No. 23-1122

In the Supreme Court of the United States

FREE SPEECH COALITION, ET AL., *PETITIONERS*,

V.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, *RESPONDENT.*

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

BRIEF OF *AMICI CURIAE* STATE LEGISLATORS, AMERICAN FAMILY ASSOCIATION, INC., AND AFA ACTION, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae (listed in the Appendix hereto) are current and former members of state legislative bodies who sponsored and/or championed legislation protecting their states' children from being exposed to graphic sexual content available on commercial websites.

Additional *amici curiae* are the American Family Association, Inc. and AFA Action, Inc. (collectively "AFA Action"). The mission of AFA Action is to inform and mobilize voters and government officials to align public policy with biblical and constitutional principles. Our vision is to see a society of citizens successfully preserving life, liberty, and the ability to pursue happiness.

AFA Action would show the free speech clause of the First Amendment as originally understood did not encompass the production and distribution of sexually explicit material, and certainly not its dissemination to minors. This is demonstrated by the consistent legal prohibition of such material in the period immediately following the ratification of the First Amendment through the middle of the twentieth century.[2]

These legal prohibitions are also informed by

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[1] Pursuant to Rule 37.6, *amici* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

[2] *See supra* Argument section II.

longstanding and widely accepted cultural and religious principles. For example, the King James Bible, a primary source of legal, moral and political education and inspiration throughout much of our country's history, teaches: "For this is the will of God, even your sanctification, that ye should abstain from fornication. That every one of you should know how to possess his vessel in sanctification and honour; Not in the lust of concupiscence . . . ."[3] The Bible likewise teaches that children are a gift from God, and we are commanded to love them, protect them, and lead them on the right path, so as not to cause them to stumble.[4]

The widespread exposure of children to hardcore pornography in America today is antithetical to the historical and traditional customs and laws of our country.

In support of Texas' House Bill 1181 ("H. B. 1181"),

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[3] 1 *Thessalonians* 4:3–5.

[4] *Psalm* 127:3, *Proverbs* 22:6, *Matthew* 18:2–6. The Founders had great respect for the Bible as a source of truth, instruction and, even, public policy. So states John Adams, with particular emphasis on sexual matters, including "ogling":

> The Bible contains the most profound Philosophy, the most perfect Morality, and the most refined Policy, that ever was conceived upon Earth. It is the most Republican Book in the World, and therefore I will still revere it. The Curses against Fornication and Adultery and the prohibition of every Wanton glance or libinous ogle at a Woman, I believe to be the only System that ever did or ever will preserve a Republick in the World.

Letter from John Adams to Benjamin Rush, (Feb. 2, 1807) (on file with the National Archives), https://founders.archives.gov/documents/Adams/99-02-02-5166.

Pet.App.169a–175a, which seeks to protect children from the scourge of pornography and is, therefore, consistent with these customs and laws, the undersigned submit this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

Some twenty years ago, four justices of this Court would have upheld against a facial First Amendment challenge a federal law that provided criminal penalties for commercial entities that published sexually graphic material harmful to minors on their websites. The law provided an affirmative defense if the website employed a reasonable method to verify that the user was an adult. Five justices disagreed, and the federal law was never implemented. The intervening years have seen an explosion of hardcore internet pornography, routinely exposing children at shockingly young ages. Several states, including Texas, took the Court's prior rulings into account, stepped into the breach, and passed smart state laws requiring pornographic websites to use age verification and, if they don't, impose civil penalties rather than criminal punishment.

Texas' H.B. 1181 is very different than laws this Court has struck down via facial First Amendment challenge. It applies only civil penalties, not criminal fines or imprisonment. It only regulates children's access to harmful sexually graphic material. It is not a ban or a prior restraint. It does not suppress any expression of ideas, nor does it discriminate against any viewpoint. It prohibits the commercialized remote sexual stimulation of children, which is more conduct than speech. H.B. 1181 does not target individualized

communication between adults, but widely disseminated, sexually graphic content accessible by children. Applied to the internet of today, in which children's social media "feeds" are inundated with unsolicited sexualized material, it is essentially a regulation of a broadcast medium, for which this Court has permitted more robust regulation. Indeed, the internet of today poses a risk of exposing children to sexual material that is orders of magnitude greater than the broadcast media of yesterday. As the risk is greater, so the Court's tolerance of regulation should be greater.

In sum, unlike the laws at issue in prior cases before this Court, H.B. 1181 provides children with desperately needed protection without threatening core First Amendment values. These considerations tip the balance in favor of upholding the constitutionality of H.B. 1181.

The judgment of the Court below should be affirmed.

ARGUMENT

I. Children are exposed to sexually graphic content online to an unprecedented degree.

Twenty years ago, this Court was asked to rule on the constitutionality of federal legislation that made it a crime for a commercial entity to allow children to access sexually graphic material on its website without employing reasonable age verification. In a 5-4 decision, the Court struck down that federal law, finding that it was overbroad and that parent-

initiated, user-side filtering software was a less restrictive alternative. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666–673 (2004).

In the intervening time, online pornography has exploded. As a result, children today are victimized by sexually graphic content online like never before.

"The US hosts more child sexual abuse content online than any other country in the world," with the US accounting "for 30% of the global total of child sexual abuse material." Rhiannon Williams, *The US now hosts more child sexual abuse material online than any other country*, MIT Tech. Review, Apr. 26, 2022, https://www.technologyreview.com/2022/04/26/1051282/the-us-now-hosts-more-child-sexual-abuse-material-online-than-any-other-country/.

"Today, porn sites receive more website traffic in the U.S. than Twitter, Instagram, Netflix, Pinterest, and LinkedIn combined. … *Studies show that most young people are exposed to porn by age 13 . . . .*" FightTheNewDrug, *Why Today's Internet Porn is Unlike Anything The World Has Ever Seen*, https://fightthenewdrug.org/why-todays-internet-porn-is-unlike-anything-the-world-has-ever-seen/. (emphasis added).

To stem the tide of filth destroying the innocence of their states' children, lawmakers from at least nineteen (19) states have acted, passing legislation requiring commercial websites to verify users' age before granting them access to sexually graphic content. *US State age verification laws for adult content*, THE AGE VERIFICATION PROVIDERS

ASSOCIATION, https://avpassociation.com/4271-2/ (last visited Oct. 29, 2024).

Now the Court is once again asked to rule on one such law duly passed by the democratically elected representatives of the people of Texas to protect children from internet porn.

Texas' H. B. 1181 is neither a criminal law nor a prior restraint. It is a viewpoint-neutral civil regulation of sexually graphic content that expresses no ideas. It prevents harm to children while maintaining adult's access. Thus, it threatens no core First Amendment interests. The ruling of the court below should be affirmed.

II. The First Amendment accords lesser protection to sexually graphic content, allows prohibiting children's access to it, and allows prohibition of obscenity.

As originally understood, the First Amendment did not prevent legislators from prohibiting the public distribution of sexually graphic material. Contrary to the recently popular historical revisionist view, Anthony Comstock did not "invent the concept of obscenity in American law or governance" in the 1870s. Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 Law & Social Inquiry 369, 382 (2002).

English common law had punished obscenity since at least the 1727 conviction of Edmund Curll for anti-Catholic writings. *Id.*

In 1808 the Supreme Court of Errors of Connecticut declared, "Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law." *Knowles v. State*, 3 Day 103, 103 (Conn. 1808).

In 1811, the Supreme Court of New York stated that "[t]hings which corrupt moral sentiment, as obscene actions, prints and writings . . . have . . . been held indictable . . . ." *People v. Ruggles*, 8 Johns. 290, 294–295, 1811 WL 1329, *3 (N.Y. Sup. Ct. 1811).

In 1815, Pennsylvania's Supreme Court held that "Any offence which, in its nature and by its example, tends to the corruption of morals, as the *exhibition of an obscene picture,* is indictable at common law." *Com. v. Sharpless*, 2 Serg. and Rawle 91 (1815), 1815 WL 1297, at *1 (Pa. 1815) (emphasis in original).

In 1821 the Supreme Judicial Court of Massachusetts upheld the conviction of a man for intending to corrupt "the morals as well of youth as of other good citizens of said commonwealth" by publication of "a certain lewd, wicked, scandalous, infamous and obscene printed book . . . ." *Commonwealth v. Holmes*, 17 Mass. 336, 336–37 (1821).

In 1824, New York officials prosecuted a vendor of the same obscene book. Dennis, *supra*, at n. 14.

Antebellum jurists and treatise writers, such as Thomas Cooley and Francis Wharton, applied the law of nuisance and obscene libel to punish expression that tended to further indecency or corruption, and reflected the view that such expression was not

protected by liberty of speech and press. Dennis, *supra*, at 383, n. 16 and accompanying text.

Many state legislatures codified these common law prohibitions against obscenity in the period following the ratification of the Bill of Rights. *Id.* at 384. Vermont was first in 1821, followed by Connecticut in 1834 and Massachusetts in 1835, ultimately leading to passage of obscenity-control statutes in 20 states by the end of the Civil War. *Id.* Congress followed with the first piece of federal obscenity control legislation, the 1842 Tariff Act banning importation of "indecent and obscene" images, and in 1865 banned obscenity in the mails. *Id.* "Judges and treatise writers uniformly portrayed these statutes as legitimate exercises of the state's expansive police powers to promote morality without considering their impositions on freedom of speech or freedom of the press." *Id.*

Thus the 1873 Comstock Act passed by Congress did not appear out of an otherwise libertine air as revisionists suggest. *Id.*

By 1879 American courts had begun to apply the "Hicklin test," adopted from English law, under which a publication was considered obscene if "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *United States v. Bennett*, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879). *See also* John S. Harrington, *The Evolution of Obscenity Control Statutes*, 3 Wm. & Mary L. Rev. 302, 303 (1962), https://scholarship.law.wm.edu/wmlr/vol3/iss2/4.

Thus, for about the first 150 years of our Nation's existence, American jurisprudence found no free

speech problem with statutes that protected children from being exposed to sexually graphic publications. Against this backdrop the Court correctly stated in *Chaplinsky v. State of New Hampshire* that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . ." 315 U.S. 568, 571–72 (1942).

This area of constitutional law became more active when, in 1925, the Court incorporated the Bill of Rights into the Fourteenth Amendment, making the First Amendment applicable to the states for the first time. *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925).

The Court held in 1957 that the First Amendment protected an adult against criminal prosecution for acquiring an erotic publication unfit for children. *Butler v. State of Mich.*, 352 U.S. 380, 381–383 (1957).

But the Court nevertheless made abundantly clear in 1968 that states could criminally punish dissemination to minors of a publication that was harmful to them, even if the publication did not meet the test for adult obscenity. *Ginsberg v. State of N. Y.*, 390 U.S. 629, 637 (1968) (criminal conviction of operator of lunch counter who sold so-called "girlie" magazine containing photographs of nude women to 16-year-old did not violate First Amendment).

In 1973 the Court laid down the now-familiar obscenity standard, making clear that obscene content may be prohibited in keeping with the First

Amendment. *Miller v. California*, 413 U.S. 15, 24 (1973).

III. This Court should reject Petitioner's facial challenge to H.B. 1181.

A. This Court disfavors facial First Amendment challenges and has upheld laws that use civil enforcement to regulate, rather than ban, content by restricting children's access, or that address widespread commercial dissemination of sexually graphic content.

The cases referenced in section II were, in effect, "as applied" challenges to criminal prosecutions involving definite, known content, such as a single book or collection of photographs. In time, the Court confronted "facial" challenges to criminal prosecutions for publication or possession of indecent or obscene material. Such cases presented fundamentally different considerations.

The threat of criminal prosecution under vague criminal statutes targeted at unprotected speech can sometimes chill protected speech. Few people are willing to risk criminal prosecution to be the test case.[5] On the other hand, such statutes may punish certain categories of speech, such as obscenity,

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[5] This rationale of facial First Amendment challenges originated in criminal cases applying the "void for vagueness" doctrine. Anthony G. Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. L. Rev. 67, 68, n. 4 and 70 n. 16 (1960).

without offending the First Amendment. *Winters v. New York*, 333 U.S. 507, 510 (1948).

To protect free speech, the Court accorded plaintiffs standing to challenge such vague criminal statutes on their face, not just as applied to a plaintiff's particular speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973).

However, the Court recognized that such facial challenges could harm legitimate interests, so they face a heavy burden and will succeed only where the challenger shows that the statute's overbreadth is real and substantial "judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615; *see also Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (same). "Even in the First Amendment context, facial challenges are disfavored, and neither parties nor courts can disregard the requisite inquiry into how a law works in all of its applications." *Id.* at 2409. "Because it destroys some good along with the bad, [i]nvalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Hansen*, 599 U.S. 762, 770 (2023). First Amendment facial challenges are to be used "only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982).

"[C]ourts usually handle constitutional claims case by case, not *en masse*." 144 S. Ct. at 2397. The Court has criticized facial challenges as speculating about the future application of a law and short-circuiting the democratic process. *Id.* "This Court has therefore made facial challenges hard to win." *Id.*

B. Premature facial challenges in the internet context create an unworkable challenge for the Court.

Justice Barrett emphasized in *Moody* just how ill-suited facial First Amenment challenges are in the internet context, commenting that "dealing with a broad swath of varied platforms and functions in a facial challenge strikes me as a daunting, if not impossible, task." *Id.* at 2409 (Barrett, J., concurring).[6]

The factual complexion of facial challenges in the internet context makes the Court's task even harder than with a typical facial challenge involving more traditional media. Because of the much larger range of potential factual applications, the burden for those bringing facial challenges is essentially unworkable.

The "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Moody*, 144 S. Ct. at 2411 (Jackson, J., *concurring*) (quoting *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386 (1969)). "Faced with difficult constitutional issues arising in new contexts on undeveloped records, this Court should strive to avoid deciding more than is necessary." *Id.* at 2412.

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[6] Justice Thomas has stated that, because the Court's constitutional authority under Article III of the Constitution is limited to deciding "cases or controversies" between parties, it lacks the constitutional authority to decide facial challenges. 144 S. Ct. at 2412.

The Court should reject Petitioner's invitation to rush to judgment. Once H.B. 1181 has a track record of implementation, and a body of "as applied" challenges develop in the lower courts, the Court will be better equipped to judge future constitutional challenges that come before it.

C. H.B. 1181 is not overly broad.

H.B. 1181 is not overly broad, because most of the website content it would bar children from accessing are "plain examples" of obscenity, entitled to no First Amendment protection. And, its remaining applications to non-obscene material do not offend the First Amendment because it is a civil regulation protecting children from widely available sexually graphic content, not a criminal ban or prior restraint.

i. The vast majority of H.B. 1181's potential applications are constitutional because they apply to plain examples of obscenity.

As Respondent demonstrates, much of the material on Petitioner's websites qualifies as "plain examples" of obscenity for adults. Resp.42 (comparing *Miller*, 413 U.S. at 25, with ROA.506–08, 538–39).

In *Ashcroft*, four justices would have held the law at issue constitutional. Justice Breyer, writing for himself and two of the four dissenters,[7] noted that the

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[7] Justice Scalia, the fourth dissenter, would not have applied strict scrutiny but considered the law at issue constitutional because its target was more conduct than speech. 542 U.S. at 676. The law applied to commercial entities engaged in "the

law in issue used the *Miller* test for obscenity, the only difference being the addition of the term "for minors" in each element. *Id.* 542 U.S. at 679–680. Congress' intent was to restrict access to commercial pornography, and only rare borderline instances of that kind of material are *not* obscene under the *Miller* test. *Id.*

Like the federal law at issue in *Ashcroft*, H. B. 1181 also mirrors the *Miller* test, adding "with respect to minors" to each element. Pet.App.4a. H. B. 1181 is also clearly intended to apply to commercial pornography. Likewise, H. B. 1181 applies primarily to commercial pornographic websites, the vast majority of which are obscene, and only in rare cases will the material not be obscene under *Miller*.

The same rationale applies here. Except for rare borderline cases, the vast majority of H.B. 1181's potential applications are constitutional, because they embrace content that is obscene and proscribable under the First Amendment.

ii. H.B. 1181's applications to non-obscene content are constitutional because it is a civil regulation, not a criminal ban or prior restraint, which protects children from being exposed to widely available, intrusive, sexually graphic content.

Facial challenges have only rarely been

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sordid business of pandering by deliberately emphasizing the sexually provocative aspects of their non-obscene products, in order to catch the salaciously disposed [which is] constitutionally unprotected behavior." *Id.*

entertained regarding civil regulations of speech. The burden for the challenger in such cases is especially great because the chilling effect is diminished when no criminal prosecution is involved. *See Winters*, 333 U.S. at 515 ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."). Between 1915 and 1960, only one Supreme Court case found a civil enforcement statute void for vagueness. Amsterdam, *supra*, at 70, n. 16.

Because the rationale of facial challenges is rooted in the void for vagueness doctrine, which itself arose in the context of criminal prosecutions, it is unsurprising that the Court's subsequent facial First Amendment challenge cases have typically involved criminal statutes. *See*, *e.g.*, *Pope v. Illinois*, 481 U.S. 497 (1987) (facial challenge in the context of a criminal obscenity prosecution); *Massachusetts v. Oakes*, 491 U.S. 576 (1989) (facial challenge to criminal prosecution involving nude child photographs); *Alexander v. United States*, 509 U.S. 544, 546 (1993) (facial challenge to criminal asset forfeiture in connection with criminal obscenity and RICO prosecution).

Conversely, following the rationale of *Winters*, laws enforced through civil penalties should be treated more leniently when subjected to facial challenge than criminally enforced laws, as the deterrent chilling effect on speech is far less when only civil penalties are involved.

Moreover, the Court has recognized that mere regulations of speech present less of a First

Amendment concern than total bans or prior restraints. *See Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 127 (1989) (distinguishing *unconstitutional total ban* on dial-a-porn for adults on the ground that it was indecent for minors from *constitutional regulation* of indecent broadcasts in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978)); *cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (prior restraint).

As the dissent noted in *Ashcroft*, regulations that impose costs, or that create some risk of user embarrassment are not *per se* unconstitutional and, when they are for children's protection, have been upheld by the Court. 542 U.S. at 682–83. H.B. 1181 prohibits websites from retaining identifying information for its verified adult users, minimizing the risk that the information would be leaked and result in user embarrassment. This further minimizes any chilling effect on adult access. In any case, the First Amendment does not grant a right to remote sexual stimulation with zero risk of embarrassment. *Cf. Ashcroft*, 542 U.S. at 683 (stressing the confidentiality provisions of the law at issue and citing *United States v. American Library Assn., Inc.*, 539 U.S. 194, 209 (2003) (plurality opinion) ("[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment")).

Additionally, different modes of communication present different First Amendment considerations. At one end of the spectrum, where First Amendment protections are most stringent, is the individual adult possessing material in the privacy of his home.

Stanley v. Georgia, 394 U.S. 557, 565 (1969). At the other end of the spectrum, where greater regulation is permitted, are broadcast media, like radio or television, in which both the audience composition and the content are diverse and fluctuating. *Pacifica,* 438 U.S. 726.

Another factor is whether the law being facially challenged attempts to suppress ideas and viewpoints, such as are involved with political speech. Such restrictions are subject to the highest possible scrutiny and are "presumptively unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–830 (1995). Conversely, evenhanded, viewpoint-neutral laws are subjected to a "less exacting overbreadth scrutiny." *Broadrick*, 413 U.S. at 616. Content-based speech regulations may present no First Amendment problem "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

Speech that expresses no ideas or viewpoints, such as run-of-the-mill pornography, is accorded less First Amendment protection. *See*, 315 U.S. at 571–72 (explaining that the "lewd and obscene" were not accorded First Amendment protection because they were "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.") Society's interest in protecting such graphic sexual expression is "of a wholly different, and lesser, magnitude than the interest in untrammeled

political debate . . . ." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–71 (1976) (plurality opinion).

Yet another consideration is whether the law at issue addresses pure speech, where First Amendment protections are strongest, or expressive conduct, where greater restrictions are permitted. *Broadrick*, 413 U.S. at 616.

In sum, speech regulations are scrutinized more leniently, and First Amendment protections are at their weakest when children are at risk; where no criminal prosecution or total ban or prior restraint or viewpoint discrimination is present; where the law regulates conduct; and where the content is sexually graphic and is broadly disseminated in a manner that may expose children.

H. B. 1181 is just such a law. Its sole purpose is to restrict children's access to sexually graphic material. Pet.App.170a. It uses solely civil enforcement and contains no criminal penalties. *Id.* at 173a–175a. It is a mere regulation, not a ban or prior restraint. *Id.* at 169a–175a. It involves no restraint upon the expression of ideas or viewpoint discrimination. *Id.* The activity it restricts, the commercialized remote sexual stimulation of children, is more conduct than speech. H.B. 1181 does not target individualized communication between adults, but widely disseminated, intrusive,[8] sexually graphic content accessible by children.

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[8] *See*, *supra*, section I.

The internet of today, particularly in the age of social media where children are barraged by unsolicited, algorithm-driven material that populates their "feeds," is more like the broadcast media the Court permitted regulation of in *Pacifica,* than like the internet of the late 1990's and early 2000's, except that the risk to children is now orders of magnitude greater.

For these reasons, H.B. 1181's applications to non-obscene material present little danger of infringement of core First Amendment interests.

All these factors show there is little, if any, protected speech unconstitutionally restricted under H.B. 1181. Balanced against that is the vast amount of plain obscenity Petitioner's websites contain. Consequently, H.B. 1181, does not violate the First Amendment because it is not overbroad when "judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615; 144 S. Ct. at 2397.

The Court should reject Petitioner's' facial challenge to H.B. 1181.

D. *Reno* and *Ashcroft* are not controlling.

The Courts' decisions in *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997) and *Ashcroft* are not controlling here.

Reno involved several dispositive facts that are absent here. The federal law at issue in *Reno* was enforced through criminal penalties, including imprisonment for up to two years for each violation.

521 U.S. at 860. The Court found the statute vague, because its provisions paralleled only one of the three *Miller* factors. *Id.* at 873–874. The Court found that the threat of criminal prosecution under that vague law could chill protected adult speech, *id.*, and that this chilling effect posed greater First Amendment concerns than those posed by civil regulations. *Id.* at 871–872. Conversely, H.B. 1181's definition of "sexual material harmful to minors" parallels all three of the *Miller* factors, adding "with respect to minors" to each element, Pet.App.170a, and it is enforced only through civil monetary fines. *Id.* at 173a–175a.

The *Reno* Court found that the late 1990's technology did not enable senders to prevent children from receiving communications without also preventing receipt for adults. *Id.* at 876. As the court below found, age-verification technology has developed dramatically since the 1990s. Pet.App.15a. Finally, the law at issue in *Reno* applied to non-sexual content, 521 U.S. at 873, whereas H.B. 1181 applies only to sexual material harmful to minors. Pet.App.170a. The *Reno* Court emphasized that the law at issue there applied to non-commercial speech, 521 U.S. at 877, while H.B. 1181 applies only to commercial websites. Pet.App.169a, 171a. The law at issue in *Reno* applied a nationwide "community standard," 521 U.S. at 877–878, whereas H.B. 1181 could involve only community standards within Texas. Pet.App.170a. *Reno* is clearly distinguishable.

Ashcroft is distinguishable for several critical reasons. The most important distinguishing factor is that the law at issue was enforced with criminal penalties, including up to six-months' imprisonment,

leading to the remark that the criminal nature of the law at issue there made it a "repressive force." 542 U.S. at 660–661. And, it provided merely an affirmative defense for websites that used adult verification, 542 U.S. at 662, whereas H.B. 1181 requires age verification up front. Pet.App.171a.

Finally, as Respondent ably demonstrated in its Brief in Opposition to the Petition for Writ of Certiorari, the technology has advanced greatly since the era of *Reno* and *Ashcroft* such that age verification software enables websites to reasonably distinguish adult users from children. Resp.18–21.

The holdings in both *Reno* and *Ashcroft* rest on facts different than those present here, the most significant being that this case involves no criminal enforcement. Those cases are not controlling here.

E. H.B. 1181 is the least restrictive, effective legislative remedy.

The five-justice majority in *Ashcroft* found that the criminal law at issue in that case did not satisfy First Amendment requirements largely because it considered parent-initiated filtering software to be a less restrictive alternative. 542 U.S. at 668–670. However, as the dissent noted, the proper constitutional question is whether there is a less restrictive and *effective legislative alternative* to the *status quo*. *Id.* at 684. Parental filtering software is simply part of the *status quo* posture of doing nothing, which is always less restrictive than when lawmakers take action. *Id.*

The dissent correctly noted that filtering software costs money, which some parents cannot afford; that it placed unreasonable reliance on parental vigilance against a backdrop of many parents who worked and left children unsupervised for long periods; and finally, that filtering software blocked much harmless and valuable material. *Id.* at 684–687.

Justice Scalia would have upheld the law at issue in *Ashcroft* because it involved behavior amounting to criminal solicitation to attract children to indecent material, which is behavior, not speech. *Id.* at 676.

All the factors noted by the four justices that would have upheld the law at issue in *Ashcroft* are present with greater force here. H.B. 1181 provides the least restrictive, effective *legislative* alternative to doing nothing. And, it targets an activity that is more conduct than speech—selling remote sexual stimulation to children.

In the twenty years since *Ashcroft*, the availability of parental filtering software has done nothing to stem the tide of online hardcore pornography available to children; rather, the problem has become markedly worse. This demonstrates that parent-initiated filtering software can no longer be considered an effective alternative to age-verification requirements. H.B. 1181 is the least restrictive, effective legislative remedy.

CONCLUSION

Since the Court's 5-4 decision in *Ashcroft*, an entire generation of children have been exposed to an

explosion of online pornography. The First Amendment was intended to ensure the free expression of ideas, not the largely obscene, idea-vacant sexual imagery populating Petitioner's websites. This pervasive sexual imagery threatens children far more than the broadcast media this Court has long permitted lawmakers to regulate. Petitioner's websites contribute nothing to the contest of ideas. Indeed, Petitioner's members peddle remote sexual stimulation, which is more conduct than speech. Requiring users to verify their adult age before accessing this content threatens no core First Amendment interests. H.B. 1181 protects children from being violated by commercial smut peddlers who would profit by destroying their innocence.

Numerous factors distinguish H.B. 1181 from the laws at issue in *Reno* and the 5-4 decision in *Ashcroft* II: most notably that H. B. 1181 involves no criminal penalties or jail time and is specific in its description of content requiring verification. These distinguishing factors come before the Court in the context of a twenty-year record of parental filtering software's practical inefficacy since *Ashcroft*.

Petitioner brought this action before giving Texas officials an opportunity to show they can implement H. B. 1181's civil penalties without sacrificing core First Amendment interests. Those interests are treasured in our free society—but so are our children. Texas deserves a chance to show that it can protect both. These factors, coupled with the Court's deep skepticism of premature facial challenges, especially in the internet context, tip the balance firmly in favor of H. B. 1181's facial constitutionality.

Accordingly, the Court should reject Petitioner's facial challenge and affirm the decision of the court below.

November 15, 2024.

Respectfully submitted,

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APPENDIX

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Alabama Legislature

Representative Ben Robbins, primary sponsor of HB 164

Representative Susan DuBose, sponsor

Representative David Faulkner, sponsor

Representative Russell Bedsole, supported and voted in favor

Representative Ron Bolton, supported and voted in favor

Representative Jim Carns, supported and voted in favor

Representative Danny Crawford, supported and voted in favor

Representative Ben Harrison, supported and voted in favor

Representative Leigh Hulsey, supported and voted in favor

Arkansas General Assembly

Senator Joshua Bryant, cosponsor of SB 66

Representative Robin Lundstrum, cosponsor

Florida Legislature

Representative Chase Tramont, primary sponsor of HB 3

Representative Lauren Melo, cosponsor

Idaho Legislature

Representative Vito Barbieri, cosponsor of H 498

Representative Judy Boyle, cosponsor

Representative Jaron Crane, cosponsor

Representative Jacyn Gallagher, cosponsor

Representative Dale Hawkins, cosponsor

Representative Ted Hill, cosponsor

Representative Wendy Horman, cosponsor

Representative Jordan Redman, cosponsor

Representative Tony Wisniewski, cosponsor

Representative Barbara Ehardt, supported and voted in favor

Senator Kelly Anthon, cosponsor

Senator Scott Grow, cosponsor

Senator Brian Lenney, cosponsor

Senator Tammy Nichols, cosponsor

Senator Glenneda Zuiderveld, cosponsor

Indiana General Assembly

Assistant Majority Floor Leader Senator Liz Brown, primary author of SB 17

Assistant Majority Floor Leader Representative Joanna King, House sponsor

Kansas Legislature

Senator Mark B. Steffen, M.D., sponsor (as member of committee) of SB 394

Senator Mike Thompson, supported and voted in favor

Kentucky General Assembly

Representative Candy Massaroni, cosponsor of HB 278

Representative Steve Rawlings, cosponsor

Louisiana State Legislature

Representative Beryl A. Amedée, coauthor of HB 142

Representative Kathy Edmonston, coauthor

Majority Leader Representative Mark Wright, coauthor

Senator Beth Mizell, coauthor

Mississippi Legislature

Senator Nicole A. Boyd, primary sponsor of SB 2346

Senator Angela Hill, cosponsor

Senator David Parker, cosponsor

Senator Bart Williams, cosponsor

Representative Lee Yancey, primary sponsor of House companion HB 1315

Representative Dan Eubanks, cosponsor

(Former) Representative Nick Bain, House conferee

(Former) Speaker Philip Gunn, supported and voted in favor

Montana Legislature

Senator Willis Curdy, primary sponsor of SB 544

Nebraska Legislature

Senator Dave Murman, primary sponsor of LB 1092

Senator Ray Aguilar, cosponsor

Senator Joni Albrecht, cosponsor

Senator Kathleen Kauth, supported and voted in favor

North Carolina General Assembly

Representative Mike Clampitt, cosponsor of HB 8

Representative George Cleveland, supported and voted in favor

Representative Neal Jackson, sponsor of House original House vehicle HB 534

South Carolina Legislature

Representative Travis Moore, primary sponsor of H. 3424

Representative John R. McCravy III, cosponsor

Senator Tom Davis, Senate committee manager

Tennessee Legislature

Senator Paul Rose, co-prime sponsor of SB 1792

Deputy Speaker Senator Janice Bowling, supported and voted in favor

Representative Jody Barrett, co-prime sponsor

Utah Legislature

Senator Todd D. Weiler, primary sponsor of SB 287

House Majority Whip Representative Karianne Lisonbee, supported and voted in favor

Representative Kay Christofferson, supported and voted in favor

Representative Ken Ivory, supported and voted in favor

Representative Tim Jiminez, supported and voted in favor

Representative Keven Stratton, supported and voted in favor