 1.**[1] The District Court issued an order dated January 18, 2024 (hereinafter, the "Gag Order"), containing the following provisions:

> IT IS HEREBY ORDERED THAT ALL PARTIES to this dependency and neglect matter are ENJOINED from disclosing any further records or reports, or making any statements or interviews, in any social media or news media (electronic, print, video), in any unauthorized manner regarding the Youth's physical or mental health, state of mind, or involvement in the above referenced dependency and neglect matter, absent express permission from this Court.
>
> IT IS FURTHER ORDERED, that the Birthfather and Step-mother shall DELETE any video or any other statements they have previously made, from any social media or news media, directly linked to this dependency and neglect matter, to prevent further dissemination of the Youth's confidential mental and physical health care information.

Exhibit 2.

The Youth's counsel filed a motion for contempt on January 22, 2024, based upon an alleged violation of the Gag Order by the Parents. **Exhibit 3**. The District Court scheduled a contempt hearing for January 29, 2024. **Exhibit 4**.

On January 25, 2024, the court granted the State temporary legal custody of the Youth for six months and authorized temporary placement with her birthmother in Canada. **Exhibit 5**. The court acknowledged that "This matter implicates issues beyond the purview of the Court, such as the political, religious, and personal

[1] Redacted copies of documents from the District Court's file are attached to this Motion and, pursuant to M. R. App. P. 10(7)(b), the original documents will be filed under seal with the clerk.

beliefs of the Youth's parents." *Id.* at pp. 4-5. The court also authorized the State to impose treatment plans on the Parents. *Id.* at p. 7.

On January 26, the Youth's counsel filed an amended motion for contempt alleging that the Parents had committed additional violations of the Gag Order. **Exhibit 6**. The District Court issued an order on January 29, 2024, continuing the Parents' contempt hearing to February 21, 2024. **Exhibit 7**. The Order included the following statement: "The Court's previous Order prohibiting release of information remains in effect and further dissemination will result in Contempt which *may result in jail and/or fine*." *Id.* (emphasis added).

On February 14, 2024, the Parents filed a notice of appeal in this Court concerning the Gag Order. **Exhibit 8**. On February 15, the Parents filed a motion for stay in the District Court. **Exhibit 9**.

ARGUMENT

I. THE FIRST AMENDMENT ENTITLES THE PARENTS TO A STAY OF THE DISTRICT COURT'S CONTEMPT PROCEEDINGS

The Gag Order against the Parents is a prior restraint because it is a "judicial order[ ] forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). Such orders are "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558-59 (1976). A prior restraint bears a "heavy presumption against its constitutionality," *id*., and

is subject to "the most exacting scrutiny." *Smith v. Daily Mail Pub. Co*., 443 U.S. 97, 102 (1979). Even the government's national security justification was insufficient to overcome the "heavy presumption against [the] constitutional validity" of "[a]ny system of prior restraints of expression." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

A court confronted with a gag order must "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). This is particularly so when the speech at issue concerns citizen protests against government misconduct because "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs." *Id.* at 838 (citations omitted). This includes discussions of judicial errors. *Id.* at 839 ("the law gives judges as persons, or courts as institutions, no greater immunity from criticism than other persons or institutions").

Courts around the nation have applied the standard in *Landmark* in striking down prior restraints purportedly issued to protect a child's best interests. See,

e.g., *In re T.T.*, 779 N.W.2d 602, 620 (Neb. App. 2009) (invalidating gag order issued against parents in juvenile case because while "further disclosure of T.T.'s private medical information is not in T.T.'s best interests," the "child's best interests are not the standard" under *Landmark*); *Baskin v. Hale,* 787 S.E.2d 785, 791-92 (Ga. App. 2016) (vacating gag order entered in child custody case due to trial court's failure to apply *Landmark* standard); *In re L.M.*, 37 P.3d 1188, 1194-96 (Utah App. 2001) (remanding case to juvenile court to apply *Landmark* standard to gag order).

The Gag Order in this case is even more problematic than those struck down in the juvenile cases cited above. First, in issuing the Gag Order, the District Court made no inquiry into the imminence and magnitude of the danger allegedly resulting from the Parents' speech. **Exhibit 2**. Second, the District Court failed to "balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark,* 435 U.S. at 843. The Parents' speech about this matter "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Finally, to the extent that any gag order was needed, the court could have tailored it much more narrowly. For example, it could have simply ordered the Parents to refrain from using their daughter's real name in public discussions about her – something they have been careful to do in their public statements.

Because the Gag Order is unconstitutional, the Parents are entitled to immediate relief and should not be subjected to contempt proceedings until this Court has decided their pending appeal. *National Socialist Party of America*, 432 U.S. at 44 ("[i]f a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review. Absent such review, the State must instead allow a stay."); see also *State ex rel. News Herald v. Ottawa County Court of Common Pleas, Juv. Div*., 671 N.E. 2d 5, 8 (Ohio 1996) ("the First Amendment demands that the court systems of the several states provide challengers of such restraints with *immediate* judicial remedies") (emphasis in original).

II. THIS MATTER SHOULD PROCEED ON AN EXPEDITED SCHEDULE

This Court has previously advised the parties that it will entertain a request for expedited briefing should they file an appeal. *T.K. and K.K. v. Montana Seventeeth Judicial Dist. Court*, No. OP 24-0078, Order (Feb. 13, 2024). Given the egregiousness of the constitutional violation arising from the Gag Order, the Parents request that the Court set an expedited briefing schedule for this matter.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court (1) stay all contempt proceedings in the District Court and (2) set an expedited briefing schedule for this appeal.

DATED: February 16, 2024

Respectfully submitted,
MONFORTON LAW OFFICES, PLLC

/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Petitioner

DECLARATION OF COUNSEL

I, Matthew Monforton, do solemnly state as follows:

1. I am a resident of Gallatin County, Montana.
2. I am appellate counsel for the Parents in this matter.
3. If called to testify, I could and would testify truthfully, from first-hand knowledge, about the following facts contained in this declaration.
4. Exhibits 1 through 9 that are attached to this Motion are true and correct copies of documents filed in Cause No. DN-2023-3 in the Montana Seventeenth Judicial District Court, Valley County.
5. The copies were provided to me by Emily Lamson, counsel for the birthfather in the District Court.
6. The Parents filed a motion for stay in the District Court on February 15, 2024.
7. I called the clerk of the District Court on February 16 at 3:00 pm, who stated that no order on the motion had been filed.
8. At 3:25 p.m. on February 16, I notified the other parties via email that the Parents intended to file a motion for stay in this Court.
9. Counsel for DPHHS and counsel for the Youth have stated that they oppose the motion.
10. Counsel for the birthmother has not responded.
11. I called the District Court clerk again at 4:50 p.m., on February 16, but was told that no ruling on the motion to stay had been filed.

I swear under penalty of perjury under the laws of the State of Montana that the foregoing is true and correct to the best of my knowledge.

Executed in Bozeman, Montana, on February 16, 2024

_____

Matthew G. Monforton

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 22(2)(a)(iv) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and does not exceed 10 pages of text.

DATED: February 16, 2024

Respectfully submitted,

/s/ Matthew G. Monforton
Matthew G. Monforton

CERTIFICATION OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing EMERGENCY MOTION FOR STAY with the Clerk of the Montana Supreme Court, and that I have served true and accurate copies of the foregoing EMERGENCY MOTION FOR STAY upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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DATED: February 16, 2024

Respectfully submitted,

MONFORTON LAW OFFICES, P.C.

/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Appellants

CERTIFICATE OF SERVICE

I, Matthew G. Monforton, hereby certify that I have served true and accurate copies of the foregoing Motion - Stay to the following on 02-16-2024:

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Electronically Signed By: Matthew G. Monforton
Dated: 02-16-2024