NO. 23-1122

IN THE
Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,
Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF TEXAS,
Respondent.

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

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom is a public-interest law firm dedicated to defending religious freedom, free speech, the sanctity of life, parental rights, and marriage and family. Because our nation's laws should protect children—including from obscenity and hardcore pornography—ADF supports reasonable measures that prevent children from accessing such material on the internet.

ADF is deeply troubled about the pornography epidemic across the nation. With the advent of easy internet access, smart phones, and social media, more children are viewing pornographic materials at young ages. Numerous studies show the deleterious effects that pornography has on the brain, particularly the impressionable minds of children. "These include increased rates of depression, anxiety, acting out and violent behavior, younger age of sexual debut, sexual promiscuity, increased risk of teen pregnancy, child sex abuse, sexual trafficking, and a distorted view of relationships between men and women." *The Impact of Pornography on Children*, Am. Coll. of Pediatricians (Aug. 2024).

ADF is also committed to robust free-speech protections. *E.g.*, *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023) (vindicating free-speech rights). Laws like Texas's strike an appropriate balance by regulating material that historically falls outside the First Amendment's scope.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Petitioners frame this case as one about "rational-basis review" versus "strict scrutiny." Pet.Br.i. That misses the broader picture. Rather than immediately jump to means-end analysis—which is "judge-empowering" and "freedom-diluting," *United States* v. *Jimenez-Shilon*, 34 F.4th 1042, 1054 (11th Cir. 2022) (Newsom, J., concurring)—constitutional analysis should always "begin with its text." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). And constitutional text must be interpreted consistent with practices "deeply embedded in the history and tradition of this country." *Marsh* v. *Chambers*, 463 U.S. 783, 786 (1983).

History presents a roadblock for Petitioners. Texas's law applies to hardcore pornographic materials that easily fit this Court's definition of obscenity, which this Court has long recognized "is not protected expression." *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968). From the Founding through the Civil War and beyond, government actors have been free to regulate access to obscenity without offending the First Amendment.

Indeed, Texas's law regulates these sexually explicit materials in a way that is analogous to historic regulations. The law does not censor any speech or prophylactically prevent publication of anything. Rather, Texas has shielded only children from access to these harmful materials, and it has done so to protect them. This purpose is historically rooted. And the means Texas has chosen to protect children tracks how this country has traditionally regulated pornographic materials.

This Court should affirm.

ARGUMENT

Texas's law is consistent with historical practices and does not offend the First Amendment.

Constitutional analysis starts with "the language of the instrument." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) (cleaned up). That language "offers a fixed standard for ascertaining what our founding document means." *Ibid.* (cleaned up).

I. Means-end scrutiny cannot upend how this Court has historically treated the First Amendment.

The First Amendment forbids the government from "abridging the freedom of speech." U.S. Const. amend. I. It "codified a pre-existing right," the bounds of which are defined by "the scope [it was] understood to have when the people adopted [it]." *Nat'l Republican Senatorial Comm.* v. *FEC*, 117 F.4th 389, 398 (6th Cir. 2024) (en banc) (Thapar, J., concurring) (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 592, 634–35 (2008)). So, "to inform the meaning of [this] constitutional text," this Court looks to history for guidance. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 25 (2022).

Regrettably, lower courts often approach the First Amendment's scope "mechanical[ly]," cf. *Riley* v. *California*, 573 U.S. 373, 386 (2014), applying "a balancing approach variously known as means-end scrutiny," *United States* v. *Rahimi*, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring). This type of review appears nowhere in the Constitution.

Under this means-end approach, "judges … weigh the benefits against the burdens of a law and … uphold the law as constitutional if, in the *judge's* view, the law is sufficiently reasonable or important." *Ibid.* (emphasis added). That is "policy by another name." *Ibid.* And it empowers judges to ignore constitutional text and go against centuries of history. *E.g.*, *303 Creative LLC* v. *Elenis*, 6 F.4th 1160 (10th Cir. 2021) (excusing government-compelled speech using means-ends analysis), *overruled by*, 600 U.S. 570 (2023).

Instead, courts must first ask "whether the expressive conduct falls outside of the category of protected speech." *Bruen*, 597 U.S. at 24 (citing *Ill. ex rel. Madigan* v. *Telemarketing Assocs.*, 538 U.S. 600, 620 n.9 (2003)). That inquiry turns on "*historical* evidence about the reach of the First Amendment's protections." *Id.* at 24–25 (citing *United States* v. *Stevens*, 559 U.S. 460, 468–71 (2010)). While "historical analysis can be difficult," *id.* at 25 (cleaned up), "reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is … more legitimate, and more administrable, than" allowing judges to engage in *ad hoc* balancing tests, an approach that mirrors policymaking, *ibid.*

Lower courts have lost sight of the historical approach. "Free speech cases ... are so choked with different variations of means-ends tests that [courts] sometimes forget what the constitutional *text* even says." *Jimenez-Shilon*, 34 F.4th at 1053 (Newsom, J., concurring). This means-end scrutiny appears only in discrete "pockets of free-speech jurisprudence." *Rahimi*, 144 S. Ct. at 1921 & n.7 (Kavanaugh, J., concurring). Yet even in those pockets, "the Court still often relies directly on history." *Ibid.*

That's because history "elucidates how contemporaries" at the Founding "understood the text." *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring). It also gives insight into "categories of private conduct that were typically subject to regulation by government when the relevant constitutional text was ratified." *Nat'l Republican Senatorial Comm.*, 117 F.4th at 408 (Bush, J., concurring dubitante). "If government never or seldom regulated a type of conduct during the pre-ratification era, then that may suggest that such conduct is constitutionally protected. But if government did typically regulate the conduct pre-ratification, then that may support an inference that the constitutional text does not bar government intervention." *Id.* at 408–09.

This Court should clarify that, when determining the First Amendment's scope, courts must "engage in the two-step inquiry that [the] Second Amendment jurisprudence uses." *Nat'l Republican Senatorial Comm.*, 117 F.4th at 399 (Thapar, J., concurring). After all, as the Court noted in *Bruen*, the two-step inquiry mirrors "how [the Court] protect[s] other constitutional rights" like "freedom of speech in the First Amendment." *Bruen*, 597 U.S. at 24.

Under this approach, courts first ask whether the "Amendment's text covers an individual's conduct." *Nat'l Republican Senatorial Comm.*, 117 F.4th at 399 (Thapar, J., concurring). That includes determining whether the alleged speech "fall[s] into one of the 'historic and traditional categories' of expression—like obscenity or defamation—that are outside 'the freedom of speech' as the founding generation understood it." *Ibid.* (quoting *Stevens*, 559 U.S. at 468–69). Accord, *e.g.*, *Jimenez-Shilon*, 34 F.4th at

1053 (Newsom, J., concurring) (noting that under both current precedent and historical practice, "the government can ban certain forms of speech outright—defamation, incitement, obscenity, etc.—because they are understood to fall outside the freedom of speech" (cleaned up)).

Only if a plaintiff proffers some protected-speech element does a court reach the second part of the inquiry, which requires the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition." *Nat'l Republican Senatorial Comm.*, 117 F.4th at 399 (Thapar, J., concurring) (cleaned up). The government must do so with an eye toward "[w]hy and how the regulation burdens" the free-speech right. *Rahimi*, 144 S. Ct. at 1898. Accord *Bruen*, 597 U.S. at 29. "[T]hat [methodology] maps nicely onto the two things that courts evaluate under the tiers of scrutiny: the purpose a regulation serves, and the way in which it advances that purpose." *Nat'l Republican Senatorial Comm.*, 117 F.4th at 401 (Thapar, J., concurring).

II. Texas's law facially applies to obscene materials that historically fall outside the First Amendment's scope.

Under this approach, Petitioners fail at the starting gate. Texas's law applies only to platforms that publish or distribute content "more than one-third of which is sexual material harmful to minors." Tex. Civ. Prac. & Rem. § 129B.002(a). The law defines such harmful material as that which is "designed to appeal to or pander to the prurient interest." *Id.* § 129B.001(6)(A). And it gives specific examples, including material that depicts "sexual intercourse,

masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act." *Id.* § 129B.001(6)(B)(iii).

That statutory definition is fully consistent with how this Court has defined "obscene material … unprotected by the First Amendment." *Miller* v. *California*, 413 U.S. 15, 23 (1973). Indeed, Texas's definition has a long historical pedigree. English common law first recognized "obscene libel" as a crime in 1727, defining it as a "species of representation, whether by writing, by picture, or by any manner of sign of substitute, which is indecent and contrary to public order and natural feeling." Francis Ludlow Holt, THE LAW OF LIBEL 73 (1816). By the early 19th century, English authorities concluded that it was "fully established, that any immodest and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable." Thomas Starkie, II A TREATISE ON THE LAW OF SLANDER AND LIBEL 155 (1813).

What was true in England was also true in the early Republic. "At the time of the adoption of the First Amendment," obscenity "was outside the protection intended for speech and press." *Roth* v. *United States*, 354 U.S. 476, 483 & n.13 (1957) (collecting sources). Accord *Smith* v. *California*, 361 U.S. 147, 163 n.1 (1959) (Frankfurter, J., concurring) ("The common-law liability was carried across the Atlantic before the United States was established and appears early in the States.").

For example, a 1786 New York copyright law "specifically stated that 'nothing in this Act shall authorise any Person or Persons to publish any Book

that may be profane, treasonable, defamatory, or injurious to Government, Morals or Religion.'" *Ibid.* (cleaned up) (quoting An Act to Promote Literature, Act of April 29, 1786, c. LIV, § IV, 1 LAWS OF NEW YORK (Jones and Varick) (1777–89) 321). And in 1811, James Kent,[2] chief justice of the New York Supreme Court, approved prosecutions against publications "which corrupt moral sentiment," including "obscene actions, prints and writing." *People* v. *Ruggles*, 8 Johns. 290, 294 (N.Y. Sup. Ct. 1811).

Two other state high courts—Pennsylvania and Massachusetts—expressly recognized the English common-law crime of obscene libel. *Commonwealth* v. *Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815); *Commonwealth* v. *Holmes*, 17 Mass. 336 (1821). Unsurprisingly, many states in the antebellum period codified the common-law prohibition against obscenity. *Smith*, 361 U.S. at 163 n.1 (Frankfurter, J., concurring) (collecting statutes). And they did not see any conflict with the First Amendment in doing so.

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[2] Justice Kent took a high view of First Amendment liberties, too. In an 1804 libel case, he opined that the First Amendment embodies liberties that "are the highest, the most solemn, and commanding," such that it "seems impossible that" the Founders "could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press, which may not publish any thing, true or false, that reflects on the character and administration of public men." *People* v. *Croswell*, 3 Johns. Cas. 337, 391–92 (N.Y. Sup. Ct. 1804) (op. of Kent, J.). His opinion "ultimately persuaded the New York legislature to amend the state constitution to specifically allow parties charged with libel to introduce the Hamiltonian truth-plus defense," a departure from the traditional common-law rule. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv. L. Rev. 2166, 2185 (2015).

For instance, when West Virginia became a state in 1863, its constitution prohibited "abridging freedom of speech" yet in the very same clause allowed the legislature to "provide for the restraint and punishment of the publishing and vending of obscene books, papers, and pictures." W.V. Const. art. 2, § 4. See also Thomas Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 422 (1871) ("[W]e understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guarantees were established.").

In practice, states prosecuted libel obscenities only against the most explicit materials. Indictments in New York were largely against "what we might now describe … extreme or 'hard-core'" pornography, Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth Century America*, 16 Colum. J. of Gender & L. 43, 54 (2007), the very materials from which Texas seeks to shield children. Those materials depicted activities such as "orgies, masturbation, and public sex." *Id.* at 55. "The book that provoked the most prosecutions … included graphic accounts of no less than thirty-nine different sexual encounters." *Ibid.* In contrast, materials that merely depicted sexual content with a "coy allusiveness," while condemned as immoral by segments of society, "failed to provoke the ire of legal authorities." *Id.* at 65–66.

Texas's law tracks this historical practice. Its text applies to "plain examples" of obscenity outside the First Amendment's scope. *Miller*, 413 U.S. at 25. It "is not directed to particular works or performance, but to their concentration." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 263–64 (1990) (Scalia, J., concurring and dissenting in part). Contra Pet.Br.1 (suggesting that Texas's law would prohibit "romance novels or R-rated movies").

Though the dissent below suggested Texas's law may cover non-obscene speech, Petitioners have not made that showing. In "a facial challenge" like this one, "the issue is whether the terms of this statute address obscenity." *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 834 n.3 (2000) (Scalia, J., dissenting). It does—and in a way that "entails no risk of suppressing even a single work of science, literature, or art—or, for that matter, even a single work of pornography." *FW/PBS*, 493 U.S. at 264 (Scalia, J., concurring and dissenting in part).

In sum, Petitioners have not come close to showing that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (cleaned up). Indeed, one would search in vain for any non-pornographic materials on XVideos, XNXX, Penthouse, and Bang Bros, some of Petitioner WebGroup Czech Republic, A.S.'s most popular adult websites. And no one is prohibiting those websites' sexually explicit content, only minors' ability to access it.

III. Texas's law regulates obscene materials consistent with historical purposes and practices.

Petitioners' challenge also fails at the second step of the analysis because Texas's law regulates access to these sexually explicit materials in a manner "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898.

1. *Purpose*. Start with the purpose underlying Texas's law: to protect children from harmful pornographic materials. That purpose is consistent with how the country has regulated sexually explicit materials throughout its history. And it does not strike at the First Amendment's core concerns.

Not long after the Founding, states enacted laws restricting obscenity with a particular eye on protecting minors. Pennsylvania, for instance, allowed obscenity prosecutions because exposure to such "lascivious" images could corrupt the morals of young people. *Sharpless*, 2 Serg. & Rawle at 91–92, 94. And Massachusetts defined obscenity as material that "manifestly tend[ed] to the corruption of the morals of the youth." Mass. Rev. Stat. ch. 130, 10 (1836). By 1868, the "test of obscenity" in most jurisdictions turned on "whether the tendency of the matter charged as obscene is to deprave and corrupt those who minds are open to such immoral influences." *Regina* v. *Hickland* [1868] 3 QB 360 at 371 (Eng.). Accord, *e.g.*, *United States* v. *Bennett*, 24 F. Cas. 1093, 1104 (S.D.N.Y. 1879) ("It is a test which has been often applied, has passed the examination of many courts, and I repeat it here, as the test to be used by you.").

Because of the internet and the ubiquity of smart phones, "[t]here is no doubt that minors are far more likely to encounter sexually explicit images today than ever before in American history." Geoffrey R. Stone, *Sex and the First Amendment: The Long and Winding History of Obscenity Law*, 17 First Amend. L. Rev. 134, 145 (2018). "[C]hildren can easily be exposed to the most extreme, misogynistic sex acts imaginable." David Horsey, *Our Social Experiment: Kids with Access to Hard-Core Porn*, L.A. Times (Sept. 3, 2013). Studies show that a large amount of youth in the United States have been exposed to hardcore pornography—84.4% of 14- to 18-year-old males and 57% of 14- to 18-year-old females. Paul J. Wright, Bryant Paul & Debby Herbenick, *Preliminary Insights from a U.S. Probability Sample on Adolescents' Pornography Exposure, Media Psychology, and Sexual Aggression,* 26 J. of Health Commc'n 39–46 (2021).

Such exposure has had disastrous effects on our youth. Pornography—particularly hardcore pornography—affects the brain in the same way that illegal drugs do. "[P]ornography consumption is associated with decreased brain volume in the right striatum, decreased left striatum activation, and lower functional connectivity to the prefrontal cortex." Simone Kühn & Jürgen Gallinat, *Brain Structure and Functional connectivity associated with pornography consumption: the brain on porn*, JAMA Psychiatry (July 2014).[3] These areas of the brain are responsible for self-discipline, planning, decision-making, motivation, and moderating social behavior. The more

[3] https://perma.cc/YAE3-WWVB.

pornography viewed, the more impulsive and less capable of monitoring behavior an individual becomes. *Ibid.*

What's more, "early exposure to pornography is connected to negative developmental outcomes, including a greater acceptance of sexual harassment, sexual activity at an early age, acceptance of negative attitudes to women, unrealistic expectations, skewed attitudes of gender roles, greater levels of body dissatisfaction, rape myths … and sexual aggression." Gabriela Coca & Jocelyn Wikle, *What Happens When Children Are Exposed to Pornography?*, Inst. for Fam. Studies (Apr. 2024) (collecting sources).[4] Because children "have difficulty differentiating between what is happening on screen and what is happening in real life," pornography exposure also leads to "mental health problems, such as depression and anxiety." *Ibid.* "One study found that twenty-three percent of minors who came across such material on the Internet were 'extremely' or 'very upset' by the incident." Stone, *supra* at 145.

Given this data, Texas's purpose in enacting the challenged statute does not threaten First Amendment concerns. *New York* v. *Ferber*, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." (cleaned up)). Instead, Texas's reasons mirror those of Congressman Clinton Merriam. In 1873, a mere five years after the Fourteenth Amendment incorporated the First Amendment against the states, Congressman Merriam supported a bill that

[4] https://perma.cc/89BY-PVQ7.

prohibited using the federal mail system to transport obscene materials. And he did so because our nation "will be of but short duration unless the vigor and purity of our youth be preserved." Cong. Globe App., 42d Cong., 3d Sess. 168 (Mar. 1, 1873) (*Obscene Literature – Mr. Merriam*). He believed that exposure to obscene material at a young age had contributed to the Nation's growing crime epidemic. *Ibid.* No court suggested the bill violated the First Amendment. What was true in 1873 still is true today.

Nothing about Texas's law suggests a purpose at odds with the First Amendment's core concerns—namely, the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. "[T]he harsh hand of censorship of ideas" is not "lurking" in the shadows. *Miller*, 413 U.S. at 35–36.

To be sure, the First Amendment historically prevented prior restraints against obscene material that otherwise fell outside the First Amendment's protection. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv. L. Rev. 2166, 2187 (2015) ("[F]or all intents and purposes, obscenity was constitutionally protected against prior restraint[s]."). Cf. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383–84 (1992). But Texas's law does not operate as a prior restraint on anything, obscene or otherwise. Instead, it "protect[s] children by restricting access to, but not banning," obscene material. *Playboy Ent. Grp.,* 529 U.S. at 838 (Breyer, J., dissenting).

This Court has always recognized that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger … of exposure to juveniles." *Miller*, 413 U.S. at 18–19. Texas's law is grounded in this historical (and paramount) interest. This Court should follow its usual course and "sustain[ ] legislation aimed at protecting the physical and emotional well-being of youth." *Ferber*, 458 U.S. at 757.

2. *Practice*. So Texas's law tracks historical reasons for regulating pornography. It also uses historical means to do so.

Start with the regulated entities: commercial distributors of sexually explicit materials. They are the same objects of America's historical obscenity prosecutions. Dennis, *supra* at 71–75. As Justice Scalia summarized years ago, "a business that (1) offers hardcore sexual material, (2) as a constant and intentional objective of its business, and (3) seeks to promote it as such finds no sanctuary in the First Amendment." *Playboy Ent. Grp.*, 529 U.S. at 832 (Scalia, J., dissenting) (cleaned up). Notably, Texas's law targets these kinds of commercial entities—and them alone, unlike overbroad statutes that this Court has invalidated. *Reno* v. *ACLU*, 521 U.S. 844, 877 (1997).

Like many historic laws, Texas imposes on these commercial entities a gatekeeping function. Hardcore pornography traditionally was delegated to "adult zones." *Reno*, 521 U.S. at 887 (O'Connor, J., concurring in part). Every state prohibited children from buying "pornographic materials," *Thompson* v.

Oklahoma, 487 U.S. 815, 824 (1988), and required brick-and-mortar stores to verify a customer's age before selling pornography, *Ginsberg*, 390 U.S. at 634–35. Texas's approach is not "novel" but deeply embedded in this nation's regulatory tradition. *Reno*, 521 U.S. at 887 (O'Connor, J., concurring in part). And the First Amendment's rules do "not change because the [interaction] has gone from the physical to the virtual world." *NetChoice*, 144 S. Ct. at 2393.

Indeed, Texas's law takes into consideration the "distinctive characteristics" of technological evolutions. *Ashcroft* v. *ACLU*, 535 U.S. 564, 604 (2002) (Stevens, J., dissenting). "[E]xisting technology" now *can* "prevent minors from obtaining access to … communications on the Internet without also denying access to adults." *Id.* at 568 (cleaned up). What could not be accomplished decades ago now can. The Constitution permits Texas to use this existing technology to protect children.

Finally, Texas's law is *more* lenient than historically permissible analogues. In the past, most statutes punished obscenity criminally. *E.g.*, THE PENAL CODE OF THE STATE OF TEXAS, Title XII, Ch. 4, Art. 399 (1857). Yet Texas's law "is a civil statute and so is not 'enforced by severe criminal penalties.'" Resp.Br.26 (quoting *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004)). There is no historical analogue that would suggest Texas's law protecting children from pornography is in its substance or its execution a violation of the Free Speech Clause.

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Thirty years ago, Justice Scalia warned that "misapplication" of First Amendment standards had led to "the erosion of public morality by the increasingly general appearance of … sexually oriented businesses." *FW/PBS*, 493 U.S. at 251–52 (Scalia, J., concurring and dissenting in part). The explosion of obscene pornography—and its deleterious effect on American youth and our culture writ large—proves his point.

This Court should reorient courts to first principles. "The Constitution does not prevent those communities that wish to do so from regulating … the business of pandering sex." *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring). Indeed, "[t]he traditional power of government to foster good morals" "ha[s] not been repealed by the First Amendment." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring).

The Constitution "protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene … modes of expression." *Iancu* v. *Brunetti*, 588 U.S. 388, 401 (2019) (Roberts, C.J., concurring and dissenting in part). Thus, "the constitutional protection of non-obscene speech cannot absorb the constitutional power of the States to deal with obscenity. It would certainly wrong them to attribute to Jefferson or Madison a doctrinaire absolutism that would bar legal restriction against obscenity as a denial of free speech." *Smith*, 361 U.S. at 162–63 (Frankfurter, J., concurring).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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