

No. 23-1122

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**In the Supreme Court of the United States**

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FREE SPEECH COALITION INC., ET AL.,

*Petitioners,*

*v.*

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

*Respondent.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF OF U.S. SENATOR MIKE LEE, SENATOR  
JOHN CORNYN, REPRESENTATIVE CHIP ROY,  
AND 20 OTHER MEMBERS OF CONGRESS AS  
*AMICI CURIAE* SUPPORTING RESPONDENT**

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are United States Senator Mike Lee of Utah, Senator John Cornyn of Texas, Representative Charles (Chip) Eugene Roy of the 21st District of Texas, and 20 other Members of Congress.<sup>1</sup> The full list is below.

As Members of Congress, they have a strong interest in drafting and passing legislation that protects children from one of the largest public health crises of the digital age: internet pornography. Recognizing the well-documented psychological, behavioral, and health detriments caused by children’s exposure to pornography, *amici* have proposed and support legislation to curb minors’ access to such content.

*Amici* are also representatives of several states that have acted to shield children from pornography by online age verification requirements. For example, Utah S.B. 287, enacted in 2023, requires that commercial entities that provide “pornography and other materials defined as being harmful to minors” as a substantial portion of the entities’ content must verify the age of individuals accessing the material. Similarly, the Texas legislation at issue in this case, H.B. 1181, requires age verification for visitors to websites on which at least one-third of the content is pornography.

As staunch advocates for both First Amendment rights *and* children’s welfare, *amici* believe that such age verification laws strike an appropriate balance between individual liberties and the compelling government interest in protecting children from pornography, in a manner that is

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<sup>1</sup> No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici*’s counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

in line with this Court's precedents. Appropriate standards of review under this Court's precedents are essential to ensure that the elected representatives of the people in political branches of government are not improperly hobbled in their efforts to enact policies they determine are needed to promote the public good, within the constraints of the Constitution. Here, this Court's precedents support the application of rational basis review.

The full list of *amici* is:

Senator Mike Lee of Utah  
Senator John Cornyn of Texas  
Representative Chip Roy of Texas  
Senator Josh Hawley of Missouri  
Senator James Lankford of Oklahoma  
Senator Rick Scott of Florida  
Representative Josh Brecheen of Oklahoma  
Representative Dan Bishop of North Carolina  
Representative Lauren Boebert of Colorado  
Representative Michael Cloud of Texas  
Representative Andrew Clyde of Georgia  
Representative Dan Crenshaw of Texas  
Representative Tony Gonzales of Texas  
Representative Lance Gooden of Texas  
Representative Andy Harris of Maryland  
Representative Clay Higgins of Louisiana  
Representative Wesley Hunt of Texas  
Representative Ronny L. Jackson of Texas  
Representative Mary Miller of Illinois  
Representative Troy Nehls of Texas  
Representative Andy Ogles of Tennessee  
Representative Keith Self of Texas  
Representative Pete Sessions of Texas

## SUMMARY OF THE ARGUMENT

Internet pornography is a plague that causes harm to millions of American children. This case is about federal and state legislatures' power to protect children from exposure to online pornography. This Court should reaffirm its longstanding rule that the government can prohibit the dissemination of pornography to children by imposing age-access restrictions on distributors.

I. Since the Court's decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the plague of internet pornography has grown worse. Unlike in 2004, when smartphones were in their infancy, today smartphones are ubiquitous and provide easy access to extreme, hardcore pornography that was never accessible to children before. As a result, children are on average exposed to pornography before their twelfth birthday. Not only has pornography become easier to access, but the content of pornography online has also descended further into violence and degradation. Today, pornography glamorizes incest, rape, and other forms of physical abuse. As children become desensitized to depictions of sexual abuse, research shows that rates of actual sexual abuse are increasing.

Congress and state governments have a critical role to play in protecting America's youth from this ever-growing commercialization of sex through electronic devices. Numerous bills have been proposed in Congress and dozens of States have enacted age-verification laws like H.B. 1181. Such laws are critical because two decades of experience and a growing body of literature demonstrate that current internet filtering and blocking tools are woefully inadequate. H.B. 1181 is a constitutional exercise of state power under any relevant standard of review. But subjecting such age verification laws to strict scrutiny could unduly hamstring *amici* and their states' ability to pass laws



that protect children from pornography in an effective manner.

II. The Fifth Circuit correctly analyzed the constitutionality of H.B. 1181 under rational-basis review per *Ginsberg v. New York*, 390 U.S. 629 (1968), not under strict scrutiny per *Ashcroft v. ACLU*, 542 U.S. 656 (2004). *Ginsberg* established that pornography is obscene for minors and that government can restrict children’s access to pornography with measures that are “not irrational.” 390 U.S. at 641. Applying these principles, *Ginsberg* upheld a law that barred minors from purchasing pornography and punished shopkeepers who did not take reasonable steps to verify the age of their customers. This Court has repeatedly affirmed *Ginsberg*’s central holding and today, internet purveyors of porn are nothing more than the modern, unsupervised version of *Ginsberg*’s shopkeeper.

Accepting Petitioners’ contention that strict scrutiny applies to H.B. 1181 would require this Court to hold that *Ginsberg* and its progeny were *sub silentio* overruled by *Ashcroft*. They were not. *Ashcroft* applied strict scrutiny to a statute that threatened all internet pornography distributors with criminal prosecution. As a starting point, *Ashcroft* only *assumed* the applicable standard of scrutiny. Therefore, it should not be read as supplanting decades of precedent recognizing the power of government to regulate commercial dissemination of pornography to children.

Moreover, among the many problems with *Ashcroft*, the holding was built around the premise that less-restrictive means were available to prevent youth access to pornography online, such as filtering software. Two decades of experience and technological advancements have shown that optimistic assumption to be wrong.

The modern-day shopkeeper should face no lesser burden to verify the age of its customers, nor should the government face a much higher burden to regulate.

## ARGUMENT

### I. Government Regulation Is Essential to Address Child Exposure to Internet Pornography.

This case is about federal and state legislatures' obligations to protect children from exposure to online pornography.

The ease with which children can access and view internet pornography is fueling a public health emergency. *See* Mitzi Perdue, "Pornography: The Public Health Crisis of the Digital Age," *Psychology Today* (Apr. 15, 2021). Experts estimate that the average age of a child's first exposure to internet pornography is just 11 years old,<sup>2</sup> with most adolescents (over 90% of boys and over 60% of girls) seeing pornography by age 18. *See* Chiara Sabina et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 *CYBERPSYCHOLOGY & BEHAV.* 1, 1 (2008).

While children are being exposed to pornography at increasingly early ages, pornographic content online is getting darker, and more frequently contains explicit images

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<sup>2</sup> Khadijah Watkins, *Impact of Pornography on Youth*, 57 *J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 89 (2018). Other reports have found that "73% of teen[s] . . . age[d] 13 to 17 have watched pornography online—and more than half (54%) reported first seeing pornography by the time they reached the age of 13." *See* Press Release, Common Sense Media, *New Report Reveals Truths About How Teens Engage with Pornography* (Jan. 10, 2023), <https://perma.cc/59UA-TQL2>; *see also* Michael B. Robb & Supreet Mann, *Common Sense Media, Teens and Pornography 5-11* (2023), <https://perma.cc/Y899-YHQ8>.

and videos of violence and exploitation. Far from the “girly” pin-up magazines of the 1960s or even the photo centerfolds of the 1970s and 80s, the internet is replete with sordid sexual content, that includes “paraphilic or criminal sexual activity . . . and sexual violence.” *Ibid.* Indeed, researchers have found that “[m]ost of today’s pornography . . . teaches dominance, aggression, disrespect, and objectification.” Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*, 45 VT. L. REV. 43, 43 (2020). Physical abuse of women is prominent “in 97% of scenes” posted on dominant platforms like Pornhub and Xvideo. Niki Fritz et al., *A Descriptive Analysis of the Types, Targets, and Relative Frequency of Aggression in Mainstream Pornography*, 49 ARCHIVES OF SEXUAL BEHAV. 3041, 3041 (2020).<sup>3</sup>

#### **A. Youth Exposure to Pornographic Material Is Linked to Serious Psychological and Behavioral Detriments.**

Given these troubling trends, it is no surprise that medical and academic studies continue to document the alarming effects of online pornography on domestic relations and the psycho-sexual development of children and

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<sup>3</sup> Violent and sadistic behaviors like “[s]lapping” and “choking” are now commonplace on most online porn platforms, *id.* at 3041, not to mention abhorrent depictions of rape, sexual assault, incest, and sex with minors, see Fiona Vera-Gray et al., *Sexual Violence as a Sexual Script in Mainstream Online Pornography*, 61 *The British J. of Criminology* (Sept. 2021); Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 *Violence Against Women* 1065 (2010); Gail Dines & Mandy Sanchez, *Hentai and the Pornification of Childhood: How the Porn Industry Just Made the Case for Regulation*, 8 *Dignity: A Journal of Analysis of Exploitation & Violence* 3 (2023).

young adults.<sup>4</sup> Research shows that the adolescent brain is particularly vulnerable to the ill-effects of online pornography, *see* Jennifer A. Brown & Jonathan J. Wisco, *The Components of the Adolescent Brain and Its Unique Sensitivity to Sexually Explicit Material*, 72 *Journal of Adolescence* 10-13 (2019). Regular pornography consumption captures the developing brain’s dopamine reward system,<sup>5</sup> and leads to long term psychological and mental health disorders—including depression, anxiety, poor executive function, aggression, and impaired judgment, memory, and emotional regulation, to name just a few.<sup>6</sup>

While it would be impossible to list all of the harms associated with adolescent pornography exposure, below are some of the most concerning and well-studied. For example, research indicates that adolescent pornography users internalize and emulate the harmful behaviors they see in pornography, leading to earlier and riskier sexual experiences and unhealthy, distorted views on intimacy and

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<sup>4</sup> *See* Romney, *Screens, Teens, and Porn Scenes*, *supra*, at 43.

<sup>5</sup> *See* Todd Love et al., *Neuroscience of Internet Pornography Addiction: A Review and Update*, *BEHAV. SCIENCES J.* 388, 389-90 (2015).

<sup>6</sup> *See* Carolina Valdez-Montero et al., *Coercive and Problematic Use of Online Sexual Material and Sexual Behavior Among University Students in Northern Mexico*, 25 *Sexual Addiction & Compulsivity* 367 (2018); Pukovisa Prawiroharjo et al., *Impaired Recent Verbal Memory in Pornography-Addicted Juvenile Subjects*, *Neurology Research International* (Aug. 18, 2019); Magdalena Mattebo et al., *Pornography Consumption and Psychosomatic and Depressive Symptoms Among Swedish Adolescents: A Longitudinal Study*, 123 *Uppsala Journal of Medical Sciences* 237 (2018); Niccolò Principi et al., *Consumption of Sexually Explicit Internet Material and Its Effects on Minors’ Health: Latest Evidence from the Literature*, 74 *Minerva Pediatrics* 332 (2022).

relationships.<sup>7</sup> They also “have lower degrees of social integration . . . and decreased emotional bonding to caregivers” like parents and loved ones.<sup>8</sup>

Consequently, children who view pornography are more likely to trivialize sexual aggression and condone sexual violence against women.<sup>9</sup> Adolescent boys who consume pornography are far more likely to objectify women and value the opposite sex only for their attractiveness and willingness to satisfy sexual desires.<sup>10</sup> Studies also show that young girls who viewed pornography were more likely to become victims of sexual aggression,<sup>11</sup> while young boys exposed to violent pornography were “over 3 times as likely to perpetuate [teen dating violence]”.<sup>12</sup>

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<sup>7</sup> Kara Anne E. Rodenhizer & Katie M. Edwards, *The Impacts of Sexual Media Exposure on Adolescent and Emerging Adults’ Dating and Sexual Violence Attitudes and Behaviors: A Critical Review of the Literature*, 20 TRAUMA, VIOLENCE, & ABUSE 439 (2019).

<sup>8</sup> See Zachary D. Bloom et al., *Male Adolescents and Contemporary Pornography: Implications for Marriage and Family Counselors*, 23 THE FAM. J.: COUNSELING & THERAPY FOR COUPLES & FAM. 82, 85 (2014).

<sup>9</sup> Megan K. Maas & Shannamar Dewey, *Internet Pornography Use Among Collegiate Women: Gender Attitudes, Body Monitoring, and Sexual Behavior*, 8 SAGE Open (2018); Rodenhizer & Edwards, *supra* note 7.

<sup>10</sup> See Principi et al., *Consumption of Sexually Explicit Internet Material* *supra* note 6.

<sup>11</sup> Jochen Peter & Patti M. Valkenburg, *Adolescents and Pornography: A Review of 20 Years of Research*, 53 THE J. SEX RES. 509, 522 (2016); see also P. J. Wright et al., *A meta-analysis of pornography consumption and actual acts of sexual aggression in general population studies*, 66 J. OF COMMUNICATION 183-205 (2016).

<sup>12</sup> Whitney Rostad et al., *The Association Between Exposure to Violent Pornography and Teen Dating Violence in Grade 10 High*

Adolescents and teens who view pornography regularly are more likely to engage in risky and delinquent behavior, such as sexual impulsivity, self-harm, skipping school and illegal drug, alcohol, and tobacco use.<sup>13</sup> Notably, pornography use among minors encourages sharing of child pornography, such as intimate photos of oneself or others (*i.e.*, “sexting”).<sup>14</sup> Sexting creates opportunities for cyberbullying,<sup>15</sup> extortion, revenge porn, and the proliferation of child pornography.

It is upon this perilous landscape that states like Texas have steadfastly sought solutions to protect children from the snares of online pornography. Age-verification technology is an effective tactic that will help shield children from the deeply harmful content lurking behind every click<sup>16</sup> and suspicious instant message, while imposing a

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*School Students*, 48 ARCHIVES SEXUAL BEHAV. 2137, 2141, 2144 (2019).

<sup>13</sup> See Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19 SEXUAL ADDICTION & COMPULSIVITY 99, 101 (2012).

<sup>14</sup> Davia B. Steinberg et al., *Onset Trajectories of Sexting and Other Sexual Behaviors Across High School: A Longitudinal Growth Mixture Modeling Approach*, 48 ARCHIVES SEXUAL BEHAV. 2321, 2322 (2019).

<sup>15</sup> See Yolanda Rodríguez-Castro et al., *Intimate Partner Cyberstalking, Sexism, Pornography, and Sexting in Adolescents: New Challenges for Sex Education*, 18 INT. J. ENVIRON. RES. PUBLIC HEALTH 2181 (2021).

<sup>16</sup> Children can come across pornography websites inadvertently. As a recent example, a misprinted children’s doll box for the movie *Wicked* directed unsuspecting children and adults to the pornography website “wicked.com” rather than the children’s movie website, “wickedmovie.com.” Julia Reinstein, *Mattel apologizes for link to porn site on ‘Wicked’ movie doll boxes*, ABC NEWS (NOV. 11, 2024), <https://perma.cc/9A3D-BNUR>.

minor barrier for adults who choose to consume that content.

**B. To Stem this Growing Crisis, Congress and Several States Have Proposed and Passed Legislation to Protect Children from the Dangers of Internet Pornography.**

Legislation is particularly critical to address this public health crisis and the prevalence of online pornography that is easily accessed through modern smartphones, a “pervasive and insistent part of daily life” that use “technology nearly inconceivable just a few decades ago.” *Riley v. California*, 573 U.S. 373, 385 (2014). Shielding minors from pornographic content on smartphones and other handheld devices is extraordinarily difficult because such devices allow minors to access the internet outside of parental supervision, and “no filtering technology blocks all pornography” that is accessible by a smartphone.<sup>17</sup> Robert Peters, *It Will Take More Than Parental Use of Filtering Software to Protect Children from Internet Pornography*, 31 N.Y.U. REV. L. & SOC. CHANGE 829, 837 (2007) (footnotes omitted). Given these challenges, legislators at the state and federal level have favored age-verification requirements as an effective and common-sense solution.

1. At the federal level, *amicus* Senator Mike Lee introduced The Shielding Children’s Retinas from Egregious Exposure on the Net (SCREEN) Act, *see* S. 3314, 118th Cong. (2023). Similar to H.B. 1181, the SCREEN Act “requires all commercial pornographic

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<sup>17</sup> As discussed in *infra* Part II.B, the potential efficacy of filtering technology played a critical role in this Court’s decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The inability of filtering technology to keep up with two-decades worth of internet advancement further undermines the application of *Ashcroft* to this case.

websites to adopt age verification technology to ensure a child cannot access its pornographic content” and “[e]stablishes data security requirements” that, among other things, “prohibit[] companies from collecting data beyond what is minimally necessary to verify a user’s age and from retaining information longer than is necessary to demonstrate compliance.”<sup>18</sup>

Relatedly, the Preventing Rampant Online Technological Exploitation and Criminal Trafficking (PROTECT) Act, *see* S. 3718, 118th Cong. (2024) and H.R. 8457, 118th Cong. (2024), which would require “age and identity verification of individuals uploading pornographic content” to adult websites, as well as “consent [], age, and identity verification from the individuals who appear in the content uploaded to these sites.”<sup>19</sup> It would also require websites “to remove any content that is not consensual from their platforms at the request of the victims, including the type of content commonly referred to as ‘revenge porn.’”<sup>20</sup>

These (and other<sup>21</sup>) legislative measures demonstrate Congress’ firm commitment to protecting children from

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<sup>18</sup> One Pager, Sen. Mike Lee, SCREEN Act, <https://perma.cc/KL87-JX5G>.

<sup>19</sup> Press Release, Rep. Anna Paulina Luna, Rep. Luna Introduces PROTECT Act to Safeguard Child Safety Online (May 17, 2024), <https://perma.cc/U9BP-PEZD>.

<sup>20</sup> *Ibid.*

<sup>21</sup> It is not just children that fall prey to the internet porn industry. It is estimated that over 10 million Americans have been the victim of non-consensual intimate imagery shared online, commonly referred to as “revenge porn.” *See* Chance Carter, *An Update on the Legal Landscape of Revenge Porn*, NAT’L ASS’N OF ATT’YS GEN. (Nov. 16, 2021), <https://perma.cc/7TZ6-XGWY>. Senator Ted Cruz’s legislation, the Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks (TAKE IT DOWN) Act, *see* S. 4569, 118th Cong. (2024), would “criminalize the publication of”



the considerable dangers of online pornography—as well as Congress’ recognition of the severity and complexity of those dangers. Applying rational basis review to age-verification laws like these respects Congress’ authority “to undertake to solve national problems directly and realistically,” within the First Amendment’s guardrails. *American Power & Light Co. v. SEC*, 329 U.S. 90, 103 (1946).<sup>22</sup>

2. Acknowledging the immeasurable and irreparable harm facing our nation’s children, at least 16 States have declared youth exposure to pornography to be a serious public health issue. *See* Romney, *Screens, Teens, and Porn Scenes*, *supra*, at 46 & n.6, 123. And, within the past two years, 18 states in addition to Texas have enacted some form of website age-verification requirement to ensure that children do not access online pornographic content (Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, and Virginia).<sup>23</sup> There are an additional four

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revenge porn, “including AI-simulated revenge pornography (or “deepfake pornography”), and require social media and similar websites to have in place procedures to remove such content upon notification from a victim.” Press Release, Sen. Ted Cruz, “Sen. Cruz Leads Colleagues in Unveiling Landmark Bill to Protect Victims of Deepfake Revenge Porn” (June 18, 2024), <https://perma.cc/WG9B-HFZK>. *See also* S. 4409, 118th Cong. (2024); S. 412, 118th Cong. (2024).

<sup>22</sup> This Court has long eschewed interpretations of the Constitution that would “hobble Congress” from legislating in an area of critical public policy concern. *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 159 (1974) (quotations and citations omitted).

<sup>23</sup> *See* Ala. H.B. 164, 2024 Leg., Reg. Sess. (Ala. 2024); Ark. S.B. 66, 2023 Leg., Reg. Sess. (Ark. 2023); Fla. H.B. 3, 2024 Leg., Reg. Sess. (Fla. 2024); Ga. S.B. 351, Act No. 463, 2024 Leg., Reg. Sess. (Ga. 2024); Idaho H.B. 498, 2024 Leg., Reg. Sess. (Idaho 2024); Ind. S.B. 17, 2024 Leg., Reg. Sess. (Ind. 2024); Kan. S.B. 394, 2024 Leg., Reg. Sess. (Kan.

States with similar legislation pending (Michigan, Ohio, Pennsylvania, and New Jersey).<sup>24</sup>

If this Court were to determine that H.B. 1181 is subject to strict scrutiny, it will discourage these important nationwide reforms. Given the myriad devices children can (and do) use to access the internet without supervision, these reforms represent the best hope for shielding children from pornography online. *Cf. Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607 (1982) (“[S]afeguarding the physical and psychological well-being of a minor . . . is a compelling [interest.]”); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1198 (10th Cir. 2010) (“Indeed, states have a compelling interest in and a solemn duty to protect the lives and health of the children within their borders.”). The holding in *Ginsberg* affords policymakers the breathing room they need to protect our nation’s children while preserving our First Amendment freedoms.

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2024); La. H.B. 142, Act No. 440, 2022 Leg., Reg. Sess. (La. 2022); Miss. H.B. 1315, 2023 Leg., Reg. Sess. (Miss. 2023); Mont. S.B. 544, 2023 Leg., Reg. Sess. (Mont. 2023); Neb. Online Age Verification Liability Act, L.B. 1092, 2024 Leg., Reg. Sess. (Neb. 2024); N.C. H.B. 8, 2023 Leg., Reg. Sess. (N.C. 2023); Okla. S.B. 1959, 2024 Leg., Reg. Sess. (Okla. 2024); S.C. H.B. 3424, Act No. 198, 2024 Leg., Reg. Sess. (S.C. 2024); Tenn. H.B. 1614/S.B. 1792, 2024 Leg., Reg. Sess. (Tenn. 2024); Utah S.B. 287, 2023 Leg., Reg. Sess. (Utah 2023); Va. S.B. 1515, 2023 Leg., Reg. Sess. (Va. 2023).

<sup>24</sup> See Mich. H.B. 5009, 2023 Leg., Reg. Sess. (Mich. 2024); Ohio S.B. 212, 2024 Leg., Reg. Sess. (Ohio 2024); Pa. H.B. 2143, 2023-2024 Leg., Reg. Sess. (Pa. 2024); N.J. A.B. 4146, 2024-2025 Leg., Reg. Sess. (N.J. 2024).

## II. Rational Basis Is the Proper Standard of Review for Regulation of Distribution to Minors of Material that Is Obscene to Minors.

“From 1791 to the present” the First Amendment “has permitted restrictions upon the content of speech in a few limited areas.” *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quotations and citations omitted). One of these “historic and traditional” areas exiled from constitutional protection is “obscenity—valueless material appealing to the prurient interest and describing sexual conduct in a patently offensive way.” *Counterman v. Colorado*, 600 U.S. 66, 73 (2023) (cleaned up). A variant on the obscenity doctrine pertains to communications that are “obscene as to [children] even if not obscene as to adults.” *Reno v. ACLU*, 521 U.S. 844, 864 (1997). It is well-settled that pornography is obscene to minors and that government has rational and legitimate reasons to prohibit the distribution of pornography to children by a commercial entity. *Ginsberg v. New York*, 390 U.S. 629 (1968); *see also Brown v. Ent. Merchants Ass’n*, 564 U.S. 786 (2011) (declining to extend *Ginsberg* to violent video games).

Those principles resolve this case. H.B. 1181 is a straightforward exercise of Texas’s sovereign authority to prohibit commercial distribution of pornography to children.

### A. Congress May Incidentally Burden Adult Access to Pornography.

Petitioners try to distinguish *Ginsberg* because the “law at issue in *Ginsberg* did not place any restriction on adults’ access to sexual materials.” Pet. Br. 20. This is wrong. Age verification by vendors was a necessary (and indeed inevitable) consequence of New York’s obscenity law. A shopkeeper who refused to probe, inquire, or seek verification as to the age of a patron would be liable for

criminal punishment if he sold pornography to minors. New York incentivized age verification by the vendor “who has made inquiry as to age and receives assurance” from the customer. *Ginsberg v. New York*, Or. Arg. Audio Recording 40:40-41:00 (Jan. 16, 1968). Accordingly, the *Ginsberg* Court understood that New York’s statutory scheme assumed, and indirectly compelled, vendors to probe, question, and vet customers’ age. Thus, the linchpin undergirding Petitioners’ entire appeal—that the law in *Ginsberg* imposed *no* burdens upon adult access to speech—is false.

While Petitioners spill much ink decrying the purported “chilling effect” that H.B. 1181 will have on adult speech due to users’ concerns about revealing their proclivities, the person-to-person vetting required by the New York law was arguably *more* invasive and chilling than Texas’s age-verification requirement. Indeed, while the New York law required one to reveal oneself by face and, quite possibly, by name and identification to the shopkeeper purveying pornography, the Texas law permits automated and software verifications that do not even require one’s information to be visible to a human being. *See* Tex. Civ. Prac. & Rem. Code Ann. § 129B.003. Moreover, H.B. 1181’s data security requirements forbid retention of any identifying information, Tex. Civ. Prac. & Rem. Code Ann. § 129B.002, a safeguard that was not imposed on any nosy vendor under the New York law in *Ginsberg*.

Petitioners contend that a law banning child access to pornography must be evaluated under the same tier of scrutiny as a law banning the access of adults. This argument has no merit. Wherever the law draws a distinction between adults and children, adults will shoulder the modest burden of showing some proof of their age. Examples abound where adults must show proof of adulthood, from

picking up prescription drugs at a pharmacy, Tex. Occ. Code Ann. § 481.061 (2016); Fla. Stat. § 893.055 (2024), purchasing a firearm, 18 U.S.C. § 922(s)(1)(A)(i)(II), purchasing tobacco products, 21 U.S.C. § 387, or registering to vote, *see, e.g.*, Ga. Code Ann. § 21-2-220 (2023), N.C. Gen. Stat. § 163-166.16 (2023), and Tex. Elec. Code Ann. § 13.002 (2021), *cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008) (upholding Indiana’s voter identification law as a reasonable exercise of state power despite “limited burden on voter’s rights”) (cleaned up). It is a stretch to suggest that such laws could be constitutionally suspect merely because they require adults to show proof of adulthood.

**B. *Ashcroft’s* Application of Strict Scrutiny in Very Different Circumstances Does Not Control.**

The application of strict scrutiny in *Ashcroft v. ACLU*, is inapt to this case. The laws are critically distinct, while technological advances have undermined *Ashcroft’s* less-restrictive-means rationale.

*Ashcroft* concerned the Child Online Protection Act (COPA), 47 U.S.C. § 231. COPA did not simply require age restrictions and make it a crime to fail to use age-access restrictions. Instead, it made it a crime to make pornography accessible to minors and allowed those displaying pornography to prove an affirmative defense that they had utilized adequate age restrictions limiting access. Petitioners’ reliance on *Ashcroft* is misplaced.

*First*, *Ashcroft* dealt with an extraordinary statutory command. COPA did not simply require age-access restrictions: it directly regulated online pornography for everyone. The key point in *Ashcroft* was that, by placing the burden on website operators to prove an affirmative defense, COPA did nothing to protect distributors from

the threat of prosecution. That created a chilling effect on speech. “Where a prosecution is a likely possibility . . . speakers may self-censor rather than risk the perils of trial.” *Ashcroft*, 542 U.S. at 670-72. COPA would be akin to New York imposing criminal penalties on a shopkeeper who makes pornographic magazines available to all purchasers, including minors, unless that shopkeeper could proffer business records showing that all sales went to adults. *Compare Ginsberg*, 390 U.S. at 634-35.<sup>25</sup>

Thus, as this Court has observed, the Constitution allows legislatures to impose incidental burdens on adults’ access to material that is obscene as to children to protect children.

*Second*, recent technological developments undermine *Ashcroft*. It is essential that Congress have available to it sufficient means to protect children online. Central to the *Ashcroft* Court’s analysis of narrow tailoring was the empirical claim that “blocking and filtering software” was a less restrictive and more effective alternative. *Ashcroft*, 542 U.S. at 666-67. Research indicates that this is no longer correct.

When *Ashcroft* was decided in 2004, children generally surfed the web from a stationary desktop computer located in an open area of a home or library. These computers often accessed the internet through a single network, allowing parents or librarians to impose a system-wide blocking and filtering policy. Today, the omnipresence of smartphones provides children with instant access to

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<sup>25</sup> In marked contrast, the law in *Ginsberg* banned only the sale of pornography to children and the honest-mistake defense was written not to allow adults to buy pornography but to avoid punishing shopkeepers who unintentionally sold to minors because, for example, they were handed a fake ID.

pornography—a problem that simply did not exist in 2004. As of 2021, 88% of teens and almost half of ten-year-olds owned a smartphone.<sup>26</sup> These devices provide multiple channels to access the internet and circumvent other filters. Therefore, age-access restrictions on distributors is the most effective way to prevent adolescent access to pornography.

Smartphones also complicate blocking-and-filtering tools. They can escape local network-level filters by switching to a mobile network wherever the user has cell service. Device-level filters are also ineffective because a smartphone can download open-source applications—many of which have in-app browsers. And even if tech-savvy parents create strong filters on their child’s devices, the child may still be exposed to pornography through their friends’ smartphones. And according to the leading study published in the *Journal of Pediatrics* in 2017, researchers surveyed 1,030 British children and “found convincing evidence that Internet filters were *not effective* at shielding early adolescents from aversive online experiences.”<sup>27</sup> Another study published the following year concluded that although filtering “might make intuitive sense,” it is “not effective” overall and “more than 99.5 percent of whether a young person encountered online

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<sup>26</sup> Victoria Rideout et al., *The Common Sense Census: Media Use by Tweens and Teens*, Common Sense Media, at 5 (2019), <https://perma.cc/EWW3-ZND6>.

<sup>27</sup> Andrew K. Przybylski, *Internet Filtering Technology and Aversive Online Experiences in Adolescents*, 184 *J. PEDIATR.* 215 (2017) (emphasis added).

sexual material had to do with factors besides their caregivers use of Internet filtering technology.”<sup>28</sup>

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Today, the porn industry is estimated to have annual global revenue of as much as \$97 billion.<sup>29</sup> Its revenue for the past 20 years or more has exceeded the revenue of all three major sports leagues, combined.<sup>30</sup> As a compelling modern metric, “[p]ornography websites get more visitors each month than Netflix, Amazon, and Twitter combined.”<sup>31</sup>

Like the unprecedented revenue and traffic figures, pornography has never before posed a bigger risk to minors, who can so innocently come across the content on the web, and be subjected to the trauma that follows. Internet purveyors of pornography are the modern-day shopkeepers that give children access to material that is obscene as to them, and they can earn profits orders of magnitude greater than the shopkeeper in *Ginsberg*. They should be subject to no lesser burden to protect children.

### CONCLUSION

The Court should affirm the judgment of the Fifth Circuit.

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<sup>28</sup> Andrew K. Przybylski & Victoria Nash, *Internet Filtering and Adolescent Exposure to Online Sexual Material* 21 *CYBERPSYCHOLOGY, BEHAVIOR, AND SOCIAL NETWORKING* 405, 409 (2018).

<sup>29</sup> Jannick Linder, *Pornography Industry Statistics: Latest Data & Summary*, WifiTalents (Aug. 7, 2024), <https://perma.cc/P9D2-2H88>.

<sup>30</sup> *See Porn Profits: Corporate America’s Secret*, ABC NEWS (Jan. 27, 2003), <https://perma.cc/G24P-XFDG>.

<sup>31</sup> Linder, *Statistics*, *supra* note 29.



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