No. 23-1122

IN THE
Supreme Court of the United States

FREE SPEECH COALITION, *ET AL.*,
Petitioners,
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief of *Amici Curiae* Council on Pornography Reform, America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Respondent

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INTEREST OF THE *AMICI CURIAE*[1]

Council on Pornography Reform (a project of Reel American Heroes Foundation), America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations which work to defend constitutional rights and protect liberties. These *amici* filed an *amicus* brief supporting Respondent when this case was in the Fifth Circuit: Brief *Amicus Curiae* of Council on Pornography Reform, *et al.*, *Free Speech Coalition v. Paxton*, U.S. Court of Appeals for the Fifth Circuit, No. 23-50627 (Sept. 24, 2023).

STATEMENT OF THE CASE

On June 12, 2023, Texas enacted H.B. 1181, requiring companies that produce or distribute pornographic material that is harmful to minors to have age-verification capability to ensure that the companies did not distribute the material to minors. *See Free Speech Coal., Inc. v. Colmenero*, 689 F. Supp. 3d 373, 382 (W.D. Tex. 2023) ("*FSC*"). It also requires these distributors to place digital "warning labels" on obscene material.

A coalition of online pornography websites (some domestic and some foreign) and "adult performers" sought injunctive relief from the federal district court

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

for the Western District of Texas. *Inter alia*, Plaintiffs alleged the law "would unconstitutionally restrict their free expression...." *Id.* at 383.

The district court determined that, "[b]ecause the law restricts access to speech based on the material's content, it is subject to strict scrutiny." *Id.* at 391. Citing the Supreme Court's decisions in *Reno v. ACLU*, 521 U.S. 844 (1997), and *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the district court found that the statute was not narrowly tailored, both because it covers at least some material that might not be "obscene," and because it could restrict content provided to adults as well as that provided to children. *See FSC* at 393. It also found that age verification was not the least restrictive means available and that the statute was not narrowly tailored, as well as both underinclusive and overbroad. *See id.* at 394-95. Finally, it held that the "warning label" requirement constituted "compelled speech," and enjoined that provision as well. *Id.* at 405.

On appeal, the Fifth Circuit upheld the injunction with regard to the warning label provision. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 267 (5th Cir. 2024). However, it vacated the injunction concerning the age verification requirement. *Id.* Citing to this Court's decision in *Ginsberg v. New York*, 390 U.S. 629 (1968), the court ruled that "regulations of the distribution to minors of materials obscene for minors are subject only to rational-basis review." *Free Speech Coal.* at 269. The court ruled that Texas' interest in preventing the distribution of pornographic

material to minors was a rational basis for the law. *Id.*

STATEMENT

In granting review of this case, the Court is poised to do great good by allowing states to exercise their historic police powers to protect public morality, and especially to protect minors. Until recently, states have been reluctant to exercise any controls over pornography — even for minors — anticipating under recent decisions of this Court that they will be stopped in their tracks by lawsuits and federal district court judges. Recently, Texas and numerous other states once again have stepped up to the plate to protect minors. Rather than being enjoined by federal judges, the law enacted by Texas should be applauded.

The problems caused by childhood exposure to pornography have been obvious, and are well documented. These observations are not limited to the publications of conservative and Christian organizations. A study by the Australian Government's Institute of Family Studies on "Children and young people's exposure to pornography" found that nearly half of children ages 9 to 16 experience regular exposure to pornographic images, detailing their negative effects. Additionally, UNICEF has issued a report calling for the "Protection of children from harmful impacts of pornography."

> Pornographic content can harm children. Exposure to pornography at a young age may lead to poor **mental health, sexism and**

> **objectification, sexual violence, and other negative outcomes**. Among other risks, when children view pornography that portrays **abusive and misogynistic acts**, they may come to view such behaviour as normal and acceptable....
>
> Efforts to regulate content and restrict children's access to pornography have not kept pace with technological shifts that have profoundly altered the landscape for the consumption of pornography. While many jurisdictions have effectively **restricted children's access to pornography** in non-digital media, including by making it illegal to distribute pornography to children or knowingly expose them to it, **efforts to do the same in digital environments have not been effective**. [Emphasis added.]

Such exposure creates a disconnect between the physical and emotional aspects of sexuality, causing women, but also men, to be viewed as objects, not people. Early viewing of pornography is linked to earlier loss of virginity, promiscuity, incest, participation in group sex and anonymous sex, sexual abuse of children, minors forcing other minors to perform sexual acts, sexual violence, sexual brutality, and rape. Technology makes pornography of the most degrading type available to children at an early age. Are these harms to children in Texas to be ignored by the Texas legislature? By any reasonable standard, Texas has not only the power, but also the responsibility, to establish such protections as are

technologically possible to impede childhood access to dark and dangerous images and videos.

Lastly, it cannot be ignored that Holy Writ reveals our Creator's special concern for children. "Let the little children come to me and do not hinder them, for to such belongs the kingdom of heaven." *Matthew* 19:14. And, the subject matter of this case cannot be taken lightly by anyone, as Scripture also contains an ominous warning to those who would corrupt innocent children. "It would be better for him if a millstone were hung around his neck and he were cast into the sea than that he should cause one of these little ones to sin." *Luke* 17:2.

SUMMARY OF ARGUMENT

The brief submitted by these *amici* addresses whether there is ample room under recent Court opinions to uphold the Texas age verification law, explaining why they believe there is. But this brief also addresses a threshold question — whether this Court's decision decades ago to constitutionalize the law of obscenity had any basis in the First Amendment's text, context, history, or tradition. It may be difficult to believe that what has been assumed to be true for nearly seven decades is in error. However, this Court only recently ruled that its constitutionalization of the regulation of abortion was a nearly five-decade-old error requiring correction.

Petitioners ground their challenge, seeking to be freed of restrictions on distribution of pornographic materials, based on protections afforded by the First

Amendment. Although there certainly is case law that provides protection for some obscene material, those decisions are predicated on an erroneous view of "the right to freedom of speech and of the press." Both "the freedom of speech" and "the freedom ... of the press" were legal doctrines with established meanings at the time they were incorporated into the Constitution. Nevertheless, since *Roth v. United States*, this Court has morphed speech and press protections into an atextual "freedom of expression," granting courts latitude to select whatever meaning of that term as each case may require to reach the desired result, without any constraint imposed by First Amendment's text, context, history, or tradition.

ARGUMENT

I. SINCE *ROTH V. UNITED STATES*, THIS COURT HAS EMPLOYED A "JUDGE-EMPOWERING 'INTEREST BALANCING INQUIRY'" AND AN ATEXTUAL RIGHT OF "FREE EXPRESSION" TO OVERRIDE THE FIRST AMENDMENT'S TEXT AND HISTORY.

In upholding the Texas law, the Fifth Circuit relied on this Court's decision in *Ginsberg v. New York*, 390 U.S. 629 (1968):

> 'The State has an interest to protect the welfare of children and to see that they are safeguarded from abuses.' *Ginsberg*, 390 U.S. at 640.... For that reason, regulations of the distribution to minors of materials obscene for

> minors are subject only to rational-basis review. [*Free Speech Coal.* at 269.]

In *Ginsberg*, Justice Brennan plainly (and correctly) declared the longstanding rule that "Obscenity is **not** within the area of protected **speech** or **press**." *Ginsberg* at 635 (emphasis added). Nevertheless, the court then evaluated (and rejected[2]) the magazine seller's challenge under an often asserted but atextual "**freedom of expression**." However, if "freedom of expression" is not shorthand for the freedom of speech and press, on what constitutional text was Justice Brennan's "free expression" decision grounded? Unfortunately, by evaluating the challenge under a phrase devoid of meaning — "freedom of expression" — the Court was laying the groundwork for future constitutional error. In the years since, this Court has built on Brennan's error, effectively gutting all protection against pornography.

Here, the challenge to the Texas law can be readily dismissed, either because the state law provides critical protections for minors, as established in *Ginsberg*, or for the simple, yet historically indisputable reason, that the First Amendment provides no protection for pornography. A decision grounded in the absence of Free Speech or Free Press protection of pornography would avoid the need to find a path around highly suspect decisions based on the

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[2] The Supreme Court ruled New York was allowed to classify the same material as being not obscene for adults, but obscene for minors.

flawed notion that the Framers of that Amendment viewed obscenity as protected under the historical understanding of "**the** freedom of speech or of the press...." (Emphasis added to the definite article "the," further demonstrating a reference to the specific, historical meaning of that term. *See* Section II.B, *infra*.)

In 1996, Congress enacted the Communications Decency Act ("CDA") as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The CDA imposed criminal penalties on persons who transmit offensive sexual content or "obscene or indecent" materials to another person under 18 years of age or otherwise use an internet service to display offensive sexual content to someone under 18 years of age. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court struck down the anti-indecency provisions of the CDA, holding that those provisions violate the First Amendment.[3]

In response to *Reno*, Congress enacted the Child Online Protection Act ("COPA"), Pub. L. No. 105-277, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231) in

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[3] Also in 1996, addressing a different problem, Congress enacted the Child Pornography Prevention Act of 1996 ("CPPA"), Pub. L. No. 104-208. Section 121 of that law expanded the federal prohibition on child pornography to include computer-generated images — "virtual child pornography." The Supreme Court struck down CPPA in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), as being overbroad. Congress responded to that Supreme Court decision, modifying the CPPA prohibition with the PROTECT Act of 2003, Pub. L. No. 108-21, which was upheld in *United States v. Williams*, 553 U.S. 285 (2008).

1998. COPA criminalized knowingly or intentionally making obscene material available to children under 17. The Supreme Court struck down COPA in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), for another First Amendment violation.[4]

With CDA, CPPA, and COPA all being struck down, the Supreme Court signaled that it would not be limited by the text, context, tradition, or history of the protections of "**the** freedom of speech or of the press" which terms would need to give way based on evolving societal and judicial standards.

In the context of the Second Amendment, Justice Scalia's opinion rejected the use of balancing tests urged in dissent by Justice Breyer,[5] because they were "judge-empowering," allowing judges to disregard the text, history, and tradition of a constitutional amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). This Court's commitment to searching out the meaning of the constitutional text was re-affirmed in Justice Thomas' opinion in *New York State Rifle & Pistol Association, Inc. v Bruen*, 597 U.S. 1 (2022). This case presents an excellent vehicle for this Court to apply the same methodology set out in *Heller* and *Bruen* to discern the meaning of the Second

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[4] The Children's Internet Protection Act ("CIPA") Pub. L. 106-554, 114 Stat. 2763A-335 required schools and libraries to have certain technology protection measures. The law was upheld as an exercise of the appropriations power. *See United States v. American Library Ass'n*, 539 U.S. 194 (2003).

[5] *Heller* at 689 (Breyer, J., dissenting).

Amendment to the First Amendment. The possibility of reconstituting the meaning of the First Amendment according to "text, history and tradition" was hinted at by Chief Justice Roberts during oral argument in *Heller* when he resisted any effort to apply First Amendment balancing tests to the Second Amendment. He noted that balancing tests were "just kind of **developed over the years as sort of baggage** that the First Amendment picked up."[6]

The application of "judge-empowering 'interest-balancing inquiry'" (*Heller* at 634) certainly cannot be relied upon to reach a historically accurate interpretation of the Constitution. Indeed, from the very first use of an enhanced judicial balancing test — then termed "the most rigid scrutiny" — it should have been clear these tests could not be relied on to faithfully interpret the Constitution. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944).

Under balancing, protecting minors from the corrosive influence of pornography certainly should trump the pornographer's desire to capture a younger demographic, or free itself from some burden in disseminating its product. Indeed, this Court has stated in the context of child pornography that "[i]t is evident beyond the need for elaboration that a State's interest in safeguard[i]ng the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

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[6] Statement of Roberts, C.J., Tr. of Oral Arg. at 44, *Dist. of Columbia v. Heller*, 554 U.S. 570 (U.S. Supreme Court No. 07-290) (emphasis added).

However, the simpler, more direct, and more historically correct approach to protecting minors would be to challenge Petitioners to provide all their evidence that the Framers and the ratifiers meant that "**the** freedom of speech and of the press" protected pornography at all, to say nothing of allowing children access to pornography. Likewise, the Petitioners could be asked, as in *Bruen*, to demonstrate through relevantly similar illustrations from the founding era where obscenity was protected by the First Amendment.

II. BEGINNING WITH ITS *ROTH* DECISION, THIS COURT HAS USURPED STATE POLICE POWER BY IMPOSING THE FIRST AMENDMENT ON THE COMMON LAW OF OBSCENITY.

A. The Supreme Court, Led by Justice Brennan, Has Negated State Authority over the Law of Obscenity (and Defamation).

As documented in Section IV, *infra*, from the founding of the Republic until the middle of the Twentieth Century, defining and controlling obscenity and pornography was the exclusive responsibility of the several states. It was unquestioned that neither the text nor the ratification-era authorities provided any support for the notion that obscenity was protected under the First Amendment. Thus, federal courts understood they had no authority whatsoever to override state laws protecting the morals of their citizens. Today, the general proposition that only

states have the police power to regulate behavior to advance health, safety, morals, and general welfare is honored only in the breach by federal judges who feel empowered to exercise federal power to override state authority by invoking decades of obscenity decisions that need to be re-examined and overturned.

In 1942, a unanimous Supreme Court emphatically affirmed that there were "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Among Justice Murphy's list of five enumerated classes were the obscene and the libelous. The Court proclaimed that neither was an "essential part of any exposition of ideas," and "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

The Supreme Court's constitutionalization of the law of obscenity and pornography is similar to its treatment of defamation, and thus these developments are best examined together. Both areas of state law were brought under the control of federal courts at the hand of Justice William J. Brennan during his 34-year tenure on the High Court.[7] Fifteen years after

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[7] During this era, the Supreme Court may have been called "the Warren Court," but it has been said that "Brennan would provide [the Court's liberal wing] its intellectual underpinnings. After he was no longer president, Eisenhower purportedly said, 'I have made two mistakes, and they are both sitting on the Supreme

Chaplinsky, the Supreme Court reiterated its view that even though "obscenity [like libel] was outside the protection intended for speech and press," it asserted a new rule: that it was for the Court to define "obscenity." *See Roth v. United States*, 354 U.S. 476, 483 (1957). Prior to *Roth*, it was understood that obscenity, a common law offense, was governed by state law, not by federal law. *See Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (1815).[8] Before *Roth*, definitions of what constituted obscenity varied, the most widely accepted of which was the Hicklin test,[9] allowing a finding of obscenity based upon the effect of "isolated passages on the most susceptible readers or viewers." *See Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930); *Commonwealth v. DeLacey*, 271 Mass. 327, 171 N.E. 455 (1930). Rejecting the Hicklin test, the U.S. District Court for the Southern District of New York "adopted instead a standard focusing on the effect on the average person of the dominant theme of the work as a whole." *See United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

Court.'" W. Fassuliotis, "Ike's Mistake: The Accidental Creation of the Warren Court," *Virginia Law Weekly* (Oct. 17, 2018).

[8] This statement and the following narrative is a paraphrase of a note on obscenity appearing on p. 1203 of G. Stone, *et al.,* Constitutional Law (2d ed. Little, Brown: 1991). *See also* Herbert W. Titus, "Obscenity: Perverting the First Amendment," *The Forecast*, vol. 3, nos. 7-9 (1966).

[9] *See Regina v. Hicklin*, L.R. 3 Q.B. 360, Court of Queen's Bench (1868).

In his *Roth* opinion, Justice Brennan leveraged this modernized test into a First Amendment rule, thereby launching the Court on a constitutional odyssey searching for a principled definition of obscenity. By 1964, the Court's quest was in such disarray that Justice Potter Stewart gave up the effort entirely, urging his colleagues to censor only "hard-core pornography," all the while reassuring them that: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

While the Court was still entangled in the bramble bush of obscenity, that same year — 1964 — it decided *New York Times v. Sullivan*, 376 U.S. 254 (1964). This time, Justice Brennan took his colleagues into the thornbush of Alabama libel law as applied to a government official in his official capacity. *Id.* at 267. At the outset of his discussion of the merits of the *New York Times*' First Amendment claim, Justice Brennan acknowledged that the Alabama courts had relied "on statements of this Court to the effect that the Constitution does not protect libelous publications." *Id.* at 268. "Those statements do not," Justice Brennan continued, "foreclose our inquiry here." *Id.* Instead of conducting a careful inquiry, Justice Brennan offered only a very brief survey of case precedents concerning libels of public officials before concluding that "we are compelled by neither precedent nor policy to give any more weight to the **epithet** 'libel' than we have to other 'mere labels' of state law." *Id.* at 269 (emphasis added). "Libel" — a

mere "epithet"!?[10] According to Blackstone, libel was not a mere label, but a well-established common law cause of action with specific elements, including burdens of proof as to the truth or falsity of the defamatory statements at issue:

> A second way of affecting a man's reputation is by printed or written libels ... which set him in an odious or ridiculous light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other cases, two remedies; one by indictment and another by action ... the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case, which is to repair the *party* in damages for the injury done him, the defendant may ... justify the truth of the facts, and show that the plaintiff has received no injury.... [3 Blackstone's Commentaries on the Laws of England at 125-26 (U. Chi. Press, Facsimile ed. 1765).]

Undeterred by this English common law pedigree and her American counterpart,[11] Justice Brennan asserted that "libel can claim no talismanic immunity from constitutional limitations[,] [but] must be measured by standards that satisfy the First Amendment." *New York Times* at 269. And what were

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[10] *Webster's Third International Dictionary* at 765 (1981) defines "epithet" as a "disparaging or abusive word."

[11] *See* W. Prosser, Law of Torts at 737-801 (4th ed. 1971).

those standards and where might they be found? Justice Brennan began:

> The general proposition that **freedom of expression** upon public questions is secured by the First Amendment has long been **settled by our decisions**. The constitutional safeguard, **we have said**, "was fashioned to assure **unfettered** interchange of ideas for the bringing about of political and social changes desired by the people." [*Id.* (emphasis added).]

That quotation was to none other than *Roth v. United States*, decided just seven years before in the case that revolutionized the law of obscenity. It was put to use by the Court in *New York Times* to justify a brand new federal rule in libel cases, one that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* at 279-80.

The *New York Times* case has received robust criticism both from sitting Justices and others, and efforts have been underway to bring to the Supreme Court a case that could require its reassessment.[12]

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[12] *See, e.g.*, *Coral Ridge v. Southern Poverty Law Center*, U.S. Supreme Court, No. 21-802 (petition denied); Brief *Amicus Curiae* of Public Advocate of the United States, *et al.* (Dec. 30, 2021); and *Blankenship v. NBCUniversal, et al.*, U.S. Supreme Court, No. 22-1125 (petition denied); Brief *Amicus Curiae* of Eight Nonprofit

Likewise, these *amici* hope that this Court will take this overdue opportunity to jettison its obscenity jurisprudence beginning with *Roth* and including decades of its unprincipled progeny.

B. The Supreme Court Has Wrongly Applied the First Amendment to Prevent States from Guarding against Wrongdoing.

Some federal courts have treated the freedoms of "speech" and "press" as though those were empty, undefined terms with no established meaning, available to be invested with any meaning that would make the judges' opinions seem less arbitrary. The history of the First Amendment makes clear that these terms were carefully chosen — not because speech referred to the spoken word and press referred to the printed word — but rather because each had an established, and different, meaning.

In James Madison's initial draft of the First Amendment submitted to the First Congress, the speech guarantee stated: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments...." *See* R. Perry and J. Cooper, edts., Sources of Our Liberties at 422 (ABA Found: 1978). Therefore, Madison's open-ended "right to speak, to write, or to publish" was reduced in Committee to read simply — "the freedom of speech." According to *Webster's 1828 Dictionary*, the word "the" was commonly used "before nouns ... to limit their

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Organizations (June 20, 2023).

signification to a specific thing or things." The manifest purpose of the change in Madison's broad-based first draft, then, was designed to limit its reach, not to enlarge it. Furthermore, by using the definite article, the Framers indicated that they had something definite and certain in mind, thereby indicating that the free speech guarantee was a pre-existing right that was discoverable from antecedent texts and from history.

Like so many of our constitutional rights, "the freedom of speech" is traceable to England. *See United States v. Johnson*, 383 U.S. 169, 177-78 (1966). Section 9 of the 1689 English Bill of Rights secured "the freedom of speech, and debates or proceedings in parliament [and] ought not to be impeached or questioned in any court or place out of parliament." Sources at 247. The adoption of the English Bill of Rights secured to the English people's elected representatives in Parliament assembled protection against the king's misuse of power through tyrannical laws prohibiting "stirring up sedition" and seditious libel for impugning the reputation of the king. *See* Sources at 228 and 235. This same protection was afforded to the American people's representatives by Article I, Section 6 of the U.S. Constitution, which provides jurisdictional immunity for both Senators and Representatives in Congress "for any Speech or Debate in either House."

As for the English people themselves, they remained accountable for actions that called into question the reputations of their rulers. *See* Sources at

306. The English common law against seditious libel remained:

> If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it. [*Rex v. Tutchin*, 14 State Trials 1095 (1704), quoted in F.S. Siebert, Freedom of the Press in England, 1476-1776 at 271 (Univ. of Ill. Press: 1952).]

But, both in England and in America, prosecutions for seditious libel were hotly contested. *See* Sources at 307-08. In America, things came to a head with the enactment of the Sedition Act of 1798 which prohibited, in part, "false, scandalous, and malicious writings against the government ... with intent to defame or to bring them [into] contempt or disrepute...." *See* G. Stone, Constitutional Law at 1015. The statute was a classic example of a seditious libel law, and it prevailed in courts, only to fail politically with the election of President Thomas Jefferson, who, in 1801, pardoned everyone who had been convicted and fined.

In 1919, Justice Oliver Wendell Holmes, Jr., wrote:

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. [*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).]

Justice Holmes was right. Both Thomas Jefferson and James Madison led the Republican resistance to the Sedition Act on already-established American constitutional grounds. As Madison wrote in support of the resistance to the Sedition Act, in America, the People are sovereign, not Parliament, and that "the great and essential rights of the people are secured against legislative as well as executive ambition." J. Madison, Report on the Virginia Resolutions quoted in Sources at 426. Thus, "the freedom of speech," which had been secured only to English parliamentarians, was now vested in the People by the First Amendment.

In contrast to this historic, textual approach, Justice Brennan used Holmes' views to launch an attack on common law defamation. Relying on his *Roth* obscenity opinion that the freedom of speech was anchored "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (*Roth* at 484; *New York Times* at 269), Justice Brennan forged a contemporary marketplace of ideas based on practical realities as he saw them — not enduring principles. By reinterpreting the First Amendment through his prism

of pragmatism, Justice Brennan then took the liberty to fashion his own view of that phrase, unhindered by historical precedent or by the constitutional text. In doing so, Justice Brennan erased the original historical and textual distinction between seditious libel and libel, the one addressing the impermissible protection of the government's reputation and the other designed to protect the good reputations of individual persons. *See McKee v. Cosby*, 139 S. Ct. 675, 679-82 (2019).

The Supreme Court's effort to ignore the historic meaning of "the freedom of speech," begun by Justice Brennan, has led us to where we are today. Defamation, particularly against public figures, is given such strong protection that lower courts routinely dismiss complaints for failing to meet an unachievable standard of specificity of allegation. The reverse is true as to obscenity and pornography, where lower courts routinely enjoin any effort to protect society from the corrosive effects of pornography.

It is past time for the federal courts to recognize that they have usurped the police power of states by asserting constitutional protection of obscenity and pornography which never could exist under any type of textual or originalist approach. It is no coincidence that Justice Brennan is revered by an extreme liberal elite who believe it is the role of courts to ensure policy outcomes that "progressive" judges personally prefer,

rather than the application of neutral principles to resolve cases and controversies.[13]

III. THIS COURT'S ATEXTUAL AND AHISTORICAL PORNOGRAPHY JURISPRUDENCE HAS BEEN A FAILURE.

The district court decision below, reversed by the Fifth Circuit, noted: "Defendant argues that Plaintiffs' content is 'obscene' and therefore undeserving of First Amendment coverage," but "we are bound by the current *Miller* framework." *FSC* at 391 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

Under its current *Miller* formulation, this Court has defined obscenity under an atextual three-part test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct... and

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[13] Justice Brennan's approach to the Constitution is embodied today in the work of the Brennan Center at New York University Law School, which embraces every liberal and leftist cause. Its mission statement demonstrates that it believes the role of the judiciary is to decide cases not based on the Constitution's text and original public meaning, but rather on fluid and evolving notions of public sentiment that it works to shape: "[W]e take our cue from Abraham Lincoln's admonition at another time of constitutional debate: 'Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.'" "Mission & Impact," The Brennan Center for Justice.

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* at 24.

This Court in *Miller* candidly admitted that its prior obscenity decisions had a "somewhat tortured history" (*id.* at 20), involving "'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication'" (*id.* at 22). But the *Miller* standard has survived for a half-century with tweaks, allowing a floodtide of pornography, including much that is indisputably "hardcore," to be unleashed on America and its children.

Although the term "freedom of expression" can be traced back to *Schenck v. United States*, 249 U.S. 47, 52 (1919), it was not embraced by the High Court until *United States v. O'Brien*, 391 U.S. 367 (1968). "The First Amendment of the United States Constitution prohibits ... 'abridging the freedom of speech, or of the press....' The freedom of speech is not the same as the freedom of the press...."[14] And, freedom of expression is not the same as either, or both, speech and press. Merging the two together has allowed courts to escape the constitutional text and the common law.

Despite admitting that the challenged law banning the destruction of draft cards proscribed "conduct having no connection with speech" (*O'Brien* at 375),

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[14] Herbert W. Titus, "The Freedom of Speech, An Introduction," *The Forecast*, vol. 2, no. 12 (Sept. 1995) at 10. Much of this *amicus* brief is based on the work of the Founding Dean of Regent Law School, Herbert W. Titus (1937-2021).

the *O'Brien* Court found it did, devising what Justice Scalia might have called a four-part "judge-empowering 'interest-balancing inquiry,'"[15] designed specifically to extend First Amendment protection to conduct. By transforming the words inherent in speech to the conduct inherent in expression, the Court may have reached the decision it desired, but at considerable cost to constitutional integrity. The *O'Brien* Court offered the reassurance that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376.

History has belied the *O'Brien* Court's assurances. By 1972, the Court had stated that "at least some" performances of "lewd or naked dancing" are "within the limits ... of freedom of expression." *Cal. v. La Rue*, 409 U.S. 109, 118 (1972). "[V]irtually *any* prohibited conduct can be performed for an expressive purpose — if only ... that the actor disagrees with the prohibition." *Barnes v. Glen Theatre*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring). Under this approach, not only pornography, but also laws against prostitution, drug use, and countless more would become protected acts. By creating a new and "limitless" general right of "expression," the Court had no need to evaluate nude dancing based on historic standards of "speech" or "press." Now, freedom of expression is generally taught to law students to be shorthand for speech and press, which allows courts to decide cases without

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[15] *See Heller* at 634.

regard to the historical meaning of those distinct constitutional provisions.

IV. HISTORY DEMONSTRATES THE FIRST AMENDMENT DOES NOT PROTECT OBSCENITY.

The prevailing judicial attitude since *Roth* and *Miller* is that states have no authority to protect public morality in the area of obscenity. There had never been such a rule of law. Up to and through the Founding era, and indeed into the 1900s, obscenity was uniformly treated as a common law offense. *Roth* and *Miller* are the aberrations. Indeed:

> [f]or most of American history, few persons questioned the legitimacy of either the public regulation of pornography or the legal category of obscenity. Regulating pornography was considered both constitutionally permissible and morally necessary. The dominant public narrative regarding pornography therefore comprised a constitutional argument (pornography can be regulated) with a hortatory perspective (pornography needs to be regulated).[16]

Blackstone described the offense of "open and notorious lewdness," and "grossly scandalous and

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[16] D. Tubbs & J. Smith, "Pornography, the Rule of Law, and Constitutional Mythology," 41 Harv. J.L. & Pub. Pol'y 499, 511 (Spring 2018).

public indecency."[17] British law enshrined "obscene libel" as punishable in the famed case of *King v. Curl*, 93 Eng. Rep. 849 (K.B. 1727). "[T]he American common law quietly absorbed obscene libel" principles from the English law[18]:

> Obscene and indecent acts of a *public* nature were always crimes at common law.... [E]xhibitions of obscene or disgusting pictures and acts, indecent exposure of one's privates, and the utterance of obscene and profane language either shocked the public's sense of decency or tended to the corruption of its morals and so were nuisances not to be tolerated.[19]

Bouvier's Law Dictionary, in 1839, defined "obscenity" as "such indecency as is calculated to promote the violation of the law, and the general corruption of morals."[20] It added that "the exhibition of an obscene picture is an indictable offense at

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[17] Blackstone, Commentaries on the Laws of England abridged, 9th ed. 442 W. Sprague, ed., Chicago: Callahan & Co. (1915).

[18] W. Strub, Obscenity Rules: Roth v. United States and the Long Struggle Over Sexual Expression at 7 (Kan. Univ. Press: 2013).

[19] J. Thompson, "The Role of Common Law Concepts in Modern Criminal Jurisprudence (A Symposium) – III Common Law Crimes against Public Morals," J. CRIM. L. AND CRIMINOLOGY 350, 351 (1959).

[20] J. Bouvier, II A Law Dictionary at 201 (T & J.W. Johnson: 1839).

common law." *Id.* In a famous 1811 New York case, *People v. Ruggles*, Judge James Kent, author of the seminal treatise "Commentaries on American Law," declared that "[t]hings which corrupt moral sentiment, as obscene actions, prints and writings" were indictable offenses, as they "tend[] to corrupt the morals of the people...." *People v. Ruggles*, 8 Johns. 290, 294 (N.Y. 1811). The Pennsylvania Supreme Court concurred in the 1815 indecency case of *Commonwealth v. Sharpless*, 2 Serg. R. 91, 100 (1815) (cited in *Commonwealth v. Heinbaugh*, 267 Pa. 1, 8 (1976)). Citing England's *Curl* case, the court ruled that "actions of *public indecency*, were always indictable, as tending to corrupt the public morals." *Sharpless* at 101. The *Sharpless* court used "obscene" and "indecent" interchangeably. The picture in question was described by the Court as "representing a man in an obscene, impudent, and indecent posture with a woman." *Id.* at 103. The Connecticut Supreme Court, in 1808, held that "[e]very public show and exhibition, which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law." *Knowles v. State*, 3 Day 103, 108 (Conn. 1808). The Massachusetts Supreme Court agreed in 1821, upholding a conviction for publishing a book that contained an obscene print. *Commonwealth v. Holmes*, 17 Mass. 336 (Mass. 1821). The Massachusetts court, too, treated the words "obscene" and "indecent" interchangeably.

Indeed, the first federal obscenity statute prohibited the importation of "all indecent and obscene

prints...."[21] Congress, too, used the words interchangeably, and the First Amendment was not thought to be offended. In fact, the law "passed without debate...." *Id.*

Influential treatises from the founding through the early 1900s were unanimous. Both William Rawle in 1825 and Joseph Story in 1833 cited Blackstone for the proposition that government could punish "offensive" speech, and described "offensive" speech in religious terms. Story cited Blackstone as follows: "To punish any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."[22] Story adds, "after some additional reflections, [Blackstone] concludes with this memorable sentence: "So true will it be found, that to censure the licentiousness, is to maintain the liberty of the press." *Id.* at 671.

Rawle, also citing to Blackstone, uses nearly identical language:

> But the liberty of speech and of the press may be abused… It is not, however, to be supposed that it may be abused with impunity. Remedies will always be found while the

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[21] W. Strub, Obscenity Rules at 12.

[22] J. Story, 2 Commentaries on the Constitution of the United States, 3d ed. 670. Boston: Little, Brown & Co. (1858).

> protection of individual rights and the reasonable safeguards of society itself form part of the principles of our government.… [T]he punishment of dangerous or offensive publications, which on a fair and impartial trial are found to have a pernicious tendency, is necessary for the peace and order of government and religion, which are the solid foundations of civil liberty.[23]

Francis Wharton's influential 1846 treatise on criminal law noted, "[i]t is an indictable offense at common law to publish an obscene book or print … and so of any offense tending to corrupt the morals of the people."[24]

"By the end of the Civil War, 20 states [out of 36] had passed laws suppressing the circulation of obscene publications."[25] In 1847, "[i]n the *License Cases* … several Supreme Court justices referred to statutory prohibitions on obscenity as exemplary exercises of the states' inherent police powers to protect the public welfare." *Id.* at 384, n.18.

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[23] W. Rawle, A View of the Constitution of the United States of America at 123-24 (Philip Niklin, 2nd Ed.: 1829).

[24] F. Wharton, A Treatise on the Criminal Law of the United States at 537 (James Kay, Jun. & Brother: 1846).

[25] D. Dennis, "Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States," JRNL. OF LAW AND SOCIAL INQUIRY 369, 384 (Spring 2002).

In 1868, the year the Fourteenth Amendment was ratified, Thomas Cooley published his seminal commentary. Cooley wrote, "The preservation of the public morals is peculiarly subject to legislative supervision, which may forbid the keeping, exhibition, or sale of indecent books or pictures, and cause their destruction if seized."[26]

Cooley expressly rejected the idea that the state police power to regulate obscenity implicated the First Amendment:

> The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence. [*Id*. at 422].

As late as 1904, in "arguably the most comprehensive treatise on the police power ever written,"[27] and long after the adoption of the Fourteenth Amendment, Professor Ernst Freund wrote, "[T]here is no doubt that speech and press may not be used to corrupt public morals, and obscene or

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[26] Thomas Cooley, A Treatise on the Constitutional Limitations at 596 (Little, Brown & Co.: 1868).

[27] S. Miller, "Community Rights and the Municipal Police Power," 55 SANTA CLARA L. REV. 675, 692, n.95 (2015).

profane utterances by word of mouth, in writing or in print may be made punishable offenses."[28]

This Court recognized in *District of Columbia v. Heller* that "[t]he First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets...." *Heller* at 635 (2008).

As Professor Jud Campbell noted:

> From a modern perspective, it may seem puzzling that the procedural and substantive dimensions of the law of expressive freedom were specified mostly by the common law. Today, common-law decisions are generally treated as ordinary law, not as constitutional law. But these are modern ideas that emerged later in the twentieth century. For much of American history, jurists understood the common law as a variant of general law and viewed many (but not all) common-law rules as fundamental in status. These were, as one court put it, "general principle[s] ... of universal application in all free governments."[29]

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[28] Ernst Freund, "The Police Power, Public Policy and Constitutional Rights," § 472 (Univ. of Chicago Press: 1904).

[29] J. Campbell, The Emergence of Neutrality, 131 YALE L.J. 861, 887-88 (Jan. 2022).

However, until 1957, not only was this view not puzzling, but it also was accepted almost universally. In 1896, in *Swearingen v. United States*, 161 U.S. 446 (1896), this Court upheld Congress' criminal statute against sending obscene material through the U.S. mail. The statute declared, "'every obscene, lewd or lascivious book, pamphlet, picture, paper, writing or other publication of an indecent character ... are hereby declared to be non-mailable matter.'" *Id.* at 449. The Court, quite correctly, never considered the First Amendment, and instead pointed directly to the common law. The Court noted that "[t]he words 'obscene,' 'lewd' and 'lascivious' ... signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law...." *Id.* at 451. Nothing about the Court's common law-based opinion suggested that material must be "hardcore" to be prohibited.

"From ... the ratification of the Bill of Rights, until 1957, the ... Court had never found the First Amendment even remotely relevant to the constitutionality of a federal or state obscenity law."[30] As recently as 1942, the Supreme Court recognized that obscenity had never received any protection whatsoever from the First Amendment:

> There are certain ... classes of speech, the prevention and punishment of which have **never been thought to raise any**

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[30] Titus, "Obscenity" at 10.

> **Constitutional problem.** These include **the lewd and obscene....** [*Chaplinsky* at 571-72.]

The common law cases connect seamlessly with the traditional police powers of the states to legislate for "the public health, safety and morals." "Public indecency — including public nudity — has long been an offense at common law. *See* 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 17, pp. 449, 472-474 (1970)." *Barnes* at 573 (Scalia, J., concurring). Nothing before *Roth* in 1957 suggests that the First Amendment protects pornography, "hardcore" or not.

CONCLUSION

There are no original constitutional principles in *Roth*, *Miller*, and their progeny. Judge-empowering interest balancing tests, divorced as they are from the constitutional text, are dangerous. Courts have a duty to investigate the "text, history, and tradition" of the First Amendment, as written. Under the original public meaning of "free speech" and "free press," state regulation of obscenity was not only permitted, but also presumed. The Fifth Circuit was correct and should be upheld. Further, this Court should use the opportunity of this case to strip the First Amendment of its "baggage," and affirm, as the Founders did and this Court did as recently as *Chaplinsky*, the police powers of the states to regulate pornography for the "health, safety and morals" of their citizens. The decision below, and H.B. 1181, should be upheld.

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