IN THE SUPREME COURT OF PENNSYLVANIA

No. 17 WAP 2025

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

ANDRE JOHNSON,

Appellant.

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION (ACLU) AND ACLU OF PENNSYLVANIA IN SUPPORT OF APPELLANT

Appeal from the Order of the Superior Court of Pennsylvania, 171 WDA 2023, dated November 13, 2024.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The **American Civil Liberties Union** ("ACLU") is a nationwide, non-profit, non-partisan organization dedicated to defending the civil liberties and civil rights guaranteed by the federal and state constitutions, and the **ACLU of Pennsylvania** is its Pennsylvania state affiliate.

Amici believe in—and have long advocated for—both free speech and the rights of criminal defendants. *See, e.g.*, *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997); *Free Speech Coal. v. Paxton*, 606 U.S. 461 (2025); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019); *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003). They have an interest in ensuring that exceptions to free speech protections, including for obscenity, are narrowly construed.

The ACLU of Pennsylvania has also represented individuals charged under the provision of the disorderly conduct statute at issue in this case. *See, e.g.*, *Hackbart v. City of Pittsburgh*, No. 2:07-cv-157, 2009 WL 10728584 (W.D. Pa. Mar. 23, 2009); *Commonwealth v. Grim*, 953 A.2d 829 (Pa. Super. Ct. 2008). It has expertise with respect to the provision's misuse.

No person or entity other than amici curiae paid for or authored this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

A defining feature of obscenity, for constitutional purposes, is that it appeals to the "prurient interest" in sex. This has been true ever since the U.S. Supreme Court announced that the First Amendment does not protect obscenity. *See Roth v. United States*, 354 U.S. 476, 485, 487 (1957). Speech, therefore, can be proscribed as obscene only if it is erotic, and only if it tends to arouse shameful or morbid sexual desires. Absent such a showing, intemperate and even deeply offensive speech does not qualify as obscene. Statutes that proscribe speech beyond this constitutional limit are not only patently unconstitutional—they also sow confusion about what speech is and is not protected, chilling expressive activity and empowering law enforcement to selectively punish people for protected speech.

Pennsylvania's disorderly conduct statute (hereinafter, the "obscenity provision") was enacted in 1972 and criminalizes the use of "obscene language" or "gesture[s]" when made with an intent "to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." 18 Pa.C.S.A. § 5503(a). The Superior Court, consistent with First Amendment standards, has consistently interpreted the statute's reference to "obscene" to require an appeal to the prurient interest.

The question in this case is whether speech intended to criticize the actions of a police officer, using lewd and vulgar language, appeals to the prurient interest. Decisions by the U.S. Supreme Court demonstrate that it cannot. Appellant Andre

Johnson's conviction for disorderly conduct for statements that he would "be seeing" the officer's daughter later, that the officer shouldn't worry because "he's a lover, not a fighter," and that he "wanted to F" the officer's daughter in order to impregnate her and cost the officer money, were clearly intended to express his dissatisfaction with the officer's decision to tow his car, not arouse the officer or tow truck driver. The Superior Court opinion equates any reference to a sexual act as "prurient," but that is inconsistent with First Amendment precedent and punishes expression that is intended to criticize, not arouse.

In granting review, this Court reframed the issues on appeal as twofold—asking not just whether Mr. Johnson's speech appealed to the prurient interest, but also whether the obscenity provision incorporates that constitutional requirement in the first place. This Court should reverse the decision below and hold that the obscenity provision necessarily incorporates the constitutional definition of obscenity, including an appeal to the prurient interest. If the obscenity provision criminalized speech that does not meet that definition, the statute would be patently unconstitutional. But that result cannot be what the legislature intended: when the disorderly conduct statute was enacted, the prurient interest prong for obscenity was well-established as a matter of constitutional law. And the legislature has since adopted the federal constitutional test for obscenity in related statutes.

Properly construed, the disorderly conduct statute does not proscribe Mr. Johnson's speech. Andre Johnson was convicted of violating this statute after he was pulled over for an extended period for failing to stop and driving without a license. Trial Tr. 6, 7 [hereinafter T.T.]; Sentencing Tr. 2. Although his car was safely and legally parked at the time of the citations, the officer then told him that police were going to have his car towed, even if the towing would cause damage. T.T. 8, 17, 32. Under those circumstances, police lack legal authority to tow a vehicle. *See Commonwealth v. Lagenella*, 83 A.3d 94, 101–02 (Pa. 2013); T.T. 30–32; Sentencing Tr. 3. Only after hearing the towing plans did Mr. Johnson become "belligerent," calling the officer a "fucking bitch" and "no woman." *Id.* at 9. He said he would "be seeing" the officer's daughter and that the officer shouldn't worry because "he's a lover, not a fighter." *Id.*[1]

Mr. Johnson's speech was deeply offensive, but it did not appeal to the prurient interest. He was objecting to a police officer's decision and the supposed policy behind it. Speech criticizing the government, even if vulgar, lies at the heart

[1] Notably, although the tow truck driver who arrived at the scene testified that he heard Mr. Johnson shouting that he wanted to cost the officer money by "F"-ing and impregnating her daughter, the officer testified that this speech occurred later at the driver's garage, outside her presence—not at the intersection where she issued Mr. Johnson the citations. *Id.* at 21, 25. Accordingly, those statements are irrelevant, in addition to not being obscene. *Id.* at 27 (trial judge stating that "we're going to keep everything centered on what happened at 4th Street" and sustaining objection to testimony regarding "information at the garage" on the ground that it was not "relevant to this case").

of First Amendment protection. This Court should hold that only speech that appeals to the prurient interest can be obscene under Pennsylvania law.

ARGUMENT

I. The obscenity provision must be interpreted to require an appeal to the prurient interest to ensure protected speech is not punished or chilled.

A. Under the U.S. and Pennsylvania Constitutions, only speech appealing to the prurient interest constitutes non-protected, obscene speech.

Although the U.S. Supreme Court has long held that the federal First Amendment offers no protection for obscene speech, it has recognized the "inherent dangers of undertaking to regulate any form of expression" and thus cautioned that "[s]tate statutes designed to regulate" even "obscene materials must be carefully limited." *Miller v. California*, 413 U.S. 15, 23–24 (1973). Accordingly, under the prevailing First Amendment standard for obscenity set out in *Miller v. California*, laws purporting to regulate obscenity must be limited to materials which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. This narrow definition, applied from the perspective of an average person in the community, *see Miller*, 413 U.S. at 24, helps ensure that bars on obscenity do not become vehicles for government suppression of protected expression.

The Pennsylvania Constitution likewise protects against prosecutions for offensive or lewd speech under the guise of obscenity regulation. Article I, section 7 provides for the "free communication of thoughts and opinions," guaranteeing to every person a right to "freely speak, write and print *on any subject*." Pa. Const. art. I, § 7 (emphasis added). As the Court has recognized, this language sweeps more broadly than the federal First Amendment. *See DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009); *see also Pap's A.M. v. City of Erie*, 812 A.2d 591, 603–06 (Pa. 2002); *Commonwealth v. Tate*, 432 A.2d 1382, 1387 (Pa. 1981). And its reference to speech "on any subject" provides strong evidence that carveouts from the state constitution's protection should be, at minimum, no greater than those under federal law. *See, e.g.*, *Trusz v. UBS Realty Invs., LLC*, 123 A.3d 1212, 1221 (Conn. 2015) (concluding that state constitution's protection for speech "on all subjects" is "broad and encompassing" and goes beyond the U.S. Constitution's guarantee).

Case law is in accord: While this Court has not separately defined obscenity as a matter of state law post-*Miller*, Pennsylvania courts have long understood it to require an appeal to the prurient interest. *See William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 64–65 (Pa. 1961) (recognizing a criminal defendant's state constitutional right of having a jury, when "applying contemporary standards of the community," determine whether "the dominant theme of his utterance taken as a whole appealed to the prurient interest of the average person").

Under the test set forth in *Miller v. California*, regulated speech must be "in some sense erotic" to appeal to the prurient interest. *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 579 & n.9 (2002) (describing erotic as meaning "of, devoted to, or tending to arouse sexual love or desire," in reliance on Webster's Ninth New Collegiate Dictionary 422 (1991)); *accord Cohen v. California*, 403 U.S. 15, 20 (1971); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498–99 (1985) (likening the prurient interest to "a shameful or morbid interest in nudity, sex, or excretion).

Context also matters. Determining whether material appeals to a prurient interest requires analyzing the material "as a whole." *Miller*, 413 U.S. at 24; *see also, e.g.*, *Splawn v. State of California*, 431 U.S. 595, 598 (1977) (recognizing "evidence of pandering to prurient interests" as relevant); *cf. Pinkus v. United States*, 436 U.S. 293, 303 (1978) (noting that "the Court has considered motivation relevant to the ultimate evaluation").

Consistent with this narrow definition, the Court has made clear that "sex and obscenity are not synonymous." *Roth*, 354 U.S. at 487. Even depictions of sexual anatomy or sexual activity do not qualify as appealing to the prurient interest if they are not erotic. Many depictions of nudity, for example, fail the test. *Ashcroft*, 535 U.S. at 579 n.9; *see also United States v. Various Articles of Merch., Schedule No. 287*, 230 F.3d 649, 655 (3d Cir. 2000), *as amended* (Dec. 15, 2000) (holding that nudist magazines did not appeal to the prurient interest because photographs of

children "primarily focused on children's activities, not on the children's bodies"). And depictions of sex—even sex between people who appear to be minors—do not automatically appeal to the prurient interest. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (invalidating a statute that "proscribe[d] any depiction of sexually explicit activity, no matter how it is presented").

The prurient-interest requirement thus "substantially limit[s]" the boundaries of obscenity. *Ashcroft*, 535 U.S. at 579. "Speech that is 'vulgar or offensive'—but not obscene—'is protected by the First and Fourteenth Amendments.'" *Moshoures v. City of North Myrtle Beach*, 131 F.4th 158, 168 (4th Cir. 2025) (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974)); *see also Cohen*, 403 U.S. at 20 (1971); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975). This reflects the "bedrock principle underlying the First Amendment" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Commonwealth v. Hock*, 728 A.2d 943, 947 (Pa. 1999) (quoting *Commonwealth v. Greene*, 189 A.2d 141, 145 (Pa. 1963)) (stating that the offense of disorderly conduct "is not to be used as a dragnet for all the irritations which breed in the ferment of a community").

For example, the First Amendment has been held to protect a jacket bearing the words "Fuck the draft" in a courthouse, *see Cohen*, 403 U.S. at 16, 26, and an

anti-gay demonstration proclaiming "Priests Rape Boys" at a service member's funeral, *see Phelps*, 562 U.S. at 448, 454, 458. "Fuck the draft," the Court reasoned in *Cohen*, may be "vulgar," but it does not "conjure up such psychic stimulation" as required for obscenity. 403 U.S. at 20. Simply stated, *Cohen* was "not . . . an obscenity case." *Id.* And while the demonstrators' speech about priests in *Snyder v. Phelps* might have "arouse[d] contempt," it did not arouse sexual desire. 562 U.S. at 458. Vulgar speech may offend listeners, but that does not make it any less protected.

This line between obscene and merely vulgar speech is crucial to expressive freedom. "Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries." *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). By sowing uncertainty about where the line falls, such prohibitions can lead to self-censorship and excessive caution in the exercise of First Amendment and state corollary freedoms. *Id.* That is why clarifying the limits of the state's power to prosecute putatively obscene speech is so important.

B. Given the constitutional test for obscenity, and in light of other statutory construction tools, this Court should hold that the obscenity provision incorporates a prurient-interest requirement.

In granting review of the case, this Court reframed the questions presented to include whether the obscenity provision even requires a showing of an appeal to the prurient interest. In light of the constitutional constraints set out in Part I.A., the answer to that question must be "yes." Otherwise, the statute would be

unconstitutional. *See Reno*, 521 U.S. at 873–74 (invalidating federal law regulating indecent internet content because it lacked several requirements in the *Miller* test and was therefore overly broad). And this Court must of course construe statutes "whenever possible to uphold their constitutionality." *DePaul*, 969 A.2d at 546; *see also* 1 Pa.C.S.A. § 1922(3) (establishing presumption that "the General Assembly does not intend to violate" the U.S. or Pennsylvania Constitution).

Traditional statutory tools of construction likewise make clear that the obscenity provision requires an appeal to the prurient interest.

First, the obscenity provision was enacted as part of a recodification of Pennsylvania's criminal code in 1972. At that time, an appeal to the prurient interest was well-established as a component of the constitutional test for obscenity. *See Commonwealth v. Dell Publ'ns, Inc.*, 233 A.2d 840, 846 (Pa. 1967) (discussing *Roth*, 354 U.S. at 489; *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Att'y Gen. Com. Mass.*, 383 U.S. 413, 418 (1966)). The Court should presume that the legislature crafted the statute "with full knowledge of pre-existing decisional law," including *Miller*. *In re T.B.*, 75 A.3d 485, 496 (Pa. Super. Ct. 2013) (citing *Commonwealth v. Willson Prods., Inc.*, 194 A.2d 162, 167 (Pa. 1963)).

Second, although the legislature did not define "obscene" in the statutory provision at issue here, it *did* define that term in 18 Pa.C.S.A. § 5903(b) to expressly incorporate the *Miller* test, including a prurient-interest requirement. Where

permissible under the statutory text, courts should generally endeavor to interpret statutory terms consistently across related statutes. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991). Consistent with this general rule, the Superior Court has long looked to the definition of obscenity in 18 Pa.C.S.A. § 5903(b) to apply the obscenity provision at issue in this case. *See, e.g.*, *Commonwealth v. Bryner*, 652 A.2d 909, 910, 912 (Pa. Super. Ct. 1995); *Commonwealth v. Bliesath*, No. 1491 MDA 2021, 2022 WL 3134041, at *2–4 (Pa. Super. Ct. Aug. 5, 2022) (nonprecedential decision reviewing similar cases and stating that "we use the *Bryner* test to determine whether words and gestures are obscene for purposes of 18 Pa.C.S. § 5503(a)(3)").

II. The prurient-interest requirement should be narrowly defined to ensure that government officials do not punish Pennsylvania residents for protected speech.

In holding that the obscenity provision incorporates a prurient-interest requirement, this Court should make clear that an appeal to the prurient interest is defined narrowly. Prosecutions of individuals for protected speech under 18 Pa.C.S.A. § 5503(a)(3), the "obscenity provision" of the disorderly conduct statute, are distressingly common in the Commonwealth. And although the Superior Court has reversed convictions of many Pennsylvanians charged with violating the obscenity provision because their expression did not meet the *Miller* test for obscenity, *see, e.g.*, *Bryner*, 652 A.2d at 911–12, it has in recent years diluted the

meaning of the prurient-interest requirement by upholding some prosecutions based on angry, non-erotic expression, as it did in this case. *See Commonwealth v. Johnson*, 327 A.3d 265, 271 (Pa. Super. Ct. July 3, 2024); *Commonwealth v. Rosenberger*, No. 477 EDA 2023, 2024 WL 3290755, *5 (Pa. Super. Ct. 2024) (non-precedential decision). Confusion over what constitutes obscene expression under the disorderly conduct statute has caused numerous individuals to be prosecuted for constitutionally protected speech.

Amicus ACLU of Pennsylvania has represented dozens of individuals cited for violating the obscenity provision based on expression that—while rude, vulgar, or disrespectful—was plainly entitled to constitutional protection. In addition to chilling protected speech, these prosecutions impose significant economic costs on those cited or arrested for constitutionally protected expression. Individuals must appear in person before the magisterial district judge to challenge the charge, often taking time off work to do so. Some hire lawyers or seek *pro bono* representation from *amicus*. Many individuals are convicted by magisterial district judges and must pay a nonrefundable fee—often equal to the fine itself—to file a summary appeal to the court of common pleas. And in some cases, including this one, it takes years and multiple levels of judicial review for affected individuals to clear their names.

In the ACLU of Pennsylvania's experience, misuse of the obscenity provision in the disorderly conduct statute is widespread. In 2006, for example, an Allegheny

County resident was charged with violating the obscenity provision after giving the middle finger to a Pittsburgh police officer. The individual was initially convicted, but the district attorney later withdrew the charge after the resident filed a summary appeal. The individual's subsequent federal lawsuit against the municipality for the unconstitutional arrest settled after the Court found that "[t]here [wa]s more than sufficient evidence in the record to create a jury question concerning municipal liability in th[e] case." *Hackbart v. City of Pittsburgh*, 2009 WL 10728584, at *9. The Court relied on evidence of "188 citations issued by City of Pittsburgh police officers between March of 2005 and October of 2007 charging persons with disorderly conduct for using profane language and/or 'obscene' hand gestures." *Id.*

Similarly in 2008, a Luzerne County resident was charged with violating the obscenity provision after she reported an incident to the state police involving a motorcyclist who swerved close to her as if to hit her. A state trooper mailed her a disorderly conduct citation for yelling "asshole" at the motorcyclist. The resident, who hired a lawyer to defend her, was found not guilty by the magisterial district judge. *Amicus* then represented the resident in a federal lawsuit—later settled—against the Pennsylvania State Police. Records obtained by *amicus* indicated that the state police issued more than 750 citations across the state for profanity or profane

gestures in a one-year period. Rich Lord, *State police to pay settlement to woman cited for swearing*, Pittsburgh Post-Gazette, Jan. 4, 2011.[2]

Additional examples, drawn from thirty years of *amicus*'s defense of individuals charged with disorderly conduct for obscene language or gestures, illustrate the ways the obscenity provision has been misapplied to punish constitutionally protected speech:

- In 2000, an Allegheny County woman was arrested and charged after telling a policer office "I'm having a bullshit day." The charge was dismissed.[3]

- In 2000, two college students were arrested and charged when one of them yelled, "It's a crosswalk, asshole," at a police car that nearly ran them over. The charges were dismissed.[4]

- In 2007, a Lawrence County man was charged for stating his view that he was being treated unfairly because of his gender, telling a Domestic Relations Office employee "[i]f I had a pussy between my legs, you wouldn't be treating me like that." He also called workers in the office "fucking sluts." The Superior Court reversed his conviction, finding that his "vulgar and inappropriate statements were not obscene" because "they were not made in an appeal to prurient interests."[5]

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[2] *Available at* https://www.post-gazette.com/breaking/2011/01/04/State-police-to-pay-settlement-to-woman-cited-for-swearing/stories/201101040187.

[3] Press Release, *ACLU Files Two Free-Speech Lawsuits Against Police For Arresting People Who Used 'Naughty Language,' ACLU of Pennsylvania*, July 2, 2002, *available at* https://www.aclu.org/press-releases/aclu-files-two-free-speech-lawsuits-against-police-arresting-people-who-used-naughty.

[4] *Id.*

[5] *Commonwealth v. Grim*, No. 686 WDA 2007 (Pa. Super. Ct. Apr. 7, 2008).

- In 2007, a Lackawanna County woman was charged after her neighbor, a Scranton police officer, heard her through an open window shouting profanities at an overflowing toilet in her home. The magisterial district judge found her not guilty, and the city settled a subsequent civil rights suit for $19,000 in damages and attorneys' fees.[6]

- In 2008, a Schuykill County resident was arrested and briefly jailed for calling a police officer a "fucking asshole" after the officer issued a parking ticket to him. The resident was found not guilty by a magisterial district judge after taking a day off from work with no pay.[7]

- In 2015, a New York man was charged for calling a woman a "bitch" during a verbal dispute in Tioga County. He was convicted by the magisterial district judge, filed a summary appeal, and was found not guilty by the court of common pleas.[8]

- In 2017, a Butler County man was charged for shouting "fucking cunt" at his girlfriend and a police officer from the porch of his house. The Superior Court reversed his conviction, finding that "fucking cunt" was not used to describe an act of sex, and did not appeal to anyone's prurient interest.[9]

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[6] *See Commonwealth v. Herb*, No. NT 0000758-07 (Magis. D. Ct. Dec. 13, 2007); Press Release, *City of Scranton Settles with Woman Improperly Charged for Swearing at Toilet, ACLU of Pennsylvania*, Oct. 22, 2008, *available at* https://www.aclupa.org/press-releases/city-scranton-settles-woman-improperly-charged-swearing-toilet.

[7] Press Release, *ACLU of PA Sues Police Over Citations For Profanity, ACLU of Pennsylvania*, May 12, 2010, *available at* https://www.aclupa.org/press-releases/aclu-pa-sues-police-over-citations-profanity.

[8] Press Release, *ACLU of PA Sues Police Officer Over Citation For Profanity, ACLU of Pennsylvania*, Mar. 3, 2016, *available at* https://www.aclupa.org/press-releases/aclu-pa-sues-police-officer-over-citation-profanity.

[9] *Commonwealth v. Dunkin*, No. 1864 WDA 2017, 2018 WL 4171209, at *3 (Pa. Super. Ct. Aug. 31, 2018).

As these examples demonstrate, police officers have a tendency to employ the obscenity provision to punish individuals who criticize them or question their authority. At minimum, they show that officers have a difficult time applying the obscenity provision in a way that avoids punishing protected speech, and that lack of certainty as to the scope of a sufficient appeal to the prurient interest imposes at least two types of significant costs, even beyond the costs to individuals wrongfully charged or arrested.

First, misuse of the obscenity provision to retaliate against disfavored speech often leads to follow-on lawsuits by people wrongly charged. Such lawsuits have cost the state and its municipalities thousands of dollars in damages and attorneys' fees. *See, e.g.*, *@#$%^&*!!!!!!! Perfectly Legal in Pennsylvania; ACLU Gains Settlement in Cursing Case*, CBS News, Jan. 5, 2011.[10] Ryan Smith, *ACLU Helps Pittsburgh Man Get $50,000 After Flipping Off Cops; 'Finger' Protected by First Amendment?*, CBS News, Nov. 25, 2009.[11]

Second, without clarity that the prurient-interest standard is narrow, a speaker might be "unsure about the side of a line on which his speech falls," or might "worry that the legal system will err," or might "simply be concerned about the expense of

[10] *Available at* https://www.cbsnews.com/news/perfectly-legal-in-pennsylvania-aclu-gains-settlement-in-cursing-case.

[11] *Available at* https://www.cbsnews.com/news/aclu-helps-pittsburgh-man-get-50000-after-flipping-off-copsfinger-protected-by-first-amendment.

becoming entangled in the legal system"—leading to the chilling of speech. *Counterman*, 600 U.S. at 75. Yet, as this Court has recognized, "the Constitution provides significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Commonwealth v. Omar*, 981 A.2d 179, 185 (Pa. 2009) (quoting *Commonwealth v. Davidson*, 938 A.2d 198, 208 (Pa. 2007)).[12] Accordingly, providing guidance to police officers and residents that speech must not just refer to sex, but must be erotic and likely to arouse, is necessary to ensure that protected expression is neither punished nor chilled.

III. Mr. Johnson's speech, however offensive, does not appeal to a prurient interest, and it therefore cannot sustain his conviction.

Mr. Johnson's speech cannot be proscribed under the obscenity provision of the disorderly conduct statute because it did not appeal to the prurient interest in sex. This is so for several reasons.

First, Mr. Johnson's speech was not "in some sense erotic," or "tending to arouse sexual love or desire." *Ashcroft*, 535 U.S. at 579 & n.9; *see also Miller*, 413

[12] In addition, if this Court were to uphold the Superior Court's expansive interpretation of a prurient interest, it would risk expanding other restrictions on expression in the Pennsylvania Code that, like the disorderly conduct statute, use the term "obscene" without defining it. These provisions include regulations of the crime of harassment, *see* 18 Pa.C.S.A. § 2709; student speech on school premises and in student newspapers, *see* 22 Pa. Code §§ 12.9, 12.2; documents filed in court, *see* 58 Pa. Code § 491a.4; the speech of limousine and taxicab drivers, *see* 52 Pa. Code §§ 1057.10, 1021.11; the behavior of visitors at hotels and campgrounds, *see* 48 Pa.C.S.A. § 1311; and various advertisements, *see* 40 Pa. Code §§ 13.13, 13.52; 52 Pa. Code § 1017.5.

U.S. at 27 ("Under the holding announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."). To be sure, Mr. Johnson relied on sexist tropes, calling the officer a "fucking bitch" and "no woman." T.T. 9. And he alluded to sex in the officer's presence, telling the officer that he would "be seeing" her daughter and that he was a "lover, not a fighter." *Id.* But those statements were mere euphemisms, at worst; they did not involve specific depictions or even descriptions of sexual acts. *Id.* Mr. Johnson's later statements that he "wanted to F" the officer's daughter and impregnate her in order to cost the officer money were expressions of anger about the cost of the tow. *Id.* at 25. What is more, they were made outside the officer's presence, at the tow truck driver's garage—a location the trial judge deemed irrelevant to the disorderly conduct charge. *Id.* at 27.

Second, under *Miller*, an appeal to the prurient interest depends on an assessment of the person's activity "as a whole," and its impact on an average person. *Miller*, 413 U.S. at 24. Here, Mr. Johnson made the relevant statements during an extended police stop that ultimately lasted for at least an hour, *see* T.T. 9–10, in response to illegal police action, *see Lagenella*, 83 A.3d at 101–02; T.T. 30–32; Sentencing Tr. 3. The officer told him that he would be cited for multiple infractions, that a "policy"—never produced at trial—required impounding his car

even though no one claimed it was illegally or dangerously parked, and that there was no supervisor available to whom he could appeal. T.T. 8–9. Mr. Johnson, who was standing "on the side" when the tow truck arrived, became "belligerent" and "screamed" at the officer only after she told him his car would be towed even if the tow would damage his vehicle. *Id.*at 25. Mr. Johnson's speech, taken as a whole, was designed to object to an illegal tow—not to titillate. *Cf. Splawn*, 431 U.S. at 598 (emphasizing the "deliberate representation of petitioners' publications as erotically arousing" and the publisher's goal of "titillation").

Indeed, the officer's actual reaction is strong evidence in this respect, insofar as it illuminates the average community member's probable understanding of Mr. Johnson's language. *Cf. Hamling v. United States*, 418 U.S. 87, 108-09, 124–27 (1974) (acknowledging the district court's "wide discretion" in determining whether testimony is relevant in an obscenity trial). She testified that his speech, far from provoking lustful desires, made her "angry" because she doesn't "allow people to disrespect [her] on the street." T.T. 10. And the officer understood Mr. Johnson's statements to target her actions as a government official, too, saying "I do not want people to bring my children into my place of employment because they don't like my job." *Id.*

At bottom, Mr. Johnson's speech was vehemently criticizing governmental conduct and policy—a type of speech that lies "at the core of our First Amendment

values." *Johnson*, 491 U.S. at 411; *see also Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999) ("The strongest protection of the First Amendment's free speech guarantee goes to the right to critic[ize] government or advocate change in governmental policy."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *Bridges v. California*, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."). This Court has cautioned against using the offense of disorderly conduct "as a catchall for every act which annoys or disturbs people." *Hock*, 728 A.2d at 947 (quoting *Greene*, 189 A.2d at 145). Police officers "must expect that, as part of their jobs, they will be exposed to daily contact with distraught individuals in emotionally charged situations." *Id.* Because Mr. Johnson's speech, considered as a whole and in context, in no way appealed to the average person's prurient interest, it does not constitute obscenity for purposes of the disorderly conduct statute, which must be interpreted to comply with constitutional requirements.

CONCLUSION

For these reasons, this Court should reverse the Superior Court's order affirming Mr. Johnson's conviction for disorderly conduct.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pa. R.A.P. 531, as it contains fewer than 7,000 words, exclusive of excluded materials.

Pursuant to Pa. R.A.P 127, I certify the brief complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania – Case Records of the Appellate and Trial Courts requiring the filing of confidential information and documents differently than non-confidential information and documents.

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