No. 22-1135

In The

Supreme Court of the United States

CENTER FOR MEDICAL PROGRESS, et al.,

Petitioners,

v.

NATIONAL ABORTION FEDERATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CONSTITUTIONAL RIGHTS UNION AND THE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Petitioners sparked nationwide debate in the summer of 2015 with the release of videos, recorded during an undercover investigation, which raised legal and ethical issues about conduct in the abortion industry. Public discussion of Petitioners' videos prompted investigations and legal changes across the country at the federal, state, and local levels. *See*, *e.g.*, *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F. 3d 347, 351 (5th Cir. 2020) (en banc). But on the motion of an abortion industry trade organization opposed to Petitioners' message, the district court entered (and the Ninth Circuit affirmed) a sweeping permanent injunction against the release of over 500 hours of further recordings, without applying *any* level of First Amendment scrutiny.

Is the district court's suppression of speech about a high profile and highly charged issue of public debate and unconstitutional prior restraint?

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INTEREST OF *AMICI CURIAE*

This *amicus* brief is submitted by The American Constitutional Rights Union (ACRU) and the Alabama Center for Law and Liberty.[1] The ACRU is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of constitutional law and free speech. Current Policy Board members include the 75th Attorney General of the United States Edwin Meese III, and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The Alabama Center for Law and Liberty is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code. Its legal work includes litigation and the filing of friend-of-the-court briefs in support of free markets,

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[1] Counsel provided the notice required by Rule 37.2 more than 10 days before the due date for the filing of this brief. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

limited government, and strong families. The Center is proud to stand up for the freedom of speech.

This case presents the Court with the opportunity to rein in the use of overly broad and unconstitutional limits on free speech. These *amici* will address the way in which the lower courts have unconstitutionally suppressed speech on a matter of public interest through a prior restraint.

SUMMARY OF ARGUMENT

In his fourth and final volume of his *Commentaries on the Laws of England*, Sir William Blackstone wrote:

> [W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with greater, others with a less, degree of severity, *the liberty of the press* properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying *no previous restraints* upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

4 William Blackstone, Commentaries * 151-52 (emphasis added).[2] In the same way Jean DeLolme, a Swiss author whose work "was well-known and well-respected by Americans at the start of the Revolution," wrote that freedom of the press meant freedom from prior restraints. Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the* Link *between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 312 (2001) (hereinafter "*Neglected History*").[3] DeLolme explained, "Liberty of the press consists in this: that neither courts of justice, not any judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed." *Id*. at 313 (quoting Jean DeLolme, The Constitution of England 254 (John McGregor ed. 1853) (1775)).

Both before and since the publication of Blackstone's Commentaries, the courts and commentators have recognized that the prior restraints infringe on the rights of free speech and of the press. The lower courts' decisions do not address this First Amendment

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[2] As this Court has noted, "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so undoubtedly the framers of the Constitution were familiar with it." *Schick v. United States*, 195 U.S. 65, 69 (1904).

[3] John Adams regarded DeLolme's books, one of which was The Constitution of England, as "the best defense of the political balance of three powers that ever was written." *Neglected History* at 312.

fundamental, and this Court should use this case to tell them to do it.

ARGUMENT

I. Introduction

Petitioners contend that the injunctions issued and upheld by the lower courts constitute an unconstitutional prior restraint on speech. They explain that instead of applying First Amendment principles, "[T]he lower courts seized on an indefensible finding of waiver, brushed aside the overriding public interest in the free flow of ideas, cited their disapproval of Petitioners' message as a reason to suppress it, and approved millions of dollars in attorney's fees to boot." Pet. at 28. Petitioners argue that the district court erred in finding that Petitioners waived their First Amendment rights, Pet. at 20-26 and *amici* concur in that argument.

The district court entered both a preliminary and permanent injunction that prohibited the Petitioners from "publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned" at two NAF meetings. Pet. Appx. at 11, 42-43. It dismissed Petitioners' reliance on the First Amendment.

Amici will first review the historical grounding of the ban on prior restraints. That history demonstrates that the disdain for prior restraints is well-grounded. The effect of the lower courts' ruling on Petitioners' rights is to "interfere with state law enforcement

investigations and public policy decisions." Pet. at 32. And, none of what Petitioners wish to say is properly subject to prior restraint.

II. The historical grounding of the bar on prior restraints in English and American law is well established.

A. The development of the prior restraint doctrine in England

In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court explained that the constitutional guarantee of freedom of the press "has been generally, if not universally considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." *Id*. at 713. When *Near* was decided, "there was a wealth of legal tradition and judicial decisions supporting a constitutional ban on prior restraints." *Neglected History* at 313.

As Meyerson notes, after the first printing occurred in England in 1546, the Crown and the Church imposed both pre-publication review and licensing schemes. *Neglected History* at 298-99. Later, in 1585, Queen Elizabeth limited the number of printing presses in the country to three locations, with none other than London, and one press in each of Oxford, and Cambridge. *Id*. at 299. The next year, the Star Chamber issued a decree requiring all printers to register their presses and receive a license before publishing any work. *Id*. at 299-300. In addition, in 1586, a Stationers Company, a "royally-authorized organization of printers and writers" whose members "received

special privileges, most notably freedom from competition," was formed. *Id*. Together the Star Chamber and the Stationers Company were "two of the most powerful forces ever created for limiting a free press." *Id*.

"Violators of Company rules could face not only a fine but destruction of printing presses as well." *Id*. at 300. While "[l]icensing of the press continued to serve as the primary, though not exclusive, means for limiting opposition to both the crown and church throughout the early Seventeenth Century." *Id*. at 302. Nonetheless, "divers libelous, seditious, and mutinous bookes have beene unduly printed, and other books and papers without license, to the disturbance of the peace of the Church and State." *Id*. at 302 (quoting *Star Chamber Decree of 1637, reprinted in 2 Complete Prose Works of John Milton* 793 (1959)).

The Star Chamber came to the end of its unnatural life in July 1641, and the power to censor moved to Parliament. *Id*. at 303. At about this time, "intellectuals began to expound on the need for freedom from prior review as an indispensable ingredient for a free society and a free press." *Id.* In particular, in his *Areopagitica*, John Milton asserted that licensing "created a special and intolerable harm by preventing books from ever seeing the light of day." Milton explained, "[w]ho kills a Man kills a reasonable creature, God's image; but hee who destroyes a good Booke, kills reason it selfe, kills the image of God, as it were in the eye[,] . . . slaies an immortality rather then a life." *Id*. at 394 (quoting Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the

Parliament of England, reprinted in 2 Complete Prose Works of John Milton 492-93 (1959) (hereinafter *Areopagitica*)).

The licensing scheme gradually rode off into the sunset, disappearing in the late 1690s. Along the way, it left a sense that judges "were a potential source of oppression." *Neglected History* at 306. In one noteworthy case, William Penn, a Quaker who was later the founder and first Governor of Pennsylvania, was charged with preaching on a London street corner in violation of English law, which prohibited the exercise of religion "in other manner than according to the liturgy of the Church of England." *Id*. (quoting Catherine Owens Peare, William Penn: A Biography 106-07 (1956) (itself quoting the Conventicle Act)). The court rejected Penn's reliance on his freedom of conscience, but the jury refused to convict him. When the jurors continued in the course of conduct, they were fined, and several were imprisoned. *Id.* at 307. In the end, the Court of Common Pleas held that the jurors could not be punished, reasoning, "It is absurd, a jury should be fined by the judge for going against the evidence." *Id*.

Thus, "[b]y the time the United States ratified the First Amendment, a consensus had developed in England that liberty of the press required the ability to put forth to the world what one wanted, as long as the printer was willing to accept the consequences of punishment for material considered illegal." *Id*. at 311.

B. The American pre-constitutional experience

In colonial times, the colonial governments "followed the English example and used licensing laws to restrict printed material." *Neglected History* at 314. The colonists learned "that assaults on liberty of the press could come from any of the three branches of government." *Id*.

When Governor Clinton of New York criticized the state's Assembly for inadequately funding the military in 1747, the Assembly responded by preparing a remonstrance. The Governor then ordered the official printer not to publish the remonstrance. The Assembly voted unanimously that the remonstrance should be printed, declaring that Governor Clinton's "Order to forbid the printing or re-printing the said Remonstrance is unwarrantable, arbitrary and illegal." *Id*. at 318. The Assembly said that "publication was necessary to demonstrate [its] 'firm Resolution to preserve the liberty of the press.'" *Id*.

In 1735, John Peter Zenger, the publisher of the *New York Weekly Journal*, was subjected to trial for seditious libel after he published criticism of government officials. The judge declared that truth was not a defense, and that he would decide whether Zenger's publications were libelous. Zenger's attorney noted that, since Star Chamber times, "Prosecutions for libels . . . have generally been set on Foot at the instance of the Crown or its Ministers; and . . . these Prosecutions were too often and too much countenanced by Judges,

who held their Places at Pleasure." The judge told the jury to convict Zenger, but the jury found him not guilty "[u]pon which there were three Huzzas in the Hall which was crowded with people." *Id*. at 318-19.

While the Constitution as originally put forth had no Bill of Rights, there was a "wide-spread consensus" that freedom of the press meant "at a bare minimum, no prior restraint." *Id*. at 320-21. "[I]n other words, the substance protected by the First Amendment was not always clearly understood, but all appreciated that limitations imposed prior to publishing were simply unacceptable." *Id*. at 321.

In the 1776 Pennsylvania Constitution, freedom of speech was first given constitutional protection. In pertinent part, that Constitution provided, "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Const. of 1776, Declaration of Rights, art. XII; see also Frederick A. Rapone, *Article I, Section 7 of the Pennsylvania Constitution and the Public Expression of Unpopular Ideas*, 74 Temp. L. Rev. 655, 664 (2001) ("Remarkably, Pennsylvania was the first to memorialize the freedom of speech, in a Constitution.").

Two years later, before James Madison drafted the federal Bill of Rights, the Supreme Court of Pennsylvania addressed the meaning of Article XII. It explained, "[T]hese sections . . . give to every citizen a right of investigating the conduct of those entrusted with the public business; and they effectually preclude

any attempt to setter the press by the institution of a licenser." *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788). The court further noted:

> The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those that are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

Id. Put simply, the Pennsylvania Supreme Court's construction of Article XII meant that one was free to speak, write or publish his sentiment on a subject, especially subjects concerned with matters of public interest, but could be held liable if he defamed another or committed a crime in the process.

In 1790, Pennsylvania adopted a revised Constitution, which discussed the freedoms of speech and of the press in greater detail. Article XII, Section VII of the Pennsylvania Constitution of 1790 stated:

> That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government. And no law shall ever be made to restrain the right thereof. The free communication of thoughts and ideas is one of the invaluable rights of man, and *every citizen may*

> *freely speak, write, and print on any subject, being responsible for the abuse* of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given as evidence. And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

Pa. Const. of 1790, art. XII, § vii (emphasis added); see also Ky. Const. of 1792, art. XII, § 7 ("every citizen may freely speak, write, and print on any subject being responsible for the abuse of that liberty); Vt. Const. of 1793, ch. 1, art. XIII (same); Tenn. Const. of 1796, art. XI, § 29 (same).

By that time, the First Amendment had been ratified as part of the Constitution. In pertinent part, it states, Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const., amend. I.

C. After the Ratification of the Constitution, the disdain for prior restraints continues in force.

In the same way, leading American commentators on the law continued to adhere to the view expressed by Blackstone. Chancellor James Kent, writing in 1827, noted, "It has, accordingly, become a constitutional principle in this country that 'every citizen may

freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right,' and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press." 2 James Kent, *Commentaries on American Law* 14, lec. 24 (1827). One year later, in the first American dictionary of the English language, Noah Webster wrote:

> *Liberty of the press*, in civil policy, is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or the peace of the state.

Webster's *American 1828 Dictionary of the English Language* 629 (Compact ed., Walking Lion Press 2010) (1828). Then, in 1833, Justice Joseph Story wrote: "The doctrine laid down by Mr. Justice Blackstone, respecting the liberty of the press, has not been repudiated (as far as known) by any solemn decision of any of the state courts, in respect to their own municipal jurisprudence." 3 Joseph Story, *Commentaries on the Constitution of the United States* 741 § 1883 (Cosmo reprints 2020) (1833).

After the Civil War, Thomas Cooley again affirmed the understanding that freedom from prior restraints lies at the heart of the freedoms of speech and of the press. He declared that freedom of the press means "only that liberty of publication without the previous permission of the government, which was obtained by the abolition of censorship." Thomas Cooley, *A Treatise*

on the Constitutional Limitations Which Rest Upon the Legislative Power of the States in the American Union 516 (6th ed. 1890). Cooley further linked the freedoms of speech and the press together:

> 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, and to be protected against any responsibility for so doing, except so far as such publications, for their blasphemy, obscenity, or scandalous character, may be a public offense, or by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure in its character, when tested by such standards as the law affords. For these standards, we mustlook to the common law rules which were in force when the constitutional guarantees were established, and in reference to which they have been adopted.

Id. at 518.

These noted commentators, Chancellor Kent, Noah Webster, Justice James Story, and Thomas Cooley, each agreed that the original public meaning of the freedoms of speech and of the press entailed a freedom from prior restraints. Wherever the contours of the rights of free speech and of the press may be, freedom

from prior restraints is at the core of those rights, not at the outer edges.

D. Prior restraints and the courts

Before the Court's decision in *Near v. Minnesota*, state courts refused to enjoin alleged libels. Then, after *Near*, this Court reinforced the legal rejection of prior restraints on speech and publication.

In 1825, the Massachusetts Supreme Judicial Court issued a decision that reflected the sentiment against prior restraints. It observed that liberty of the press "was intended to prevent all such previous restraints upon publication as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rules." *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313-14 (1825). Other state courts followed the lead of the Massachusetts court.

In *Brandreth v. Lance*, for example, the New York court dismissed an attempt to enjoin the publication of a "made-up 'autobiography.'" *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. 1839). The court's opinion pointed to the Star Chamber which it wrote "once exercised the power of cutting off ears, branding the foreheads, and slitting the noses of libellers of notable personages. And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining of such libels by injunction." *Id.* at 24. In the same way, the Missouri Court of Appeals rejected an insurance

company's effort to enjoin a libel. *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173 (1876).

In *Near*, the Court deemed a Minnesota statute that declared the publication of obscene, malicious, or scandalous material to be a public nuisance to be "the essence of censorship" in its operation. 283 U.S. at 713. It drew on the history of the opposition to prior restraints, some of which is discussed above, to conclude that "the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from prior restraints or censorship." *Id*. at 716. The potential for misuse "does not make any the less necessary the immunity of the press from previous restraint." *Id*. at 719.

In 1976, the Court held that restraints imposed on newspapers and broadcasters to protect the right of a criminal accused from unfair pretrial publicity went too far. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). It noted that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Id*. at 559. That is because "[a] prior restraint . . . by definition, has an immediate and irreversible sanction." *Id*. The Court concluded that the record did not support the injunction, and that measures short of a prior restraint could protect the criminal accused. *Id*. at 563-64 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966)).

For its part, the Court has explained, "Any prior restraint on expression comes to this Court with a

heavy presumption against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation omitted) "The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *United States v. Alexander*, 509 U.S. 544, 550 (1993) (quoting and adding emphasis to M. Nimmer on Freedom of Speech, § 4.03, p.4-14 (1984)). And, the proponent carries "a heavy burden of showing justification for the imposition of such a restraint." *Keefe*, 402 U.S. at 419.

By any measure, the injunction operates as a prior restraint. *Amici* will next show that the prior restraint cannot be justified.

III. The materials that Petitioners might have published are not suitable for a prior restraint.

The materials Petitioners might have published remain sealed. Even so, some things might be said about them.

Notably, they cannot be said to be false. Cf. App. 143 "NAF [did] not assert[] a defamation claim." If it had been, truth would have been a defense. And, as John Milton wrote:

> And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and

> Falshood grapple, who ever knew Truth be put to the wors, in a free and open encounter.

Areopagitica at 561; see also *United States v. Alvarez*, 567 U.S. 709, 726 (2012) ("[T]he dynamics of free speech, of counterspeech, of refutation, can overcome the lie." (plurality op.); *id*. at 729 ("Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.") (plurality op.).

Likewise, those materials cannot be said to be within the range of permissible content-based restrictions on speech. Such restrictions "have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar." *United States v. Alvarez*, 567 U.S. at 717 (plurality op.) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)). Put differently, they cannot be said to be likely to "incite imminent lawless action," constitute obscenity, or defamation, be "integral to criminal conduct," be fighting words, constitute child pornography, fraud, or represent true threats. *Id*. (citing cases). Even if the government might restrain "speech representing some grave and imminent threat the government has the power to prevent, . . . a restriction under the last category is the most difficult to sustain." *Id*.

Moreover, the fear of criticism cannot sustain a prior restraint. As the Court observed in *Keefe*, "No prior decisions support the claim that the interest of

the individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." 402 U.S. at 419; see also *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., on Application for Stay) (Neither "significant economic harm" nor allegations of criminal conduct warrant a prior restraint on publication of undercover films of a meat-packing plant's operations.). If the allegations of criminal conduct in undercover filming will not support a prior restraint in *CBS*, the same result should follow when the claim is a breach of contract.

Finally, to return to Blackstone, the materials cannot be said to be "blasphemous, immoral, treasonable, schismatical, seditious or scandalous." 4 Blackstone, Commentaries * 151.

Put simply, nothing that would support a prior restraint can be said to be present in this case. The district court's injunctions are therefore lacking in legal grounding.

CONCLUSION

For the reasons stated in the Petition and this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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