No. 23-1122

IN THE

Supreme Court of the United States

FREE SPEECH COALITION INC., ET AL.,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICAN PRINCIPLES PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS[1]

American Principles Project (APP) is a national non-profit organization engaging in research, public education, and advocacy on behalf of the institution of the family. It evaluates public policy, legislation, culture, and social and political trends as those factors affect parents, children, communities, and the health, welfare, and liberties of the American citizenry. It also files legal briefs as amicus in cases that implicate those issues. APP has advocated for measures protecting children from exposure to harmful content online and testified before state legislatures in that regard. It regularly addresses in publications and advocacy the actual risks that obscenity to minors poses to America's youth, issues that strike at the heart of this case.

SUMMARY OF ARGUMENT

Obscenity as to minors is the sole target of H.B. 1181's online regulations. The regulations merely require certain websites disseminating such content to limit minors' access, by choosing from a menu of reasonable age verification methods. Both obscenity as to minors addressed in *Ginsberg v. New York,* 390 U.S. 629 (1968), and obscenity generally under *Miller v. California*, 413 U.S. 15 (1973), have no First Amendment protection. Rational basis, not strict scrutiny, should prevail as the standard to review and uphold H.B. 1181.

The need for H.B. 1181 is critical. Since the Court decided *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656

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[1] Rule 37 Statement: No part of this brief was authored by any party's counsel, and no person or entity other than amicus and its counsel funded its preparation or submission.

(2004), online pornography accessible by juveniles is now populated with sexual violence and degradation, even targeting the interests of minors with "hentai" cartoons that include incest and rape.

Juveniles' constant use of smartphones and other digital devices renders a *captive audience* today, akin to householders who received unsolicited pornography mailings in *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728 (1970), which decision upheld distribution restrictions.

The reasons for applying rational basis here are numerous.

First, *Ginsberg* applied rational basis in upholding the New York law outlawing the distribution to juveniles of material obscene as to minors. Significantly, the New York law contained a *de facto* age verification provision.

Second, *Miller* affirmed *Ginsberg's* legal template by expanding upon it without criticizing its basic reasoning or its rational basis review.

Third, the Court in *Reno v. ACLU,* 521 U.S. 844 (1997), analyzed four *Ginsberg* factors that distinguished the flawed Communications Decency Act (CDA) from the New York law previously upheld, all without limiting *Ginsberg's* reach.

Fourth, of the four *Ginsberg* factors that *Reno* read as vindicating the New York law, H.B. 1181 contains three of them, and the fourth is not challenged by Petitioner.

Fifth, the impact on pornographers under H.B. 1181 is on distribution, not content, and less than the expressive limitations directly placed on adult performers and upheld in *Paris Adult Theatre I v. Slaton,*

413 U.S. 49 (1973). Financial, expressive, or technological "burdens" on pornography websites under H.B. 1181 are *de minimis*.

Ginsberg, *Miller*, and *Slaton* are still good law. What needs revision are the technological and societal assumptions made in *Ashcroft II*. Software filters there were favored over age verification, yet studies now establish that age verification is more effective than filters. Age verification has been refined with improved effectiveness, possessing the flexibility to avoid the exaggerated risks of data security and privacy raised by Petitioner Free Speech Coalition, Inc. ("FSC"). The risks are no greater than in the usual digital transactions of the porn industry.

Meanwhile, in the decades since *Ashcroft II*, a cascade of toxic online pornographic content is not just accessible to minors, but is catered to them, producing harms that include sexual exploitation.

Even if any close question remains, rather than the Court engaging in a technological sifting and weighing, Federalism counsels that the Court defer to State laboratories of democracy, such as the Texas legislature.

Should a heightened form of scrutiny apply however, FSC has conceded a compelling, and therefore a substantial, State interest. Regarding any question of lesser restrictive means to advance that interest, any burden on pornography panderers, as in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), is still *minor*, if not *de minimi*s under *New York v. Ferber*, 458 U.S. 747, 762 (1982). That, coupled with the efficacy of age verification, satisfies heightened scrutiny.

ARGUMENT

I. Rational Basis Review Applies to H.B. 1181.

A. An Overview.

From its ratification to the present, the First Amendment has consistently excluded a few specific categories of expression, "including obscenity." *United States v. Stevens*, 559 U.S. 468, 471 (2010) (citing *Roth v. United States*, 354 U.S. 476, 483 (1957)). Obscenity is "fully outside the protection of the First Amendment," *Stevens*, 559 U.S. at 471, including obscenity as to minors. Protecting obscenity as to minors undermines State authority to protect children from harm.

The harms have increased: "child sexual abuse material on online platforms grew from 32 million in 2022 to a record high of more than 36 million in 2023." Will Oremus & Cristiano Lima-Strong, *Child Sex Images are Booming Online: Congress Wants to Know Why,* WASH. POST (Jan. 28, 2024), https://www.washingtonpost.com/technology/2024/01/28/csam-ncmec-senate-hearing-child-porn/. "[R]ecent findings suggest a link between early [age] consumption of pornography and increased engagement in online sexual behaviors, such as sexting, that can lead to further online sexual victimization, such as sextortion or online grooming." Aina M. Gassó & Anna Bruch-Granados, *Psychological and Forensic Challenges Regarding Youth Consumption of Pornography: A Narrative Review*, 2021 ADOLESCENTS 108 (Apr. 7, 2021) (abstract), https://doi.org/10.3390/adolescents1020009.

Stopping pornographers from reaching juveniles directly via end-run around parents agrees with Founding principles. "[T]he practices and beliefs held by the Founders reveal another category of excluded speech: speech to minor children bypassing their parents," *Brown v. Ent. Merchs. Ass'n*, 564 U. S. 786, 822 (2011) (Thomas, J., dissenting) (citation omitted).

Texas law H.B. 1181 satisfies rational basis review by protecting juveniles from obscenity as to minors, through a menu of age verification choices. The "mere fact that" adult sexual expression "may be incidentally affected does not bar the State from acting." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973).

Ginsberg v. New York, 390 U.S. 629 (1968), upheld New York's law banning distribution of "obscenity 'harmful to minors,'" *id*. at 641, rejecting the need for "scientifically certain criteria of legislation." *Id.* at 642-43 (citation omitted). But FSC recasts *Ginsberg* as only a free-speech-rights-of-minors case, Brief of Petitioner FSC ("Br.") at 30-31, as did the Government, Brief of United States as Amicus Curiae Supporting Vacatur, ("Gov. Br.") at 20. If *Ginsberg* were so limited, *Reno* would not have applied the *Ginsberg* template to adult free speech rights. Contrary to FSC's assertion at Br. 20, the law challenged in *Ginsberg* contained an implicit age verification factor. And H.B. 1181 defines its terms even more clearly, adapting to minors each of the obscenity elements stated in *Miller v. California*, 413 U.S. 15 (1973), then narrowing coverage by prohibiting specific depictions within that *Miller* template.

Sufficient support exists for the efficacy of age verification and for the failure of software filters. Yet, even if a close question remained regarding filters versus age verification, the scale tips favorably to

the State, because pornographers target juveniles with content that is, as to them, constitutionally unprotected.

FSC lauds pornography's value in "art, literature and science." Br. 18. Yet this case truly implicates the "sordid business of pandering" pornography, *e.g., Ginzburg v. U.S.*, 383 U.S. 463, 467 (1966) (mailing from cities with names prone to sexual innuendo). *See also* Jess Weatherbed, *Mattel accidently linked a pornsite on Wicked doll packaging*, THE VERGE.COM (Nov. 11, 2024) (eroticizing the word "Wicked," to commercial confusion), https://www.theverge.com/2024/11/11/24293395/mattel-wicked-doll-porn-website-url-misprint-error.

Despite FSC's near-fictional account of erotic content supposedly relished by Early America, Br. 18, the facts are contrary. Reference to Jefferson's expansive library at Monticello is unavailing and cites no sexually scandalous title in that collection. Br. 18. The reference to the Library of Congress covers, *inter alia*, the literary "Romance" category. 4 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 433-36, 447, 456, 553-54 (E. Millicent Sowerby ed., 1955). But Jefferson denounced the pulp fiction of his day in a letter of 1818, tagging sensationalist works as a "poison that infects the mind … and revolts against wholesome reading." 4 JEFFERSON CATALOGUE 433, 2007jeffcat4.pdf (loc.gov).

Reference to Benjamin Franklin is dubious. Br. 18. Franklin publicly admired essayist Joseph Addison, whom FSC would likely consider an intolerable prude. Addison regularly wrote for *Spectator*, a publication dedicated to the notion "that virtue was never found in … brothels." WELL ACQUAINTED WITH BOOKS – THE FOUNDING FRAMERS OF 1787 16 (Robert A. Rutland ed.,

1987). James Madison considered Addison's *Spectator* contributions "peculiarly adapted to inculcate in youthful mind just sentiments … and a taste for improvement of the mind and manners." *Id*. This was hardly the stuff of pornography.

FSC's assertion, Br. 19, that early laws outlawing porn and resulting prosecutions were either sparse or nonexistent, also errs. Professor Stone reports pornography prosecutions after the Constitution's ratification: in the "first obscenity prosecution in 1815," the Pennsylvania Supreme Court upheld an obscenity conviction for public display of sexual imagery, ruling that "such 'lascivious' images could corrupt the morals of young people." Geoffrey R. Stone, *Sex and the First Amendment: the Long and Winding History of Obscenity Law*, FIRST AMEND. L. REV. 135 n.10-11 (2019), citing *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 92, 94, 102, 1815 WL 1297 (Pa. Dec. 1815). *Compare* Br. 19 (citing Prof. Stone).

B. An Absence of Real Burdens.

The "burdens" that FSC asserts are *de minimis,* at most. Technology does not pose a problem for FSC's pornographers; they have become experts in digital exploitation. They created a culture where "people now surf for porn from the comfort of their basements thanks to technologies that the [porn] industry helped popularize. The internet gave people a way to privatize their unmentionable habits, and this dynamic pushed porn firms to become early adopters of many tech features." Ross Benes, *Porn could have a bigger economic influence on the US than Netflix*, QUARTZ (June 20, 2018), https://search.app/s3uAgJ6pHwQLZCrx9.

The complaint of security risks and hacking threats, Br. 25-26, is a false alarm. Pornographers have long adopted the use of "digital credit-card transactions, instant messaging, and video streaming. Current emerging technologies like VR are getting boosts from porn too." Ross Benes, *supra*. FSC fails to show why the options in H.B. 1181 are any riskier than the common digital transactions already used by pornographers.

Age verification does not necessarily implicate "private and sensitive information," J. App. 208, ¶ 80 (expert Tony Allen), and does not pose cost or technical impediments.

Internet porn revenue in 2018 was a $6 billion to $15 billion business. J. App. 208, ¶ 80. Today, the online pornography industry funds its own six-figure political advocacy campaign in the 2024 presidential election. *See* S.A. McCarthy, *Porn Industry Runs Ads for Harris in Wake of VP's Appearance on Sex Podcast,* WASH. STAND (Oct. 2024), https://washingtonstand.com/news/porn-industry-runs-ads-for-harris-in-wake-of-vps-appearance-on-sex-podcast. Further, "From the perspective of pornography website operators and others affected by age-verification legislation, it is not cost-prohibitive or overly difficult for pornography companies to add age verification to their websites." Christine Marsden, Comment, *Age-Verification Laws in the Era of Digital Privacy*, NAT'L SEC. L.J. 230-31 n.145. https://www.nslj.org/wp-content/uploads/Marsden-10.2-v272.pdf.

Beyond the scholarly evidence supporting H.B. 1181, there are fundamental constitutional values at play, derived from established "social standards of decency," *Moore v. Texas*, 581 U.S. 1, 28-29, (2017) (Roberts, C.J., dissenting) (discussing death penalty).

The constitutional principles transcend mere technological best practices, particularly where the point is to provide a "moral backstop." *Id*. at 29. At principle here is the State's authority to protect minors from obscenity.

In the case of obscenity to minors, "the evil to be restricted so overwhelmingly outweighs the expressive interests if any, at stake," that a "case-by-case adjudication" is not necessary. *Stevens,* 559 U.S. at 470 (quoting *New York v. Ferber*, 458 U.S. 747, 763-64 (1982)).

C. Rational Basis, Obscenity, and the Court's Precedents.

H.B. 1181 complies with the elements of *Miller v. California*, a legal template that is still controlling precedent, including the element of obscenity *as to minors*.

1. *Miller v. California* Remains Good Law.

The obscenity test in *Miller v. California* is alive and well. *See Fulton v. City of Phila*., 593 U.S. 522, 565 n.28 (2021), (Alito, J., concurring) (citing *Miller* for the obscenity exception to free speech); s*ee also Barr v. Am. Ass'n of Political Consultants, Inc*., 591 U.S. 610, 644 (2020) (Breyer, J., dissenting) (citing *Miller's* obscenity exception); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citing *Miller* as a traditional, historic content-based exception to free speech).

2. *Ginsberg v. New York* Established Rational Basis Review for Obscenity as to Minors.

In *Ginsberg,* 390 U.S. 629, the Court applied the rational basis test to State obscenity law. Later, the

Miller Court applied *Ginsberg* to the concept of obscenity as to minors.

FSC's attempt to distinguish *Ginsberg* incorrectly asserts, "The law at issue in *Ginsberg* did not … require sellers to conduct *age verification* of adult customers." Br. 20 (emphasis added). The New York criminal statute provided a *de-facto age verification* obligation whereby magazine dealers avoided prosecution. The law made it illegal "to *knowingly* … sell to a minor" such material, *Ginsberg*, 390 U.S. at 633 (emphasis added), and provided an affirmative defense for a seller who demanded *age verification* by "draft card, driver's license, birth certificate" or other "official" document, and thus exculpated magazine dealers if they "had reasonable cause to believe" the customer was the legal age, in conjunction with demanding "official" proof of age. *Id*. at 631 n.1.[2]

3. *Paris Adult Theatre I v. Slaton*: Rational Basis Test Applies.

In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court applied rational basis review to uphold a state law forbidding theaters from exhibiting sexually indecent films to adults. The Court found no need "to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges" constitutional rights. *Id.* at 60; *see also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 580 (1991) (Scalia, J., concurring) (citing *Slaton's* rational basis test).

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[2] While *Ginsberg* stated "no view whatsoever upon the constitutional validity of [the knowledge] presumption" in the statute, the Court voiced no similar caveat about the statute's affirmative defense in age-verification. 390 U.S. at 631 & n.1.

D. The Obscene-for-Minors Test is Valid.

Miller also implicitly approved the application of its obscenity rules as to juveniles in light of *Ginsberg*. "(W)e have indicated . . . that because of its strong and abiding interest in youth, a *State may regulate the dissemination to juveniles* of, and their access to, *material objectionable as to them*, but which a State clearly could not regulate as to adults." *Miller*, 413 U.S. at 36 n.17 (emphasis added)(citing *Ginsberg v. New York*).

Bewilderingly, the District Court here rejected the entire obscene-to-minors concept. Pet. App. 109a n.3. That collides with *Reno*, where the Court affirmed that concept by faulting the text of the CDA (aimed at protecting minors) for its failure to include the *Miller* element "for minors." *Reno,* 521 U.S. at 865 (requiring that banned material must be "utterly without redeeming social importance *for minors*") (emphasis added).

Defining obscenity in context of minors is an established doctrine. In her concurrence in *Reno*, Justice O'Connor makes that clear:

> In *Ginsberg,* the New York law we sustained prohibited the sale to minors of magazines that were "harmful to minors." Under that law, a magazine was "harmful to minors" only if it was obscene as to minors. 390 U.S., at 632-633 … New York *was constitutionally free to adjust the definition of obscenity for minors*, 390 U.S. at 638 … *Cf. Erznoznik* v. *Jacksonville,* 422 U.S. 205, 213 (1975) (striking down city ordinance that banned nudity that was not "*obscene even as to minors*").

521 U.S. at 895 (O'Connor, J., concurring in part, dissenting in part) (cleaned up) (emphasis added).

E. H.B. 1181 Imported all the *Miller* Elements as to Minors.

H.B. 1181 uses all *Miller* elements *explicitly as to minors in each context*, including that "redeeming social value" element. *See* Pet. App. 170a, ¶6(C).

The Texas law applies *Miller* by its "community standards" and "appeal" to "prurient interests" elements, Pet. App. 170a, ¶ 6(A), and the element that content must be "patently offensive," Pet. App. 170a, ¶ 6(B), and the requirement that such content "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors," Pet. App. 170a, ¶ 6 (C).

In addition, H.B. 1181 focuses more narrowly than *Miller*. It defines "patently offensive" as "actual, simulated, or animated displays or depictions of" specific sexual images and sexual conduct, and then expressly describes them in the statute. Pet. App. 170a, ¶ (B).

F. The *Reno/Ginsberg* Test Validate H.B. 1181.

Reno's outdated reasoning about the internet and technology, among other problems, prevents it from being an accurate *factual* litmus test for the tech implications of age verification options under H.B. 1181.[3]

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[3] When *Reno* was decided, "Facebook and the world of online apps … did not even exist then. Mark Zuckerberg was only 13 years old when the court decision was released, and other app content pioneers such as Snapchat's Evan Spiegel were still in elementary school." Stuart N. Brotman, *Twenty years after Reno*

On the other hand, *Reno's* constitutional analysis of the *Ginsberg* decision as applied, strongly supports H.B. 1181. The District Court erroneously avoided that outcome by creating its own rules, including its illogical "awkwardness" factor and even more surprisingly, by ignoring the Court's precedents and then nullifying the entire *Miller* concept of obscenity as applied to minors.

1. H.B. 1181 Meets the *Ginsberg*/*Reno* Test on Parental Discretion.

Reno concluded that the federal CDA failed in four different ways to emulate the State law upheld in *Ginsberg*. *See Reno,* 521 U.S. at 865. By contrast, H.B. 1181 satisfies the four tests.

The *Reno* Court began that four-part analysis with the issue of parental discretion.

> First, we noted in *Ginsberg* that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."

521 U.S. at 865. The District Court recognized, Pet. App. 133a n.14, that H.B. 1181 (like the New York law upheld in *Ginsberg*) does not bar parents from allowing child access to adult content. That should have satisfied the first *Reno* test.

But the District Court then applied its own additional "awkwardness" rule, without citation to any law or record evidence, to rule that H.B. 1181

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v. ACLU, the long arc of internet history returns, BROOKINGS INSTITUTION (June 26, 2017), https://search.app/kVM411HM56S7iN7S9. *Reno*'s pronouncement that the internet is not as "invasive as radio or television," 521 U.S. at 869, is overcome by events.

made parental consent impractical, even though not barred: "*Parents may* only *allow access* through age verification by providing their ID or credentials to a minor. This is unlikely in light of the obvious *awkwardness* of a teenager asking their parents' permission *each time* they wish to view sexual content." Pet. App. 133a (emphasis added).

This "awkwardness" approach ignores the clear language of *Reno*/*Ginsberg* that addressed, not intra-family dynamics, but whether a law will "bar parents," *Reno*, 521 U.S. at 865, from giving their minors access.

The District Court erred both pragmatically and legally. An ID or password need only be shared by a parent with the minor *once* to permit ongoing access, not "each time" as the District Court states. Also, if an adult parent believes in a no-holds-barred access to adult sexual content for their child, awkwardness will not be a problem. On the other hand, if it is only the underage young person but not the parent who wants adult access, then the parent will prevail, and rightly so.

Legally, H.B. 1181 operates as did the law in *Ginsberg,* which, as the Court in *Reno* recognized, "*does not bar* parents who so desire from [granting adult access to] their children." *Reno*, 521 U.S. at 865 (emphasis added).

2. H.B. 1181 Meets the *Ginsberg*/*Reno* Test on Commercial Coverage.

Reno next distinguished the federal CDA from the state law in *Ginsberg*, stating, "Second, the New York statute applied only to commercial transactions." *Reno*, 521 U.S. at 865. This second factor is not disputed. FSC agrees that "1181 [like the *Ginsberg*

law] imposes requirements on *commercial* websites." Br. 1, 6 (emphasis added).

3. H.B. 1181 Meets the *Ginsberg*/*Reno* Test on Redeeming Social Value.

The third *Ginsberg* distinguishing factor according to the Court in *Reno* was that the New York statute, unlike the CDA, "cabined its definition of material that is harmful to minors with the requirement that it be 'utterly without redeeming social importance for minors,'" *i.e.*, one of the elements of the *Miller* test as applied to minors. 521 U.S. at 865.

H.B. 1181, unlike the CDA rejected in *Reno* but like the law upheld in *Ginsberg*, has adopted the *Miller* test as applied to minors (including the "redeeming social" value test). As the majority opinion in the Fifth Circuit noted:

> The newly enacted statute defines sexual material harmful to minors by *adding "with respect to minors" or "for minors,"* where relevant, *to the well-established Miller test for obscenity*. *See Miller v. California*, 413 U.S. 15, 24 (1973).3 It also mimics the language of 47 U.S.C. § 231, which the Supreme Court reviewed in *Ashcroft II*." (footnote omitted) (emphasis added).

Pet. App. 4a.

Yet strikingly, the District Court ruled that H.B. 1181 failed to meet the *Miller* test, not by any failure to include all the *Miller* elements, but because the Texas law had adapted the *Miller* elements to minors: "In particular, *Miller* requires that patently offensive material be so defined by the applicable state statute. *Id*. That cannot be the case here for H.B. 1181, which

defines material only with reference to whether it is obscene for minors." Pet. App. 109a n.3.

But H.B. 1181's *Miller*-adapted "obscene for minors" approach is the same statutory paradigm upheld in *Ginsberg*, a statute that prohibited

> "knowingly to sell . . . to a minor" under 17 of "(a) any picture . . . which depicts nudity . . . and *which is harmful to minors*," and "(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is *harmful to minors*."

Ginsberg, 390 U.S. at 633 (emphasis added). As the Court ruled, the New York law "simply *adjust[ed] the definition of obscenity* 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . ." of such minors." *Id.* at 638 (emphasis added).

4. The Parties Do Not Contest the *Ginsberg*/*Reno* Test on Age.

Lastly, *Reno* determined that, "Fourth, the New York statute [in *Ginsberg*] defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority." *Reno*, 521 U.S. at 865.

Here however, the propriety of the age established in H.B. 1181 is not challenged. FSC expressly recognizes that 18 years-or-older is the break-point in the Texas law for unfettered adult access to adult content. Br. 7. Yet, FSC makes no argument in its merits brief that such a one-year difference between ages 17 (in *Ginsberg*) and age 18 (in H.B. 1181) regarding access to adult content, is relevant or significant.

H.B.1811's use of age 18 hews to the national standard recognized by the federal government in pornography-related matters impacting minors. *See* U.S. DEPARTMENT OF JUSTICE, BEYOND THE PORNOGRAPHY COMMISSION: THE FEDERAL RESPONSE (1988) 21, ¶ 38 ("existing law … uses age eighteen as its basis" in prohibiting the use of minors in pornographic performances or activities), https://search.app/x1nwtRtsEWH9a2EE8. *See also* U.S. DEPARTMENT OF JUSTICE, CITIZEN'S GUIDE TO U.S. FEDERAL LAW ON CHILD PORNOGRAPHY para. 2 (2023) ("any depiction of a minor under 18 years of age engaging in sexually explicit conduct is illegal"), https://www.justice.gov/criminal/criminal-ceos/citizens-guide-us-federal-law-child-pornography.

G. *Ashcroft II* Reexamined: A Grim Legacy of Harms.

FSC cites and relies extensively upon the Court's decision in *Ashcroft II*. Br. 1-3, 5-6, 9, 10, 12-16, 23-25, 27-29, 31-33, 37, 39-42, 44. In *Ashcroft II*, the Court considered a preliminary injunction entered against the Child Online Protection Act (COPA). The First Amendment analysis dealt only with the likelihood of a violation of free speech in COPA, a criminal statute.

COPA significantly differed from H.B. 1181 because COPA authorized criminal prosecution, a factor totally absent from H.B. 1181, but one that figured prominently in the Court's resolution of *Ashcroft II*.

The *Ashcroft II* majority warned at the outset, "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force." *Ashcroft II*, 542 U.S. at 660. The majority rejected age verification and favored filtering software, expressly reasoning that "*Above all*," the

"use of filters does not condemn as criminal any category of speech," thus "eliminat[ing]" or "at least much diminish[ing"] "the potential chilling effect." *Id*. at 667 (emphasis added). Two other Justices specifically mentioned that criminal law factor several times and commented that "COPA's criminal penalties are, moreover, strong medicine for the ill that the statute seeks to remedy." 542 U.S. at 675 (Stevens, J., concurring).

But H.B. 1181 does not include criminal penalties, as the Fifth Circuit recognized. "[HB1181's] penalties are strictly civil. This law does not criminalize the publication or distribution of obscenity." Pet. App. 6a n.7.

Grim facts also warrant a total reexamination of *Ashcroft II*, namely, the damaging price that families and juveniles have paid from the empowerment of the porn industry to reach minors.

Since the *Ashcroft II* decision, an increasing number of juveniles have accessed pornography online. Five years after *Ashcroft II*, one health study reported that among adolescents surveyed (96% with internet access), 55.4% reported visiting a sexually explicit website (SEW), that report concluding that "Internet pornography is readily accessible and available to adolescents," producing corresponding harms: "adolescents exposed to SEWs were more likely to have multiple lifetime sexual partners … to have had more than one sexual partner in the last 3 months… to have used alcohol or other substances at last sexual encounter … [and] Adolescents who visit SEWs display higher sexual permissiveness." *See* Debra K. Braun-Courville & Mary Rojas, *Exposure to Sexually Explicit Web Sites and Adolescent Sexual Attitudes*

and Behaviors, 45 J. ADOLESCENT HEALTH 156 (Aug. 2009).

Pornographic content accessible by teens and children has become increasingly violent and degrading. It is saturated by:

- images of sexual "gagging, slapping, hair pulling, and choking." J. App. 158, ¶ 9 (Dr. Gail Dines);
- simulated, explicit depictions of rape. J. App.158-59, ¶11;
- in sites like Pornhub, "hentai" content, a shocking, sexually aggressive form of animation, in hundreds of thousands of animated videos to millions of viewers. J. App. 159, ¶¶ 12-13;
- hentai cartoons involving a "grotesque creature penetrating a girl with an enormous phallus or tentacle," engaged in "brutal, often monstrous sex," where the female appears child-like except for exaggerated sexual anatomy. J. App. 159, ¶¶ 12-13. Hentai also includes images of child incest. J. App. 160, ¶ 15.

Worse, Pornhub "features cartoons, animation, and costumed skits drawn from a wide range of children's entertainment and games," J. App.160, ¶ 15 (citing British study); thus, these pornographers are directly *pandering* to minors.

Judicial rejection of age verification systems, and the evisceration of "effectiveness" theory of filters by more contemporary studies, result in a national failure to protect minors from harmful content.

The ubiquitous teen use of digital devices multiplies this troubling trend. A recent study reported by Pew Research found

> that the vast majority of teens have access to digital devices, such as smartphones (95%), desktop or laptop computers (90%) and gaming consoles (80%) [accompanied by] an uptick in daily teen internet users, from 92% in 2014-15 to 97% today. In addition, the share of teens who say they are online almost constantly has roughly doubled since 2014-15 (46% now and 24% then).

Emily A. Vogels, *et al.*, PEW RSCH. CTR., TEENS, SOCIAL MEDIA AND TECHNOLOGY 2022 (Aug. 10, 2022), https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/.

The avalanche of juvenile harm from digital obscene-to-minors content derives from easy access: "some three-quarters of teens (73 percent) have viewed porn, either intentionally or accidentally. Nearly half (44 percent) indicated they had done so intentionally, including 52 percent of boys … [and] 36 percent of girls." Jon Schweppe, *"Porn," in* PRO-CHILD POLITICS 86-89 *(*Katy Faust ed., 2024).[4]

Celebrity stories of the ensuing harm include Grammy Award-winning singer Billie Eilish, sharing the direct link from exposure to porn at "an early age" to resulting abusive behaviors. *Id*.[5] One study shows

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[4] Citing Michael B. Robb & Supreet Mann, *New Report Reveals Truths About How Teens Engage With Pornography,* COMMON SENSE MEDIA (2023), http://www.commonsensemedia.org/press-releases/new-report-reveals-truths-about-how-teens-engage-with-pornography.

[5] Citing *Billie Eilish Says Watching Porn as a Child 'Destroyed My Brain*,' GUARDIAN (Dec. 14, 2021), http://www.theguardian.com/music/2021/dec/15/billie-eilish-says-watching-porn-gave-her-nightmares-and-destroyed-my-brain.

that online exposure between ages ten and fifteen causes a more than six-times higher chance of later reporting involvement in "sexually aggressive behavior." *Id*.[6] Another study shows that exposure to porn among fifteen- and sixteen-year-olds is tied to a 42% greater risk of acting-out in real life what they have viewed online. *Id*.[7]

H.B. 1181 can correct this human toll, starting with a fresh view of the current technology landscape that clashes with the assumptions of *Ashcroft II*.

1. Technology, Then and Now.

In the twenty years since *Ashcroft II*, both technology itself and the technological assumptions relied upon in that case have evolved.

The Court's past endorsement of use of filters and rejection of age verification are long due for reexamination and revision. The potential flaws with filters, only mentioned in passing in the *Ashcroft II* opinion, are now an established fact. Meanwhile, the age verification systems in H.B. 1181 have been shown to be reliable and reasonable.

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[6] Citing Michele L. Ybarra, *et al., X- Rated Material and Perpetration of Sexually Aggressive Behavior Among Children and Adolescents: Is There a Link?,* 37 AGGRESSIVE BEHAVIOR 1 (Jan.-Feb. 2011), abstracted at https://pubmed.ncbi.nlm.nih.gov/21046607/.)

[7] Citing ELENA MARTELLOZZO, *ET. AL., N*AT'L SOC'Y FOR PREVENTION CRUELTY TO CHILD., "…I WASN'T SURE IT WAS NORMAL TO WATCH IT…" (May 2017), https://learning.nspcc.org.uk/media/1187/mdx-nspcc-occ-pornography-report.pdf.

2. Faulty Effectiveness Assumptions on Filters.

The record shows that filters alone are an "ineffective mechanism," J. App. 207, ¶ 76 (expert Tony Allen), and can be "easily circumvented," J. App. 206-207, ¶ 74.

Yet the *Ashcroft II* majority accepted the assumption that "Filters also may well be *more effective* than [the age verification process in] COPA." 542 U.S. at 667 (emphasis added). *See also id*. at 668 ("filtering software may well be *more effective* than COPA.") (emphasis added).

Ashcroft II cited a commission on online pornography which found:

> That filtering software may well be more effective than COPA is confirmed by the findings of the Commission on Child Online Protection … [which] found that filters are more effective than age-verification requirements. *See* Commission on Child Online Protection (COPA), Report to Congress, at 19–21, 23–25, 27 (Oct. 20, 2000) (assigning a score for "Effectiveness" of 7.4 for server-based filters and 6.5 for client-based filters, as compared to 5.9 for independent adult-ID verification, and 5.5 for credit card verification).

542 U.S. at 668. A closer look at those Commission findings shows less than a 1-point difference between the stated effectiveness "score" of 6.5 for "client-based filters" (*i.e.,* used by the average home), compared to "adult" ID verification (at 5.9) and a 1-point difference for credit card verification (scored at 5.5). It strains logic that this tiny differential gauged by a commission

twenty years ago should bar the judgment of a State legislature today.

Ashcroft II made only a passing mention of those "inevitable errors" of content filters, concluding: "Although filtering software is not a perfect solution because it may block some materials not harmful to minors and fail to catch some that are, the Government has not satisfied its burden to introduce specific evidence proving that filters are less effective." *Ashcroft II,* 542 U.S. at 657-58.

Problematically, in the year before *Ashcroft II* the Court expressly recognized the substantial problem with software filters "erroneously block[ing]" perfectly suitable and "completely innocuous" content that "no rational person" would call pornography. *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 208-09 (2003); *id*. at 222 (filters would "provide parents with a false sense of security").

Second, this downside of filters was well known to the U.S. Government prior to the 2004 *Ashcroft* opinion. *See* NAT'L TELECOMMS. INFO. ADMIN., U.S. DEP'T COM., REPORT TO CONGRESS - CHILDREN'S INTERNET PROTECTION ACT PUB. L. 106-554 - STUDY OF TECHNOLOGY PROTECTION MEASURES IN SECTION 1703 13 & n.43 (Aug. 2003), https://www.ntia.gov/sites/default/files/publications/cipareport08142003_0.pdf ("Where filtering fell short of being effective, the situation usually involved either overblocking or underblocking of material.").

Third, the passage of time is critical in evaluating technological efficacy. By 2017 and 2018, studies were already decimating the filter effectiveness argument.

3. The Filter Effectiveness Argument: Disproven.

In the decade after *Ashcroft*, large sample studies of families' and youth use of software filters to protect minors from unacceptable content have demonstrated such filters to be "entirely ineffective." This was the conclusion of experts at the Oxford Internet Institute and Department of Experimental Psychology of Oxford University, UK, in a report co-reviewed by the London School of Economics. Andrew K. Przybylski & Victoria Nash, *Internet Filtering and Adolescent Exposure to Online Sexual Material*, 21 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 409 (2018).

That study reports that a more contemporary "study, analyzing data collected a *decade after* [certain earlier] papers provided *strong evidence* that caregivers' use of Internet filtering technologies *did not reduce children's exposure* to a range of aversive online experiences including, but not limited to, encountering *sexual content that made them feel uncomfortable.*" *Id*. at 406 (emphasis added) (citing authors' similar 2017 report); J. App. 207, ¶76, & n.20 (Dines).

These studies are a devastating blow both to FSC's criticism of Texas' failure to pursue the use of filters, Br. 41, as well as to the District Court's critical reliance on filters, Pet. App. 128a.

By contrast, age verification aims at protecting youth, rather than targeting certain content, by creating two zones; one zone for minors and one for adults, on the sound and well-established premise that minors should not access some content, while adults should have unfettered access. Further, parents are not removed from their oversight opportunity by age

verification, because they can still provide access to their adolescents.

Justice O'Connor, joined by Chief Justice Rehnquist, analogized this "zone" approach, separating young audiences from adults, as a suitable judicial approach to online content. *Reno v. ACLU*, 521 U.S. at 888 (O'Connor, J., concurring in part, dissenting in part) ("That is to say, a zoning law [application to online restrictions] is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material").

4. VPNs Can Bypass Filters.

FSC complains that Virtual Private Networks (VPNs) can bypass age verification systems. Br. 41.

VPNs, for years now, effectively bypass the content filters that FSC advocates. "Global Internet users increasingly rely on virtual private network (VPN) services to … circumvent censorship, and *access geo-filtered content*." Mohammad T. Khan, *et al.*, *An Empirical Analysis of the Commercial VPN Ecosystem*, IMC '18: PROCS. INTERNET MEASUREMENT CONF. 2018 443-56 (Oct. 31, 2108), https://doi.org/10.1145/3278532.3278570.

If age verification and content filters are both subject to technological reality, it should be up to legislative bodies, not courts, to select the most effective method protecting the greatest number of minors from the greatest amount of content that constitutes obscenity for minors, while supporting the parents and families seeking a safe online harbor for their children.

5. Age Verification: Validated.

The lapse of time since *Ashcroft* II supports the age verification options in H.B. 1181. As the National Institute of Standards and Technology determined recently, "Age estimation accuracy has improved since we first measured it in 2014." NAT'L INST. STANDARDS & TECH., U.S. DEP'T COM., FACE ANALYSIS TECHNOLOGY EVALUATION: AGE ESTIMATION & VERIFICATION 1 (May 2024), https://nvlpubs.nist.gov/nistpubs/ir/2024/NIST.IR.8525.pdf. Investigating only one method — facial recognition from photo ID in conjunction with age determination systems — for legislative systems to reserve adult content online for adults only, NIST found a very low rate of false positives.

NIST used just facial verification for 14-17 year olds, as measured against the challenge test age of 25 among six different tech algorithms, resulting in a false positive rate (including both male and females) from a low incidence rate of a mere .006, to a high of only 0.248 in one single algorithm (while the other five algorithms ranged from as little as 0.012 to 0.178). *Id*.

H.B. 1181 does not require just one method of age determination, but specifically mentions several methods, including the catch-all for other "reasonable" systems.

Age verification is also the least restrictive method, because when filters fail, they fail because they aim at, and suppress, otherwise appropriate content. Age verification, by contrast, treats minors differently than adults, a process replicating ordinary life. In summary, "age-verification legislation is likely the best, least restrictive solution to the rampant issue of childhood pornography exposure …." Christine Marsden, Comment, *Age Verification Laws in the*

Era of Digital Privacy, 10 NAT'L SEC. L.J. 210, 213-14 (2020).

6. Minors as a Captive Digital Audience.

The sanctity of the home, including the family unit, has benefitted from some of what the internet provides. At the same time, that protective zone for children and adolescents succumbs to the ubiquity of digital devices flooding minors with harmful content.

That invasion is a statistical fact. Smartphone and other digital device use by juveniles is so overwhelming that the industry most in-tune with that reality - internet advertising and content placement agencies - recognizes that teens comprise a digital "captive audience." Noting that 1 in 5 teens are "almost constantly on YouTube" for instance, one social media agency concludes that, "With such a *captive audience*, YouTube presents an unparalleled opportunity for advertisers to engage with teens where they're already spending much of their time online." MEDIA PLACEMENT SERVS., TARGETING TEENS WITH DIGITAL ADVERTISING (May 29, 2024), accessed at https://search.app/omXbBR5vpqHJyJyk9.

It would be naive to think that the porn industry is not similarly aware that the teen obsession with digital usage has made them a *captive audience*.

The Court has addressed this phenomenon of sexually explicit content *pandered* by the purveyor to a captive audience that does not (or in our case, should not) wish to receive it. In *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728 (1970), the Court upheld 39 U.S.C. § 4009 against a constitutional challenge. That statute permitted a person who has received by mail "a *pandering* advertisement which offers for sale matter which the

addressee in his sole discretion believes to be erotically arousing or sexually provocative," to demand that the postal service direct the mailing purveyors to cease any further mailings to that address. *Id*. at 729-30.

In *Rowan*, Congress "erected a wall" that purveyors could not invade except with the homeowner's "acquiescence." 397 U.S. at 738. H.B. 1181 erects a similar, but much less extreme wall. Here, the Court should likewise "categorically reject the argument that a vendor has a right, under the Constitution ... to send unwanted material into the home of another," *id.*, particularly when that content is obscene as to minors.

7. Legislative Discretion and Federalism Support H.B. 1181.

Justice Alito, joined by Chief Justice Roberts, recognized the importance of the "judgment of legislators" in responding to technology developments and the need to regulate its harms, particularly after a sufficient lapse of time:

> We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time… And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology.

Brown v. Ent. Merchs. Ass'n, 564 U. S. at 806 (Alito, J., concurring).

Respect for such State legislative balancing of its interests in protecting young persons is a hallmark of federalism. The Court has long recognized "the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S.

160, 171 (2009). It is imperative that state lawmakers have breathing room so that "[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). That is particularly relevant here, where the "reserved powers of the States are sufficient to enact those measures" that are designed to protect children. *Id*. (State has authority to protect children from harm in schools).

While all agree about the wisdom of restricting minors' access to obscenity, the debate here focuses mainly on methodology. The evidence since *Ashcroft II* disproves the effectiveness of filters and shows age verification systems are an acceptable framework for legislation.

Nor is legislative discretion dismissed merely if it does not solve every associated problem. The District Court concluded that H.B. 1181 was faulty because it "leav[es] minors able to access any pornography as long as it is hosted by foreign websites with no ties to the United States." Pet App 113a. FSC similarly argues the law fails by not eliminating enough sexual smut. Br. 35-36.

But none dispute that H.R. 1181 reduces minors' access to perverse and harmful sexual content online. Moreover, lawmakers are not required to slay all dragons at once:

> Congress need not deal with every problem at once. *Cf. Semler v. Or. Bd. of Dental Exam'rs,* 294 U.S. 608, 610 (1935) (the legislature need not "strike at all evils at the same time") and "Congress also must have a *degree of*

> *leeway* in tailoring means to ends." *Columbia Broadcasting,* 412 U.S. at 102-103.

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 757 (1996) (emphasis added). The Texas legislature merits that same "leeway."

II. Heightened Scrutiny, although Unnecessary, is Satisfied.

A. Heightened Scrutiny is Unnecessary.

When State laws regulate commercial entities that *pander* pornography, those restrictions do not warrant heightened scrutiny, let alone strict scrutiny.

> Nothing in the First Amendment entitles [that] type of material … to that exacting standard of review. "We have recognized that commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects … in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior."

Ashcroft II, 542 U.S. at 676. (Scalia, J., dissenting) (citations omitted). The pornography industry engages in that precise sexual "pandering" of their content, including as to juveniles. J. App. 177-78, ¶¶ 18-19 (Sgt. Erik Cabrera) (promotional hooks, sex taglines and glimpses for online viewers); J. App. 175-76 (tamer labels include "teen hardcore," "young petite," and "teen bondage").

The law requires no form of heightened scrutiny.

B. H.B. 1181 Satisfies Heightened Scrutiny.

The Texas law satisfies even a heightened form of scrutiny test. A compelling State interest (not just a substantial interest) exists, as FSC concedes. Br. 3.

Nor are the statutory requirements overly burdensome. In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, Indiana's prohibition against publicly performing nude satisfied heightened scrutiny via State interest in protecting good order and public morality. The Court upheld that ban, despite "incidental limitations on some expressive activity." *Id*. at 567. Requiring strip club dancers to perform scantily dressed rather than fully naked was a "*limitation [that] is minor* when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Id.* at 587 (Souter, J., concurring) (emphasis added).

Arguably, the restriction the Court upheld in *Barnes* was a more direct interference with an erotic "message." H.B. 1181 merely imposes a pre-condition to adult content access, closer to a tavern bouncer checking for adult ID at the door. The Texas law does not censor any actual pornographic "message."

The slight burden on adult access is a condition analogous to grocery stores that sell wine or beer only upon proof of age. The value for pornography websites saturated with sexually explicit content to be free of such restrictions is *de minimis. Stevens*, 559 U.S. at 471. No technological solution is perfect. So, even if H.B. 1181 is "especially broad" as FSC contends, Br. 25, its "legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773.

Like efforts to attack the horrors of child pornography, legislative efforts to attack online obscenity to minors have encountered road blocks. Both forms of

sexual content "… harm[ ] and debase[ ] the most defenseless of our citizens … Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet." *United States v. Williams*, 553 U.S. 285, 307 (2008) (upholding the crime of knowingly "pandering" online); *see also id.* at 290 (a purported "obscene *visual depiction* of a minor engaging in sexually explicit conduct") (emphasis added).

The Court should similarly conclude here that the legislative "effort was successful." *Id*. at 307.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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