[SLIDE 1]
Thank you to Alexis Boggs Potaman and Houston OASIS for inviting me here, virtually, to give you an update on the Supreme Court's 2022 Spring term

[SLIDE 2]
Actually, just like last time, I've lured you here under false pretenses. Here's the actual title of this speech: The Supreme Court Hates You (Yes You!) Personally & What Little You can Do About It

[SLIDE 3]
Houston Freethought OASIS is a 501(c)(3) nonprofit educational organization and nothing in this speech is, or is intended to, advocate on behalf of or in opposition to any political campaign or any candidate for public office. And, of course, nothing in this speech constitutes legal advice or creates an attorney-client relationship. **Don't take legal advice from this speech!**

Oh, and the puppy is there for two reasons. First, a lot of you listen to my show, and that is indeed Lily, the Opening Arguments puppy, and second, times are really bad, so I've included an adorable picture to help ease the pain.

[SLIDE 4]
Part I: I Can't Believe It's Not Milk

[SLIDE 5]
This is the Supreme Court. It looks like the Parthenon, and that's on purpose. If you google it, you will find that the single phrase most often used to describe the Supreme is …

[SLIDE 6]
"that august body." Now "august" means "dignified" and "impressive." Noble. Worthy of respect. But I am here to tell you to today that there was, and is, only ever one reason to respect the Supreme Court.

[SLIDE 7]
This is the Carolene Products Company, today a wholly-owned subdivision of Eagle Family Foods Group, LLC, former manufacturers of "Milnut," a sludge of condensed skim milk thickened with coconut oil. Congress banned it as "an adulterated article of food, injurious to the public health."

[SLIDE 8]
It was basically the "MALK" of the 1920s and 30s. Chemically formulated with Vitamin R! Use it to replace milk in all your recipes if you can't afford milk like… you know, pretty much everyone during the Great Depression. And there's something else you need to know, which is that from

[SLIDE 9]
1897 to 1937 was what we lawyers call the "Lochner Era," it was 40 years of right-wing judicial activism, in which the Supreme Court invented nonsensical constructions of property rights and struck down pretty much every progressive law for 40 years as being unconstitutional. Minimum wage. UNCONSTITUTIONAL. Maximum working hours. UNCONSTITUTIONAL. You couldn't regulate workplace conditions. You couldn't ban CHILD LABOR.

[SLIDE 10]
And let me emphasize some math here. The Lochner Era ran for FORTY YEARS. By contrast, this Supreme Court has only been in full-on howler monkey mode for the past five years, since Mitch McConnell stole Merrick Garland's Supreme Court seat and gave it to Neil Gorsuch in 2017. So if you think, "eh, this is one of those things where the pendulum swings back and forth," or "hey, terrible decisions now will only accelerate the socialist revolution!" or whatever, there's 40 years of abject misery that would like to beg to differ and it happened to us **<u>less than a century ago</u>**.

[SLIDE 11]
So anyway, Carolene Products was indicted for selling this crap in 1936, and they argued that the law was unconstitutional. And you'd think they had to feel pretty good about their chances before the right-wing hackery of the Lochner Court, right? I mean, if you could make kids work 90 hours a week in the uranium mines, what's a little Vitamin R?

[SLIDE 12]
...except that Caroline Products couldn't have known that it wasn't going to have its case decided until 19**38** – that's the year that Franklin Roosevelt threatened to pack the Court if it didn't change its ways, and shockingly, the Court suddenly stopped just making up the constitutional right to work 12-year-olds to death.

[SLIDE 13]
Now, it *probably* helped that Roosevelt had just won the Presidential election by an unprecedented almost 2:1 margin, 523 electoral votes to 8. Put a pin in that. So the really important thing here isn't that the Supreme Court said it was okay to pass laws against selling milky sludge. In fact, if you're feeling as depressed as I am about the recent events, it probably won't surprise to you learn

[SLIDE 14]
that the Carolene Products Company changed the name of their flagship product from MilNUT to MilNOT, got bought out by Borden Milk, bought out again by Eagle Foods, and right this very minute you can whip out your cell phone

[SLIDE 15]
go to www.milnot.com and order up some tasty MILNOT from a participating store near you

[SLIDE 16]
Make sure you get the original, though! It's the only oil-thickened skim milk product with soybeans *and* 100% of the recommended daily allowance of Dipotassium Phosphate.

[SLIDE 17]
Because you see, this was never really about Carolene Products the Product. For all I know, Milnot is delicious and its mutagens give you super-powers. Lawyers don't care about that. What we care about is *why* the Supreme Court decided what it did.

[SLIDE 18]
Actually we don't even care about that. *W*hat we care about is this little footnote right here. Footnote 4, the most famous footnote in history. And remember, this number right here, THIS is the only good reason AT ALL that the Supreme Court ever has, had, or will deserve your, or anyone's support.

So, let's take a look.

[SLIDE 19]
Hey, I said it was *important* – I didn't say it was easy to decipher. But here's what's going on. In the main text, the Supreme Court in 1938 finally realized something that should have been super obvious to it for the past 40 years, which is: you know, the Carolene Products Company, a wholly-owned subsidiary of Eagle Family Foods Group, LLC, *does not need the Constitution's help*. They've got money! They've got influence! Either they can persuade Congress to let them sell Milnut or Milnot or whatever, or maybe Congress will make them go back and change it to take out a couple carcinogens, but this is precisely the kind of thing we should probably leave up to the democratic process. And so for economic regulations, the Supreme Court announced in 1938 a rule that – so far – is still the rule today: if Congress can show a rational basis for the regulation, the corporation has to follow the law. The Supreme Court isn't going to intervene and say the Constitution protects you, the corporation, unless the law is irrational (and that's not often).

But then the Supreme Court also wrote this footnote, and here's what it says. First, it starts off with, "look, we want to be careful here with what we're saying. Congress can't do *anything* on a rational basis – only the stuff that we think you can probably fix with the political process. So if you're talking about – and now we're in the second paragraph – laws that restrict your right to vote, or otherwise interfere with the political process, it would be pretty stupid of us to say "use the political process to fix that," and so we might use "more exacting judicial scrutiny." That makes sense.

And now we get to the third paragraph, and the part I've highlighted. The Supreme Court, in 1938, recognized that sometimes the political process doesn't work well for … well, people who aren't white men and corporations. For "discrete and insular minorities," that tends to "curtail the operation of those political processes ordinarily to be relied on to protect minorities."

Here's what that means. If you're pro-Milnut, you may find yourself in the majority, like now, I guess, or you might find yourself in the minority, like in the 1930s. But there's no sense that you're permanently stuck in one box or the other, you can persuade people to join your cause, and your opponents can do the same thing. So those minorities are *fluid*.

[SLIDE 20]
But when a minority is "discrete" – that is, comprised of members who are easily identifiable – and "insular" – that is, capable of being written off by everyone else who *isn't* a member of the group, we think the democratic process can't always fix things. And THAT is where the Constitution comes in. THIS is the legitimate role of the Supreme Court, to step in on behalf of discrete and insular minorities and say, hey, we're going to protect you from the stuff the majority might want to do to you because you're different.

[SLIDE 21]
And that Supreme Court didn't just make that up in 1938. You will hear how this Court claims to value history and tradition; well, you don't get more historical than the literal founding fathers, who wrote the Federalist Papers, the documents that were the arguments for ratifying the Constitution. You may recall a Mr. James Madison, who went on to become President. And here he is, when asked to describe some of the problems predating the Constitution, he says "complaints are **everywhere heard**" that our laws "are too often decided not according to the rules of justice and the rights of the minority party, but by the superior force of an interested and overbearing majority."

And so the Founding Fathers set aside a special institution to occasionally, every once in a while, take those rules of justice, and enforce the rights of the minority party against even the majority.

[SLIDE 22]
PART 2

[SLIDE 23]
So, I get emails. And when we started the show, I would get a lot of emails from conservatives who wanted to argue that abortion wasn't a Constitutional right. And for some completely inexplicable reason, they all started off with the same terrible argument – and when I say terrible, I mean, laughably bad on the level that other lawyers will point at you and snicker. Not me, though, because I was super nice and patient.

[SLIDE 24]
And that argument was "where does it say abortion in the constitution?" And the response here is really simple: the Constitution doesn't say abortion. It also doesn't say a word about

[SLIDE 25]
Dating

[SLIDE 26]
Marriage

[SLIDE 27]
Condoms

[SLIDE 28]
Clothes

[SLIDE 29]
Hair color,

[SLIDE 30]
Adult toys; or

[SLIDE 31]
Everyone's favorite, butt stuff.

[SLIDE 32]
And I would say, "suppose a state, let's say it rhymes with Shmexas, decides to ban interracial dating, interracial marriage, condoms, adult sex toys, wearing off-the-shoulder dresses, coloring your hair, purchasing vibrators, and, of course, butt stuff – all at once. And by the way, all of these are real things states have either tried or successfully banned. I mean, is that what we mean when we say we live in a free country? Free to… meddle in your most personal decisions?"

[SLIDE 33]
And then I would show them the text of the 5th and 14th Amendments and ask, "what do you think the Founding Fathers meant by "liberty" there?

So usually the first response you get is, well, things like freedom of speech. Things it actually says! Not just stuff you make up!

And then I say, okay, let's think about that for a second. If the government tries to censor you, to take away your freedom of speech, you would sue under the First Amendment, right? That's the one that says "Congress shall make no law abridging the freedom of speech." And they'd say yes. And I'd say, "and you never hear anyone say that you need something *other* than the First Amendment to protect your right to free speech, right?" And they'd admit that, and I'd say, "so that reading would make the fifth amendment completely superfluous, it wouldn't protect *anything*, because anything already spelled out in the constitution as a "right" is by definition protected by *that section of the Constitution*, and it doesn't need to be included in the definition of "liberty."

And you know what? They'd slowly come around. Then I would get the argument of "well, liberty can't just be what liberal judges *think* is a right, that's crazy." And of course, that's been a Scalia talking point for 40 years. And now my trap was sprung.

[SLIDE 34]
That's from the concurrence in *Griswold v. Connecticut*, and those internal citations are, in some cases, almost 100 years old. "Liberty" in the 5th and 14th amendments means the stuff that *isn't* written down, but that doesn't mean it's just up for grabs, up for a judge's personal whims. Rather, the question is: are these rights 'fundamental'? Are they implicit in the concept of ordered liberty? Are they intensely personal and private?

And like I said, for 100 years, that worked pretty well.

[SLIDE 35]
I wish Samuel Alito had emailed my show. Yeah, right there on page ONE of his opinion in *Dobbs* is "Roe is terrible because the Constitution doesn't mention abortion." Literally the dumbest argument anyone makes, and .. our Supreme Court just made it. And you're probably guessing that because that box is at the top of the page, Alito probably goes to this well more than once.

[SLIDE 36]
In major sections of the opinion, Alito's argument is that because the word abortion is not explicitly in the Constitution, it must be viewed with extreme suspicion unless it is "deeply rooted in our Nation's history and traditions."

[SLIDE 37]
And so, we have the legal conclusion of *Dobbs*: Because abortion isn't in the Constitution, we need to look to see if it is "deeply rooted in the Nation's history and traditions." Because abortion was criminalized in 1868 by the vast majority of states, it can't be deeply rooted in our nation's traditions. Therefore, it's not a right.

Each and every thing I previously mentioned as also not being in the Constitution was also the subject of criminal punishment by 1868: contraceptive, interracial dating and marriage, and of course, simply existing as an LGBTQ person. Clarence Thomas says as much in his concurrence – although he leaves out the interracial marriage part, which I'm sure is unrelated to the fact that he is married to a white woman.

I want to make two observations about this new test that the Supreme Court has forged – by deliberately ignoring our nation's *actual* history – in its zeal to overturn the right to an abortion.

[SLIDE 38]
1. By requiring a right to be "deeply rooted in our nation's history and traditions" to count as "implicit in the concept of ordered liberty," it means that by definition ONLY THOSE WHO DO NOT NEED THE CONSTITUTION'S PROTECTION can possibly get it.

You have to prove that the liberty you want protected is a thing that was… already being protected through the ordinary political process. This is of course the exact opposite of footnote 4 of Carolene products, and it's not hard to see why.

[SLIDE 39]
2. Deeply-rooted "traditions" means traditions <u>at the time</u> the 5th and 14th Amendments were ratified (1791 and 1868). This means, in no uncertain terms, that *only* the traditions of white, male, cisgendered, heterosexual, landed property owners count. This means that the traditions of slave *owners* count in defining "liberty" but the traditions of slaves do not.

[SLIDE 40]
So when I said this Supreme Court hates you personally, I was not being facetious or hyperbolic. If you're a white male cis hetero landed property owner – you're okay, unless you're an atheist. Oops. You won't find a lot of well-established atheist traditions in 1868. And if you're everyone else, you never had a chance.

[SLIDE 41]
So now what?

[SLIDE 42]
First, some more lawyer disclaimer stuff. You know, if this was a church, we wouldn't have to do this. But we aren't; and I'm cognizant that this is a speech before a 501(c)(3) organization. The point of this is not to influence legislation, or to promote any political campaign on behalf of or in opposition to any candidate for public office. Instead, I'm going to talk to you about candidates in the past – that's fair game! – and *principles* for the future.

Some of you are not going to like this. I was asked to give this presentation about 40 hours ago – on a Friday night in between two three-hour recording sessions. I said yes so that I could give this part of the speech, because I intend to fight with everything I have to try and take back what we've lost.

And a lot of that is work at the grassroots and local level, building communities, working with organizations that, for example, transport women and pregnant patients across state lines to states that protect the right to abortion. **<u>Listen to OA for more on that</u>**. But Politically, there's one thing you can do.

[SLIDE 43]
And, look, I get that people are hurting and desperate and angry right now, but this is literally the worst possible take. The person who wrote this is someone I consider a friend, he's a fellow podcast host and I eagerly await when his show comes out. This is someone who is *on our side*, but they're so angry they're about to make things much, much worse. SO let's unpack this exchange.

1) Starts with - hey, F you if you're telling me the solution is to vote. **By the way, spoiler alert, the solution is to vote**.
2) But I didn't reply, someone else did, and said, "why? This seems like a weird take"
3) And then the follow-up reply is from a third person – I want to be clear, not the original poster – was "Because we did vote and nothing happened."

And that's right in that we sounded the alarms and shouted from the rooftops and said you need to do everything in your power in 2020 to go vote, to stop a criminally insane game-show host from wrecking democracy. **And NOT nothing happened, by the way, but that's probably not something I can get into given the whole 501c3 thing.**

But nothing happened to prevent the Supreme Court's opinion in *Dobbs*, because those wheels were set in motion in 2017. Voting in 2020 was too late. Mitch McConnell had already stolen one Supreme Court seat, and the president would get to fill two more with judges who explicitly promised to deliver the opinion I just broke down for you. To make *that* not happen, you would have had to have voted in 2016.

And a lot of you did.

[SLIDE 44]
But not quite enough. And some of you did a truly bad thing. And let me be clear, I mean "bad" as in "strategically bad given your likely preferences." Let's lay those out. On a political spectrum in 2016, the two candidates who actually won any electoral votes were Hillary Clinton, and the candidate to her right, Donald Trump.

[SLIDE 45]
There was also a con artist and professional grifter running a vanity campaign who ran to the left of Hillary Clinton, and her name was Jill Stein.

So there you have it, from left to right, Stein, Clinton, and Trump.

And then this thing happens that ALWAYS HAPPENS WHEN YOU HAVE FIRST-PAST-THE-POST VOTING and winner-take-all elections: votes for the third party – actually, a fourth-party – vanity candidate wind up helping the candidate most ideologically opposed.

[SLIDE 46]
In Michigan, Trump defeated Clinton by less than 11,000 votes and more than 50,000 people voted for Jill Stein. In Wisconsin, Trump won by 22,000 votes, and more than 30,000 people voted for Jill Stein. And in Pennsylvania, the crucial, heart of swing states, Trump won by 44 thousand, and 49,000 voted for Jill Stein.

Again, this is math: I'm not telling you what you should have done in 2016. What I'm saying is that IF you were a Jill Stein voter, presumably the last thing you wanted was a president Trump. And yet…

[SLIDE 47]
More math. Had some of those Stein voters cast their ballots for Hillary Clinton instead, that would have swung 46 electoral votes, and Trump would have never been President, and three of the five justices who signed on to the Dobbs opinion I explained today would not have been on the Court. That was your chance to vote and stop it.

[SLIDE 48]
Let me be clear what I'm saying here. I am trying to craft a future strategy based on past history. I am not saying that it's Stein's "fault" that Hillary Clinton lost. (For some reason, this seems to be the first defensive argument that Stein voters give when I tell this anecdote.) Look, I'm not saying Hillary's campaign didn't suck or that her loss can be blamed on anyone but her. But those are the numbers. It's a mathematical fact that if ONLY the Jill Stein voters in Michigan, Wisconsin, and Pennsylvania had voted for Hillary Clinton instead, she would have won outright and we would not be here today.

[SLIDE 49]
I can't explain the Pennsylvania voters. But I actually have some insight into the other two states. They were looking at this electoral history. Seven wins in row for Democrats, that's 28 years of unbroken success in Wisconsin. Wisconsin voted for Michael Dukakis, and he was a big suck loser. Democrats can't lose Wisconsin.

And Michigan! Six years in a row, 24 years running, ok, even they didn't buy Dukakis, but they've voted for everyone else. Al Gore. John Kerry. Democrats can't lose Michigan.

And so the thought process was: Hillary Clinton is going to win my state, it's not a swing state, and so I'm going to use my vote as a protest vote to send a message that you should nominate a more liberal candidate next time.

[SLIDE 50]
So, two things. First, historically, people are not good at predicting swing states. A state is totally safe until it isn't.

But second, never in the history of modern elections have political parties gone back, looked at their margins of victory and defeat with respect to third-party candidates and swung left because of it. In fact, the opposite happens.

[SLIDE 51]
When you think about 2000, you probably think about Florida. I can't blame you. But when I think about it, I think about New Hampshire. Al Gore – who ran probably the most progressive political campaign in modern American history – narrowly lost New Hampshire by 7,000 votes. 22,198 people voted for Ralph Nader. So yeah, if just a third of Ralph Nader voters in New Hampshire had voted for Gore instead, the shenanigans and recounts and hanging chads in Florida wouldn't have mattered at all. Bush would have had 268 electoral votes and Al Gore, 270. Bush is the guy who nominated Alito to the court, by the way.

Now think about each of these elections in 2000 and 2016. Did withholding votes from the Democratic candidate "send a message?" NO! In both subsequent elections, the Democratic Party said "holy crap, we can't lose this race again" and, with the active machinations of the DNC, put their thumb on the scale for the MOST conservative Democratic candidate in the field. In 2004, that was John Kerry instead of Howard Dean. In 2020, that was Joe Biden instead of Bernie Sanders or Liz Warren.

[SLIDE 52]
And that gets us to here. YOUR VOTE IS NOT A MESSAGE. Your vote is the right to choose, frequently between the lesser of two evils. And if you don't like that, start working at the grassroots level to get rid of first-past-the-post voting, for instant runoffs. But until those rules change, don't act as though those changes are already in place.

I want to leave you with a stern warning. Right now, a lot of us are watching the January 6th hearings. A lot of us have pointed and laughed at grifters and frauds and liars and incompetent dolts like Sidney Powell who kept claiming even after Joe Biden was inaugurated that they were going to throw out the whole election and re-vote and get Trump back into office. Surely none of us could be that stupid, right?

[SLIDE 53]
Yeah, that's a Daily Kos article from February 2017, three weeks AFTER Trump had been inaugurated, breathlessly reporting on a "potentially landmark" writ of mandamus that would nullify the 2016 election. It sits on the SCOTUS docket!

[SLIDE 54]
It was the work of these grifters and liars, ReVote 2017 – thank god their site is finally down. For the low low sum of $25, they would have sent you a printed copy of their completely bonkers petition which, I don't have to tell you, did not nullify the 2016 election. It was "assigned a number of the Supreme Court docket" because anything a crazy person files with the Supreme Court gets automatically assigned a number on the docket until it gets dismissed. Which of course this did.

[SLIDE 55]
So yeah, our side is guilty of wishful thinking and motivated reasoning too.

[SLIDE 56]
Here are my takeaways

1. **The Supreme Court has abandoned its most important historical justification: to protect discrete and insular minorities from majority legislation.**

[SLIDE 57]

2. **The Supreme Court explicitly hates *you* in particular. They replaced this century-old test with a new one they just made up that explicitly cares *only* about the historical views of white, male, cisgendered, heterosexual, landed property owners.**

[SLIDE 58]

3. **The last time they did this, the Supreme Court kept at it for FORTY YEARS until we mustered overwhelming electoral force. We're in year five. This is gonna be a long fight. The right spent 50 years to get to this point, we're not going to undo it by the midterms.**

[SLIDE 59]

4. **That fight will be longer if you give up, drop out, or vote third party.**

Thank you, I'm now happy to take your questions.