No. 05-1306

IN THE

Supreme Court of the United States

EXTREME ASSOCIATES, INC.;
ROBERT ZICARI; AND JANET ROMANO,

Petitioners

v.

UNITED STATES OF AMERICA

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

BRIEF OF AMICI CURIAE FIRST AMENDMENT LAWYERS ASSOCIATION FREE SPEECH COALITION and ASSOCIATION OF CLUB EXECUTIVES In Support of Petitioners

(Filed with the Consent of All Parties)

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CORPORATE DISCLOSURE STATEMENT

Although not strictly required by Rule 29.6 or 37.5, the instant *amici* submit the following corporate disclosure statement:

Each of the *amici* is a nonprofit corporation. None has any parent corporation, and none has issued any stock. For this reason, no parent or publicly held company owns 10 % or more of the stock of any of the *amici* corporations.

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INTEREST OF *AMICI*

Amicus First Amendment Lawyers Association is composed of attorneys whose practices substantially involve free expression matters including, in virtually every case, matters concerning sexually oriented expression.

Amicus Free Speech Coalition is the trade association of the adult entertainment industry and is composed of businesses and individuals each of which is involved in some aspect of that industry.

Amicus Association of Club Executives is composed of the owners of adult entertainment cabarets which disseminate sexually oriented expression to their willing adult patrons.

Each *amicus* is a nationwide membership organization, and FSC and ACE are trade associations. Each is vitally concerned to protect sexually oriented expression among consenting adults, and each has an interest in the proper development of the law under the First Amendment and under the constitutional sexual privacy protections.

Petitioner Extreme Associates, Inc. is one of several thousand members of the Free Speech Coalition. None of the Petitioners is otherwise a member of any of the *amici*. Counsel for the Petitioners are among the approximately 200 members of the First Amendment Lawyers Association.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no one other than the instant *amici* and their counsel and members – *not* including Petitioners' counsel or Extreme Associates (beyond its ordinary dues payment to FSC) – made any monetary contribution to the preparation or submission of this brief. *Cf*. Rule 37.6.

CONSENT OF THE PARTIES

All of the parties to this proceeding have consented to the filing of this brief, and the written consents thereof have been filed herewith. Rule 37. 2(a)

ARGUMENT IN SUPPORT OF THE PETITION

The court of appeals resolved this case below on the sole ground that this Court has not reconsidered the constitutional questions surrounding the commercial distribution of obscenity through secure private channels in over thirty years. *See* App. 26a. As the Petitioners quite correctly point out, Pet. at 1, this Court has thus never had any occasion to consider the extent to which the Internet serves as a constitutionally protected channel for the sort of obscenity – not involving children in any way – which may be privately possessed by consenting adults at home. *Cf. Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969). The Internet is now widely used for secure credit card and similar banking transactions, and a password-protected World Wide Web site plainly promises sufficient security to avoid exposing children or unwilling adults to expression communicated between consenting adults.

Amicus Free Speech Coalition has several thousand members, virtually every one of which is vitally interested in questions concerning the legitimate scope of obscenity law. Many of those members actively engage in commerce concerning sexually explicit expression over the Internet. The same is true for many of the adult entertainment cabarets represented by *Amicus* Association of Club Executives as well as for many of the clients of members of *Amicus* First Amendment Lawyers Association. The adult entertainment industry is widely estimated to generate well over $8 Billion in annual revenues in the United States,

and it has a *very* substantial presence on the Internet. Freridge, et al. *Free Speech Coalition White Paper 2005*, www.freespeechcoalition.com/whitepaper05.htm. Literally tens of thousands of producers of sexually oriented expression and millions of consumers are vitally interested in whether the Constitution protects the commercial distribution of obscenity among consenting adults using secure private channels. In light of this enormous interest and of the substantial technical developments which this Court has already recognized in other First Amendment contexts, *e.g. Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-70 (1997), substantive review – and affirmance – of the trial court's judgment below is warranted at this time.

Half a century ago, this Court first stated in *dicta*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), and then squarely held, *Roth v. United States*, 354 U.S. 476 (1957), that "obscenity is not within the area of constitutionally protected speech and press." *Id* at 485. Neither the trial court, nor the Petitioners, nor the instant *amici* question that basic holding here. The recitation of this familiar proposition does not, however, end the constitutional analysis in this case. To be sure, the Government alleged below that the expression at issue here is legally obscene,[2] but it has altogether failed to allege that the Petitioners exposed any of that expression to minors or to unwilling adults. As the trial court correctly recognized, contemporary constitutional jurisprudence has developed to a point where such an omission is now fatal.

In the first place, more than one constitutional protection limits the governmental regulations challenged here, so that an exception limiting the scope of only one such protection will leave others in full force and effect. This

[2] Given the present procedural posture of this case, this Court must assume the truth of the Government's allegation in this regard.

Court has recently recognized that constitutionally protected privacy interests flatly limit the extent to which the government may regulate the way in which an adult may engage in consensual intimate relations with another adult. *Lawrence v. State of Texas*, 539 U.S. 558, 575, 578 (2003). *A fortiori*, those same interests protect adults in choosing to make even legally obscene pornography a part of their own private, intimate sexual activities, *cf. Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969), whether those activities are solitary or involve another consenting adult. So it is clear, as the trial court recognized, that constitutional privacy protections limit the permissible scope of obscenity statutes even if those statutes fit comfortably within the obscenity exception to the First Amendment's free speech clause.

Beyond this, constitutional developments over the past three decades have thoroughly undercut any legitimate rationale for treating the commercial distribution of obscenity differently from the private possession which has long been recognized as constitutionally protected. *Compare*, *e.g.*, *Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969), *with United States v. Orito*, 413 U.S. 139, 141 (1973), *and United States v. Reidel*, 402 U.S. 351, 355 (1971). Seminal First Amendment cases decided since 1973 have now unmistakably established that the connection – necessary in our economy – between money and expression raises a free speech barrier to governmental attempts to ban or substantially burden commerce in expression. *Buckley v. Valeo*, 424 U.S. 1, 19, 39 (1976); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 116 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582-83, 592-93 (1983). Thus, contrary to the Government's position in this case, the trial court properly recognized that this Court's older rulings simply failed to anticipate the substantial First Amend-

ment protection now afforded to commerce in expression. *E.g. United States v. Reidel*, 402 U.S. 351, 355 (1971); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973).

Finally, and even more fundamentally, this Court has recently refined the constitutional analysis surrounding the traditionally "unprotected" categories of expression. As a result, it is now clear that government may legitimately regulate obscenity – like the other "well-defined and narrowly limited classes of speech" recognized under *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942) – only for the specific reasons why it has been recognized as a constitutionally "unprotected" category of expression in the first place. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992). The holding, which the instant *amici* acknowledge at the outset, that obscenity is an "unprotected" category of expression "surely do[es] not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate them freely." *R.A.V.* at 384 (quotation marks and citation omitted); *but cf. Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 57-69 (1973). It merely means that, under the First Amendment, governments have *some* legitimate reasons for regulating that content-based category of expression and that they may regulate it for *those* reasons. But a *careful* examination of this Court's obscenity cases reveals that the only surviving reasons why obscenity is, as a *constitutional* matter, treated specially are that it may offend unwillingly exposed adults and that it may harm exposed children. Those concerns are altogether absent here.

Because the Petitioners have rather fully elaborated the reasons why constitutional privacy concerns protect them against the indictments at issue below, the instant *amici* will not belabor these important points. *Amici* fully sup-

port the Petitioners' privacy arguments, and they largely limit the following brief to other parallel constitutional arguments only in the interest of avoiding unnecessary repetition. Rule 37.1. An initial word is in order, however, concerning the very close connection between the privacy arguments presented by the Petitioners and the First Amendment arguments articulated *infra*.

In the first place, it is important to recognize that the precise focus of constitutional "privacy" analysis often shifts, sometimes *sub silentio*, from a predominant concern about secrecy[3] to one of repose[4] to one of autonomy.[5] It may well be that these basic foci relate to one another in important ways, as, for instance, a certain amount of secrecy may be necessary for genuine repose. But whatever their precise "spatial and more transcendent dimensions," *Lawrence v. State of Texas*, 539 U.S. 558, 562 (2003), at any given moment, constitutional sexual privacy concerns predominately focus upon the *autonomy* of the individual in making decisions about consensual sexual activity. *See Lawrence* at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct").

Because the First Amendment also protects individual autonomy in areas similarly central to an individual's "personhood," *Lawrence* at 574 (2003), *quoting Planned*

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[3] *See*, *e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 344 (1995); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[4] *See*, *e.g.*, *Frisby v. Schultz*, 487 U.S. 474 (1988); *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970); *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

[5] *See*, *e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

Parenthood v. Casey, 505 U.S. 833, 851 (1992) – *i.e.* in the choice of what to say and write and what to hear and read and, ultimately, what to think and believe, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) – free speech and sexual privacy protections are indeed so similar that they may be seen to blend into one another where sexually explicit expression is concerned, much as the First Amendment's Free Speech Clause seems to blend into the Equal Protection Clause when content discrimination is involved. *Police Department of Chicago v. Mosely*, 408 U.S. 92, 94-96 (1972). For this reason, the Petitioners' constitutional arguments and those of the instant *amici* fully reinforce one another. They are in no way inimical, and they each have their separate source in similar and overlapping principles firmly established by the Constitution.

I. The Petitioners Have a Constitutional Right to Supply, Through Discrete Commercial Channels, Obscene Expression to Consenting Adults for Their Private Possession and Use.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court recognized that the mere private possession of legally obscene material is protected by the First Amendment. *Id*. at 568. Over the next four years, this Court expressly and deliberately refused to extend similar constitutional protection to the commercial distribution which is necessary – as a practical matter – to enable the private possession of obscene expression. *United States v. Riedel*, 402 U.S. 351, 355 (1971) ("Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here"); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971); *United States v. 12 200-Foot Reels*, 413

U.S. 123, 128 (1973); *United State v. Orito*, 413 U.S. 139, 141 (1973); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973)(rejecting contention that obscenity was protected in a motion picture theater because it was restricted to consenting adults).

In so doing, virtually all of the justices addressing the issue contrasted the right to read and see what one pleases with the right to *sell* reading or viewing material to others or to move it through the channels of *commerce*. *See*, *e.g.*, *Reidel*, 402 U.S. at 359 (Harlan, J., concurring)("the 'right to receive' recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts"); *Thirty-Seven Photographs*, 402 U.S. at 376 (White, J., plurality) ("That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce"); *Reidel* 402 U.S. at 361 (Marshall, J., concurring) ("mail order distribution poses the danger that obscenity will be sent to children").[6]

Chief Justice Burger, in particular, repeatedly sought to juxtapose the private home against a more "public" com-

[6] Justice Marshall's concerns – plainly shared by some other Justices as well – focused upon "mail order distribution" as presented in *Riedel* and as it existed in those days: persons ordering through the mail were simply asked to state in writing that they were of proper age. *Reidel* at 353 n. 3. The more modern transactions at issue in this case provide for *much* better protection against Justice Marshall's fears. Indeed, both the Federal Communications Commission, *see Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128 (1989), and the Congress, *see Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 662 (2004), have now recognized that credit card mechanisms which are now widely available for non-face-to-face transactions provide acceptable screening against minors and, presumably, also against unwilling adults.

merce. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57, 66 (1973); *United State v. Orito*, 413 U.S. 139, 142-43 (1973). With the possible exception of a vague general concern about the "tone of . . . the market," *Paris Adult Theatre* at 59, *quoting* A. Bickel, *Dissenting and Concurring Opinions I*, 22 The Public Interest 25-26 (Winter 1971), all of the Justices' concerns about commerce focused almost exclusively on a concern that obscenity might be exposed to minors or unwilling adults. *E.g. Paris Adult Theatre* at 59 n. 7 (1973).

Whatever their precise basis, all of the holdings distinguishing commercial transactions in obscenity from the private possession thereof came between 1971 and 1973, and this Court has not carefully reconsidered this question since. Yet several important constitutional developments over the ensuing three decades have thoroughly undercut any viable distinction between expression *simpliciter* and commerce in expression.

Most obvious are the cases concerning the constitutionality of statutes regulating political campaign financing. In the seminal case of *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court fundamentally rejected a speech/conduct distinction between actually speaking, on one hand, and *paying* to produce, distribute, or obtain speech, on the other. *Id*. at 15-20. It repeatedly recognized that, in our society, any limitation on payment for expression amounts to a very real limitation on the expression itself. *Id*. at 19 ("virtually every means of communicating ideas in today's mass society requires the expenditure of money"), 39 ("expenditure ceilings impose direct and substantial restraints on the quantity of political speech"). Campaign financing standards are thus subject to detailed and searching scrutiny under the First Amendment itself. *McConnell v. Federal Election Commission*, 540 U.S. 93, 137 (2003) (limits on political contributions subject to intermediate "closely

drawn" scrutiny); *Buckley* at 44 (regulations concerning direct campaign expenditures subject to most exacting constitutional scrutiny). They cannot benefit from mere rational basis scrutiny either as regulations of mere conduct, *Id*. at 16, or under any other guise. *Id*. at 17-18.

This Court's campaign financing cases make it clear that the fact that expression is sold to others, *Buckley* at 16, or purchased for one's self, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337 (1995), is not a permissible reason for removing the otherwise applicable constitutional protections surrounding the expression. *Buckley* at 48. In this case, the money spent to produce, distribute, and purchase sexually explicit expression is clearly analogous to direct campaign expenditures, rather than to political contributions to others. The money paid goes to finance expression of the payer's choice, not to fund another person's or organization's choice of expression to be directed elsewhere. Indeed, payments by the Petitioners' customers are most similar to a candidate's own personal campaign expenditures, *cf*. *Buckley* at 51-54, while the Petitioners themselves are directly analogous to a paid printer who may receive campaign disbursements in order to provide expressive materials to a purchaser, *cf*. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-98 (1982).

The Justices who considered the questions surrounding the commercial distribution of obscene materials for private use over three decades ago simply did not have the benefit of the very elaborate constitutional analysis which has developed as a result of the legal controversies surrounding the campaign financing statutes and regulations. Their uniformly cursory analysis of the private possession/public commerce question, *cf.*, *e.g.*, *United States v. Reidel*, 402 U.S. 352-57 (1971); *United States v. Orito*, 413 U.S. 140-145 (1973), was, to say the least, far less nuanced than

current constitutional analysis, and it took no account whatsoever of the critical significance of money to speech which has now become a constitutional commonplace. In this day and age, the fact that the Petitioners engage in the commercial distribution of sexually explicit expression can no longer be deemed to limit their constitutional rights. Since their consenting adult customers retain the right to possess even legally obscene pornography privately, the Petitioners have a right to supply that demand through secure private channels of commerce.

Nor is the necessity of considering financing limits as expression limits confined to situations involving core political expression. This Court has consistently made it unmistakably clear that entertainment – even quite salacious entertainment – is no less constitutionally protected than is core political expression. *Winters v. State of New York*, 333 U.S. 507, 510 (1948)("line between informing and entertaining is too elusive for the protections of that basic [free press] right"); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000). This Court has thus articulated substantial constitutional protection for commerce in speech well outside of the core political category, again well after the 1971 and 1973 decisions upon which the court of appeals relied.

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court struck down a statute which – in the interest of compensating crime victims – effectively deprived convicts of the right to be paid for books which they might write describing their crimes. The Court had no trouble recognizing that the statute imposed content-based restrictions, *Id.* at 116 ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"), and it

concluded that the challenged statutory limitation on commercial transactions surrounding potential books relating to notorious crimes amounted to a limitation on those books themselves, *Id.* at 123 (state impermissibly "singled out speech on a particular subject for a financial burden [imposed] on no other speech and no other income").

Indeed, this Court has applied – also well after 1973 – similarly strict constitutional scrutiny, *Leathers v. Medlock*, 499 U.S. 439, 447 (1991), and reached similar conclusions, *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227-31 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner or Revenue*, 460 U.S. 575, 582-83, 592-93 (1983), even where commercial transactions concerning particular expression were subject to special taxation rather than being limited or regulated more directly. Just as it was no answer in *Simon & Schuster* and these tax cases that the targeted speaker could write, publish, and distribute books gratuitously, it is no answer here that the Petitioners or their customers could conceivably publish, distribute, or obtain the items protected by *Stanley* entirely outside of the channels of commerce. *Cf. United States v. Thirty-Seven Photographs*, 402 U.S. 363, 382 (1971)(Black, J., dissenting)(contemplating "man [who] writes salacious books in his attic, prints them in his basement, and reads them in his living room").

In distinguishing between expression and commerce in expression, *Reidel*, *Thirty-Seven Photographs*, *Paris Adult Theatre*, *Orito*, and *12 200-Foot Reels* have not survived subsequent constitutional developments. They cannot be squared with the subsequent decisions which have expressly recognized that limitations on expenditures for or commerce in particular expression amount to a direct suppression of that expression itself. This Court should reexamine the cases upon which the court of appeals relied.

II. The Government May Regulate Obscenity Only to Prevent Its Exposure to Children or to Unwilling Adults.

Most expression is immune from content-based government regulation unless the restrictions can withstand strict scrutiny. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 118 (1991). In contrast, some expression can be regulated precisely *because* of its content. Beginning with *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), this Court noted that::

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes, quotation marks, and citation omitted). Thus speech can be *categorized by content*, for constitutional purposes, and a few narrow speech categories have been said since *Chaplinsky* to be constitutionally unprotected while most fall fully within "the freedom of speech, or of the press," U.S. Const. Amend 1 cl. 3, 4, and are thus protected. *State of Virginia v. Black*, 538 U.S. 343, 358-60 (2003). Set, as it is, against the backdrop of a firm presumption that expression is protected by the First Amendment, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-17 (2000), *Chaplisnky's* so-

called "two-level" approach to speech protection, *cf*. H. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S. Ct. Rev. 1, 10, has served the First Amendment well.

Two essential characteristics of that approach have stood the test of time and remain critical to the very substantial protection which the Constitution affords to expression. First, as just noted, the *Chaplinsky* approach is universally understood to stand against a prior and more fundamental presumption that all expression is protected by the First Amendment. *E.g. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). Among other things, this means that the burden is always on the government to demonstrate, by the appropriate quantum of proof and under the applicable constitutional standard that particular expression falls within a constitutionally unprotected class of expression. *Id*. at 816. The second critical feature is that the question of full constitutional protection *vel non* is assessed and answered categorically in the sense that if the precise expression at issue falls outside of an unprotected category, even by just a bit, it remains fully protected on the same terms and by the same constitutional standards as even the most clearly protected expression. *Free Speech Coalition*, 535 U.S. at 240, 251.

These features of the *Chaplinsky* approach remain valuable bulwarks against the potential erosion of constitutional protections which would arise if the level of speech protection were assessed on a case-by-case balancing basis against a spectrum of expression. In other words, it is critical that expression is presumed to be on the broad protected constitutional plateau rather than in a narrow unprotected hole and, further, that the boundaries between the vast plateau and rare holes are constitutional cliffs, not gentle and extensive downhill slopes. These very speech-

protective features of the *Chaplinsky* approach are entirely independent of the new constitutional developments addressed *infra*, and the instant *amici* do not call these features into question in any way.

A third characteristic of the two-level approach to speech protection, however, was often casually articulated and sometimes directly applied in the years following *Chaplinsky*. Although *Chaplisnky* never actually *said* as much, this Court eventually came to speak as if expression falling within one of the "unprotected" categories was altogether unprotected by the First Amendment. *E.g. Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 124 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984). That is, this Court assumed for a time that such expression was entitled to no heightened First Amendment scrutiny under any circumstances, so that *any* substantive regulation of obscenity – or other "unprotected" speech category – could be supported by *any* rational basis. Many rational bases, the Court thought, could be assigned to regulate speech which had no special constitutional protection, *Roth v. United States*, 354 U.S. 476, 485-87 (1952); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-69 (1973) (enumerating rational bases for banning obscenity *once* it had been established that obscenity was categorically unprotected in the first place, *Id.* at 54, 57, 60, 61, 63-64, 66, 67), just as many rational bases support regulation of other constitutionally unprotected matters. *See*, *e.g.*, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-88 (1955); *but see Carolene Products Co. v. United States*, 304 U.S. 144, 153 n. 4 (1938).

But this Court has now expressly recognized that *Chaplinsky* does *not*, after all, mean that certain classes of expression – even "well-defined and narrowly limited classes," *Chaplinsky*, 315 U.S. at 571 – are *altogether* un-

protected by the First Amendment. The proposition that obscenity, for instance, can be suppressed without raising "any Constitutional problem," *Id*. at 572, ultimately entails nothing more than a recognition that there is *at least one* constitutionally acceptable reason for suppressing it; it does not necessarily mean that *any* reason will do. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court put it this way:

> We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all," Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 615 n. 146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. . . .
>
> Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate them freely. That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amend-

> ment protection is at odds with common sense and with our jurisprudence as well.

Id. at 383-84 (emphasis in original, quotation marks and citations omitted). This observation that the 'holes' which *Chaplinsky* recognized in the First Amendment's protection are not constitutional bottomless pits should come as no surprise. After all, even on the constitutional plateau, expression is not absolutely *protected* from regulation under all circumstances, *e.g. Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989)(strict scrutiny for content-based regulations); *United States v. Grace*, 461 U.S. 171, 177 (1983)(intermediate scrutiny for time, place, and manner regulations), so there is conversely no reason to expect that expression will be absolutely *un*protected in the holes. Moreover, there are additional clues that an "all-or-nothing-at-all approach" is too "simplistic." Certain sexual expression, for instance, remains fully protected when disseminated to adults even while it is obscene as to minors. *Ginsberg v. State of New York*, 390 U.S. 629, 635 (1968). Even more to the present point, obscenity itself remains constitutionally protected when privately possessed by an adult, *Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969), even though the same content can be criminally sanctioned if placed on a billboard or sent through unsolicited mail, *Miller v. State of California*, 413 U.S. 15, 18 (1973). This suggests that the *context* in these examples helps to relate the "proscribable content" to the permissible reasons supporting proscription.

As the result in *R.A.V.* demonstrates, 505 U.S. at 391-92, the recognition that certain categories of expression can be regulated for some reasons but not for others requires an inquiry into whether a particular restriction is appropriately tailored to a constitutionally permissible reason. And, for present purposes, *that* necessitates a determina-

tion of just what reason or reasons warrant the conclusion that obscenity as a class is "unprotected" by the First Amendment.[7]

When it first discussed obscenity in connection with the First Amendment, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942), this Court cited an analysis which strictly limited those reasons to the prevention of offense to unwillingly exposed adults and protecting the development – moral or otherwise – of children. *Id*. at 572 nn. 4, 5, *citing* Z. Chafee, *Free Speech in the United States* 149-50 (1941). An examination of the cited section of Professor Chafee's book readily discloses that Chafee was overwhelmingly concerned with the offense which certain expression may give to others and with the breaches of peace which likely result therefrom. *Id*. at 149-51. To be sure, Chafee mentions "morality" as an underlying concern, *Free Speech* at 150, and *Chaplinsky* closely paraphrases him in doing so, *Chaplinsky* at 572. But even a

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[7] It is quite telling that the *R.A.V.* refinement of the *Chaplinsky* two-level approach to speech protection was, in fact, anticipated in a prior obscenity case. As the author of this Court's opinion in *Stanley v. State of Georgia*, 394 U.S. 557 (1969), later explained: ". . . *Stanley* turned on an assessment of which interests may legitimately underpin governmental action . . .." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 351, 360 (1971)(Marshall, J., dissenting). Indeed, much of this Court's opinion in *Stanley* is devoted to determining the constitutional *im*permissibility of those governmental interests which could logically support a ban on the private possession of obscenity. *Stanley* at 263-68 (rejecting suggested governmental interests such as preserving the current morality against social change or evolution resulting from the dissemination of expression, *Id*. at 565-66,and protecting against crime, *Id*. at 566-67). *Stanley's* rejection of these interests has plainly stood the test of time. *Cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)(citing *Stanley* and noting "we need not quarrel with this."); *Lawrence v. State of Texas*, 539 U.S. 558, 577 (2003)("fact that the governing majority . . . has traditionally viewed a particular practice as immoral is not sufficient reason for . . . prohibiting the practice")(citation omitted).

cursory reading of Chafee's actual analysis confirms that this concern is restricted to the moral development of *children*. *Free Speech* at 150 ("Adulterated candy is no more poisonous *to children* than some books" (emphasis added)). Indeed, Chafee himself expressly criticizes the suppression of obscenity to promote the morality of adults. *Id*. at 150-51 (criticizing use of obscenity as "a roundabout modern method to make heterodoxy in sex matters . . . a crime"). This is the reasoning – the only reasoning – on which *Chaplinsky* relied in setting up the two-level approach to speech protection.

The one other significant attempt to introduce another possible reason why obscenity is unprotected in the first place came in *Roth v. United States*, 354 U.S. 476 (1957). This Court there suggested that constitutional free speech protections do not extend to obscenity because obscenity is "utterly without redeeming social importance," *Id*. at 484, *i.e.* worthless as expression. While such reasoning certainly may have permitted the government to suppress obscenity in situations far beyond those involving children or unwilling adults, it *also* effectively required a determination that a work is "unqualifiedly worthless" before it can be deemed legally obscene. *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*, 383 U.S. 413, 419 (1966)(plurality opinion)(internal quotation marks omitted). It thus imposed an unacceptably high burden on the government in obscenity prosecutions, *Miller v. State of California*, 413 U.S. 1, 22 (1973). In ultimately relaxing the extraordinarily speech-protective value prong from *Memoirs*, *see Miller* at 24-25 (substituting 'lacks serious . . . value" for "utterly without redeeming . . . value"), this Court necessarily abandoned the utter worthlessness reasoning from *Roth* and returned to *Chaplinsky's* understanding. Justice White had expressly charted this precise course in 1966, *Memoirs* at 461-62 (White, J., dissenting)(citing to *Chaplinsky* in order to avoid implications

of *Roth*), and this Court deliberately followed him there seven years later, *Miller* at 25 n. 7 (citing to White, J.).

With *R.A.V.'s* refined understanding that the *reasons* which remove a category of expression from the presumptive constitutional protection also *limit* the purposes for which the government may regulate that category, these reasons become critical to full constitutional analysis. Because the only reasons this Court has ultimately accepted for considering obscenity to be beyond the First Amendment's protection are the welfare of children and the prevention of offense to unwilling adults, obscenity prosecutions must be restricted to situations implicating at least one of those concerns. This case concerns neither.

CONCLUSION

The foregoing First Amendment considerations present reasons – in addition to the constitutional privacy concerns pressed by the Petitioners – why obscenity cannot be criminally sanctioned unless it is exposed to children or unwilling adults. For these additional reasons, this Court should grant the instant petition for a writ of certiorari.

Respectfully submitted,

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