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

AMICUS CURIAE BRIEF OF SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are academics who study and teach law, legal process, and history, and several specialize in the study of the First Amendment. They share an interest in the coherent development of First Amendment law, particularly the law governing obscene content and similar content harmful to children. They believe that the Constitution should be interpreted in a manner with consistent the Founders' design and intention, and that our Founders did not support legal protections for obscenity, pornography, or other material harmful to kids.

Amici also believe that laws protecting children, the family, and parents' ability to control what enters the home are constitutional and, in fact, essential for the development of healthy society. These laws are particularly important given today's "digital childhood," in which smartphone-delivered pornography has become part of kids' lives as early as 9 or 10. In previous decades, pornography was delivered primarily through magazines or other physical printed or videotape media—thanks to this Court's rational basis review of zoning laws that kept adult bookstores far away from families. In contrast, parents have no real effective control over smartphones. Contrary to this Court's prediction in *Ashcroft*, filters do not work, as kids are more tech savvy than their parents and smartphone technology is not amenable to careful parental monitoring. The results have been a disaster for our children's mental health and sound development.

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1. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

First, the Framers of the Constitution were not free speech absolutists. And, most relevant here, our Founders never thought obscenity or, more broadly, pornography, should receive legal protection. Rather, their views, as expressed by Founders such as James Wilson, recognize that obscene and similar types of speech can be prohibited.

Second, contrary to the claims of Petitioners, there is no evidence that the Founders collected erotica or tolerated obscenity. While 18th century London publishers produced pornographic books, many of which would be judged obscene under 20th century standards, no such books were printed in America during that time period. Further, there is no evidence that the Founders, such as Jefferson, collected or approved of imported pornographic material, which Jefferson did not include in his library, one of the best in 18th century America.

Unlike England, where the first actions for obscenity or "obscene libel" as it was then called occurred in the 18th century, there were no published obscenity cases until the 19th century. This "gap" does not reflect tolerance of the Founding generation towards obscenity. Rather, it reflects that no pornography was printed in the United States and the importation and distribution of books, including the pornographic books published in England through the 18th century, was difficult and expensive. But, by the early 19th century, as printed materials became cheaper and more available and pornography began to be published in the United States, states passed laws and initiated prosecutions against obscenity. These prohibitions, which never raised First Amendment concerns, were

uncontroversially applied to new technologies such as the telegraph and telephone in the 19th century and radio and television in the early 20th century.

Third, in *Miller v. California*, 413 U.S. 15, 24 (1973), the Court adopted a focused, difficult-to-prove test for obscenity. And, it made clear that *only* obscene speech lacked First Amendment protection. As a result, laws restricting non-obscene, First Amendment-protected pornography were reviewed under strict scrutiny.

But, the Court did not leave families powerless against either obscene pornography or constitutionally protected sexually explicit material. After *Miller*, the Court applied rational basis review to laws focusing on the effect of speech or controlling children's access to obscene and near-obscene content. The Court ensured that legislators had the flexibility to respond to the challenge that new media posed to families attempting to control what enters the home—or via the smartphone what a child sees anywhere.

For instance, this Court continues to review zoning restrictions under rational basis scrutiny, allowing communities to keep stores which sell obscene material and constitutionally protected sexually explicit material away from kids and families. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Similarly, the Court upheld age restrictions on the sale of "girlie magazines." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). And, in *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 740 (1970), the Court upheld on rational basis review a federal law that allowed individuals to bar the post office from delivering sexually suggestive catalogs to their homes. With these

precedents, and others like it, families had the ability to keep obscene and constitutionally protected sexually explicit content, which until the 1990s was distributed in physical form, i.e., magazines or VCRs, out of the home.

H.B. 1181 simply updates this precedent for the smartphone which distributes pornography digitally. A sensible restriction that does not directly regulate speech and allows parents to control content that enters the home, H.B. 1181 receives rational basis review.

Fourth, without legislators' flexibility in passing laws that indirectly regulate access to pornography, helping parents control what enters the home, children are harmed. The smartphone is a portal that has given children access in a private, unsupervised way to huge amounts of the pornography, both obscene and First Amendment protected. It can deliver content outside of parental control *both* within the home and anywhere the child is located. It is a psychological experiment on our children to which parents did not consent.

The results have been disastrous, as psychologists have documented. The grotesque truth is that pornography is simply a standard part of today's American "digital childhood." Most children in America initiate watching sexually explicit material around the ages of 10 to 14 years of age. This exposure leads to more violent and risky sexual encounters. Further, pornography reduces successful romantic attachment and satisfaction with one's sex life and partner.

Fifth, Petitioners base their entire argument on the accusation that the lower court ignored this Court's

decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004)—but applying the reasoning of *Ashcroft* would compel the Court to uphold H.B. 1181. It is a pre-smartphone case, and its twin assumptions about the internet are no longer true. In striking down age verification requirement of the Children's Online Protection Act (COPA), *Ashcroft* pointed to filters as an effective least-restrictive alternative to age verification requirements, preferable under the First Amendment. But, twenty years of experience shows kids are more tech-savvy than their parents—making them ineffective. Filters impose an unreasonably high burden on parents to install, update, and monitor filters, except perhaps those with advanced computer science degrees.

Further, the *Ashcroft* Court stated that age verification perforce requires a user to reveal his or her credit card numbers or government-issued documents or otherwise identify him or herself. *Id.* This forced identification, the *Ashcroft* Court ruled, functioned as a burden on constitutionally protected adult speech. *Id.* at 663. But new technology has developed to allow individuals to verify age without revealing their identities. These technologies—ranging from trusted third parties employing zero-knowledge proofs to age estimation based on hand movements—allow verification without identification, thereby eliminating the burden on speech that *Ashcroft* identified.

Most broadly, *Ashcroft*'s assumption that people browse the internet anonymously—and then have to identify themselves with age verification—is false. Internet users are constantly tracked and monitored, and their IP addresses and device numbers can easily be associated with real people. Age verification does

not burden speech by eliminating on-line anonymity, as *Ashcroft* assumed, because if you are online your identity is already compromised.

Finally, the scope of H.B. 1181 is a matter of state law, and therefore, the Court should wait for an as-applied challenge. Petitioners assume that H.B. 1181's definition of "harmful to children," which the law defines as "obscene with respect to children," extends to constitutionally protected sexually explicit material. But, Texas courts need not accept that construction and could find that the law *only* covers constitutionally unprotected obscene content.

ARGUMENT

I. H.B. 1181 Is Consistent With the Original Intent of the First Amendment

A. The Founders and Early American Jurists Would View H.B. 1181 As a Constitutional and Proper Use of State Power.

H.B. 1181 is consistent with the original intent of the First Amendment. The Framers considered free speech to be a natural right. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 258-59 (2017). However, they distinguished between the liberty of free speech and its licentious abuse such as obscenity or "obscene libel" as it was called in the 18th century.

Contrary to Petitioners' claim that "the distribution, exhibition, and possession of pornographic material was simply not thought to be any of the state's business,"

Pet. Br. at 19, *citing* Geoffrey R. Stone, *Sex and the First Amendment*, 17 First Amend. L. Rev. 134, 135 (2022), the Founders saw an important role for the state in regulating harmful material.

The Framers of the Constitution were not free-speech absolutists. Rather, as the work of Leonard Levy demonstrates, in his aptly titled book, *A Legacy of Suppression, see* Leonard W. Levy, Legacy of suppression: Freedom of speech and press in early American history (1964), almost all the American Founders, even the critics of the Alien and Sedition Acts such as James Madison and Thomas Jefferson, believed morality and public good limited the right to freedom of speech. *See* also Leonard W. Levy, Jefferson And Civil Liberties: The Darker Side 56 (1963). "For the founders . . . it would have been second nature to distinguish 'freedom' and 'license.'" Christopher Wolfe, *Originalist Reflections on Constitutional Freedom of Speech*, 72 SMU L. Rev. 535, 537-38 (2019). From George Washington to Thomas Jefferson, all of the Founders distinguished ordered liberty from disordered licentiousness. They owed that idea of rights in part to John Locke, who wrote that human beings had "liberty, not license" in the state of nature. *See* John Locke, Two Treatises on Government 270-71, 277-78 (Peter Laslett 5th ed., 2019).

The Founders also inherited the views of William Blackstone, who in his Commentaries recognized that common law courts could sanction as libel "any writings, pictures, or the like of an immoral or illegal tendency." 4 William Blackstone, Commentaries on the Laws of England *150 (1765). James Wilson, one of the handful of men who signed both the Declaration of Independence

and the Constitution, in his Lectures on Law "treats public indecency as one of the public nuisances, 'which attack several of those natural rights' of individuals." Thomas G. West, *Free Speech in the American Founding and in Modern Liberalism*, 21 Soc. Phil. and Pol'y, 310, 341 (2004). Wilson states, "[t]he citizen under a free government "has a right to think, to speak, to write, to print, and to publish freely, *but with decency* and truth, concerning publick men, publick bodies, and publick measures." James Wilson, 2 The Works of James Wilson 287 (James DeWitt Andrews ed., 1896 ed.) (*emphasis* added).

Justice James Kent, a leading legal scholar of the era, who served as a state legislator and voted for New York State's adoption of the Constitution, wrote "Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have upon the same principle [protecting the 'the tender morals of the young' against 'gross violations of decency'] been held indictable." *People v. Ruggles*, 8 Johns. R. 290 (1811).

From the first decades of the 19th century onwards, legislatures and courts have prohibited the production and distribution of obscene material. Connecticut passed an act in 1803 forbidding the "printing, import, sale, or distribution of books, pamphlets, ballads or other printed material of an immoral tendency containing obscene language, prints, or descriptions."[2] Vermont adopted the first criminal statute banning obscenity in 1821 followed

2. Marcus A. McCorison, *Printers and the Law: The Trials of Publishing Obscene Libel in Early America*, 104 Papers of the Bibliographical Soc'y of Am. 181, 183 (2010).

by Connecticut in 1834 and Massachusetts in 1835.[3] In 1815, in *Commonwealth v. Sharpless*, a printmaker was held liable for display of an obscene painting. In a written opinion, the Pennsylvania Supreme Court upheld his conviction.[4] In 1821, the Supreme Judicial Court of Massachusetts affirmed a conviction for publication of an illustrated edition of *Fanny Hill*.[5]

The reach of these early laws and legal actions certainly would have included the content H.B. 1181 covers. After first passing laws prohibiting the importation of obscene or pornographic material,[6] Congress barred obscenity from the U.S. mail in 1865 in reaction to the pornography sent to Union troops.[7] Soon after, Congress passed the Comstock Act in 1873. *See* Ch. 258, 17 Stat. 598, 599 (1873), *codified at* 18 U.S.C. §§ 1461-1462. The Comstock Act broadly restricted mailing obscene materials. States regulated the transmission of obscene content in telegraph.[8] Federal law, starting in 1914, regulated obscene radio transmission, and, to this day, the Communications Act regulates obscene transmissions on radio and

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3. *Id.* at 186.

4. *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815).

5. *Commonwealth v. Holmes*, 17 Mass. 335 (1821).

6. James C. N. Paul & Murray L. Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 214, 215 (1957), *citing* The Tariff Act of 1842, 5 Stat. 548, 566 (1842).

7. Act of March 3, 1865, ch. 89, § 16, 13 Stat. 507.

8. *See*, *e.g.*, *Taylor v. State*, 76 Tex. Crim. 642, 643 (1915).

television.[9] For most of our history, even the most unsophisticated parent could keep undesirable material from entering the home.

B. There is No Evidence that the Founders Tolerated or Collected Pornography or that Such Material Was Common or Tolerated in 18th Century America.

The Founders saw press freedom from the perspective of licensing laws for printing presses. These laws in England gave a printing monopoly to one guild, the London Stationers' Company, and limited book importation to certain firms in London. Fredrick Seaton Siebert, Freedom of the Press in England, 1476-1776:

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9. The Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302, though adopting a laissez-faire approach to spectrum management, nonetheless authorized the Department of Commerce to publish Regulation 210 . It stated that "No person shall transmit or make a signal containing profane or obscene words or language." Milagros Rivera-Sanchez, *The Origins of the Ban on Obscene, Indecent, or Profane Language of the Radio Act of 1927*, 149 Journalism & Mass Comm. Monographs 1, 7 (1995). The Radio Act of 1927, ch. 169, 44 Stat. 1162, 1172-73, which was a federal licensing scheme based upon a claim of federal ownership of all radio spectrum, prohibited transmitting obscene, indecent, and profane speech. Title III of the Communications Act of 1934 mirrored the 1927 Act and adopted its obscenity, indecency, and profanity language largely verbatim. The ban on obscene, indecent, and profane language was amended in 1948 and replaced with criminal penalties for using such language over the airwaves and codified at 18 U.S.C. § 1464 where it forms the basis of the FCC's indecency regulation still in force for radio and television. *See* Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U L. Rev. 1463, 1479-80.

THE RISE AND DECLINE OF GOVERNMENT CONTROLS 22-23, 172-76 (1952). By the turn of the 18th century, England abandoned governmental licensing of the press,[10] but licensing regimes persisted in the United States until as late as 1730 in some areas.[11] This ensured that nearly all politically and culturally controversial materials were censored. Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STANFORD L. REV. 661-765 (1985).

After licensing was abandoned and ecclesiastical courts relinquished their jurisdiction over obscenity and other morals offenses, English courts developed their own law of libel in the mid-18th century to cover obscenity, first termed "obscene libel." James R. Alexander, Roth *at Fifty: Reconsidering the Common Law Antecedents of American Obscenity Doctrine*, 41 J. Marshall L. Rev. 393, 397-98 (2008). King's Bench assumed from the ecclesiastical courts jurisdiction over offenses against public morals, including lewd conduct, a century earlier in 1663. *Id*. at 398-400. The crown's courts developed a doctrine of obscene libel by 1727. *Id*. at 400. The doctrine was therefore firmly rooted in the fundamental law at the time of the American Founding.

Against this long history of regulating obscenity, Petitioners make an originalist claim that, "[s]exual expression and imagery were common, widespread, legal,

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10. The last licensing statute lapsed in 1695 in England. Michael Treadwell, *1695-1995: Some tercentenary thoughts on the freedoms of the press*, 7 HARVARD LIBRARY BULLETIN 3-5 (1997).

11. JAMES RAVEN, THE BUSINESS OF BOOKS: BOOKSELLERS AND THE ENGLISH BOOK TRADE 1450-1850 at 145 (2007).

and quite explicit" before and during the Founding era. Pet. Br. at 18, *citing* Geoffrey R. Stone, *Sex and the First Amendment*, 17 First Amend. L. Rev. 134, 135 (2022). Petitioners assert that American colonial bookstores "carried an extraordinary array of erotica." *Id.* From which they conclude, "the distribution, exhibition, and possession of pornographic material was simply not thought to be any of the state's business." *Id.* at 18-19.

This is wildly inaccurate. Petitioners do not provide a single example of a widely read and accepted explicit pornographic book in the Founding Era.[12] This is because "[n]o homegrown pornography was published in eighteenth-century America." Peter Wagner, Eros Revived: Erotica of the Enlightenment in England and America, 297 (1988). In fact, "[t]here seems to have been no domestically produced pornography" until the 1840s. Judith Giesberg, Sex and the Civil War : Soldiers, Pornography, and the Making of American Morality 12 (The Univ. of N.C. Press, 2017).

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12. Petitioners claim that "many Americans" "read sex manuals such as Aristotle's Masterpiece—an 'erotic' anthology understood to have medical value." Pet. Br. at 18, *citing* Vern L. Bullough, *An Early American Sex Manual, Or, Aristotle Who?*, 7 Early Am. Literature 236, 236, 241 (1973). "Aristotle's Masterpiece" was a folkloric collection of information about reproduction and childbirth, which had pictures that only the most severe Puritan could call erotic. It was not widely accepted let alone openly read. Jonathan Edwards in 1744 learned of its circulation among some of his congregants. He demanded destruction of the book and signed repentances from those reading and distributing it. Mary E. Fissell, *Hairy Women and Naked Truths: Gender and the Politics of Knowledge in Aristotle's Masterpiece*, 60 The William and Mary Quarterly 43, 43 (2003).

Rather, "[a]mong people who did have the means . . . [erotic] writings . . . were imported from the Old World." WAGNER, *supra* at 292. Because "the common people lacked the means to buy bound, imported books." Russell L. Martin, *A Note on Book Prices, in* I A HISTORY OF THE BOOK IN AMERICA at 522, 523 (2007), *citing* B. Franklin, Biography, at 1387, imported books were not widely circulated. It is worth noting that this paucity of books, particularly those that would be considered obscene, likely explains why there were obscenity trials in 18th century England but not the United States.

Rather than cite evidence of a wide distribution of obscene or erotic material, Petitioners claim it was common among elites. They state that Thomas Jefferson "collected many [such] [sic] works." Pet. Br. at 18, *citing* GEOFFREY R. STONE, SEX AND THE CONSTITUTION 83 (2017). As evidence, they point to Jefferson's library, which they say contained numerous works that "portrayed vivid scenes of sexuality, lust, and sexual scandal." Pet. Br. at 18.

The federal government bought Jefferson's library, which became the nucleus for the Library of Congress. Its contents have been fully documented. But, none of the books Petitioners cite in Jefferson's library, *see id, citing* 4 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 433-36, 447, 456, 553-54 (E. Millicent Sowerby ed., 1955)—would be considered obscene under 20th century standards—or any reasonable application of 19th century standards.

Petitioners, for instance, reference Sterne's *Tristram Shandy*, a book that concededly critics have described as the "dirtiest novel in English." Frank Brady, *Tristram Shandy, Sexuality, Morality, and Sensibility*,

4 Eighteenth-Century Studies, 41 (1970). But, like the Restoration dramas of Wycherley, Sedley, and Congreve, which Petitioners also cite, and which are rife with sexual puns and clever innuendos, *Tristram Shandy* lacks explicit descriptions of sex. Petitioners also reference Dante's *Inferno*. This work has scatological moments, as in the Eighth Circle where the flatterers are submerged "in an excrement / that seemed to have come from human privates" (*Inferno* XVIII, 113-114), but is not obscene.

What is significant about Jefferson's library is what the Petitioners fail to mention in their historical survey, namely what it *lacks.* In the 18th century, there was a huge amount of pornography produced in London and elsewhere in Europe.[13] Books such as *The Memoirs of a Woman of Pleasure*, a/k/a *Fanny Hill*, were in wide circulation in Europe—although only a handful of copies were imported into the United States in the 18th century.[14] These books had detailed descriptions of sexual acts with many editions featuring explicit illustrations. Indeed, *Fanny Hill* was considered obscene in the United States until the mid-20th century. *See Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

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13. S*ee generally* Julie Peakman, Mighty Lewd Books: The Development of Pornography in Eighteenth-Century England 12 (2003) ("By the end of the eighteenth century, London was awash with all sort of printed matter . . . [p]art of this cache of reading was highly erotic, including licentious novels, adventurous travelogues, rude prints, ribald songs and racy poems, and some pornographic.").

14. *See* Donna I. Dennis, Obscenity Regulation, New York City, and the Creation of American Erotica, 1820-1880 (Sept. 2005) (Ph.D. dissertation, Princeton University) (There is no record of significant importation of *Fanny Hill* until the beginning of the 19th century).

Yet, despite owning one of the best collections in the United States, filled with thousands of imported books, Jefferson notably failed to collect any of the pornographic works widely distributed in Europe at the time. Petitioners are just flat wrong in suggesting that Jefferson's library evidences the Founders' receptivity to obscenity or pornography.

There is no evidence that the Founders valued pornography or were opposed to laws banning or regulating its distribution. Pornography was not printed in America in the 18th century, and imports were only accessible to elites. And, even the most sophisticated of the Founders who had vast collection of imported books, Thomas Jefferson, did not own material, like *Fanny Hill*, which was considered obscene until 1966.

II. H.B. 1181 Is Consistent With First Amendment Doctrine Developed By This Court

A. Even After *Miller*, this Court Reviews Laws Under Rational Basis, Such as H.B. 1181, That Target the Effects of and Kids' Access to Obscene Content and Sexually Explicit Material.

The Court's decision in *Miller v. California* limited the scope of obscenity laws by defining "obscenity" narrowly. It announced a three-part test in use today: (1) Whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;

and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

"It should also be noted that the Texas law restricts commercial pornography, and the modern court distinguishes commercial speech from non-commercial speech (which the Framers did not do), with commercial speech lower in the balance. In the dicta of *Miller*, the Court wrote that "in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Id.* at 34.

Despite this statement and in contrast to the older *Hicklin* test, that asked whether a work had a 'tendency . . . 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) (No. 14,571), *citing Regina v. Hicklin* (L. R., 3 Q. B. 360), the effect of the *Miller* definition was to make obscenity very difficult to prove, and prosecutions are rare in the United States today.[15]

But, until the advent of the smartphone, pornography was not flowing unchecked into the home. This is because

15. Bruce A. Taylor, *Hard-Core Pornography: A Proposal for A Per Se Rule*, 21 U. Mich. J.L. Reform 255, 271 (1987) (This morass of conflicting definitions can discourage prosecutors from bringing obscenity cases to trial and can confuse jurors, causing deadlocked and hung juries, and acquittals on material that is clearly obscene.); Attorney General's Comm'n On Pornography, U.S. Dep't Of Just., Final Report 367 at 100-01 (1986).

the Court reviewed on rational basis laws that restricted the ability of minors to access pornography or regulated its effects.

For instance, this Court continues to review zoning restrictions under rational basis scrutiny, allowing communities to keep material obscene under *Miller*, as well as constitutionally protected sexually explicit material, away from kids and families. *Renton*, 475 U.S. at 48.

Under this precedent, communities could ensure the stores that sold obscene and constitutionally protected sexually explicit material would do so in places children could not walk to or easily access. Further, most of these stores would not allow children. In an age where most pornography is distributed via printed media or video-cassettes, these laws allow parents to control the content that enters the home.

Similarly, the Court upheld age restrictions on the distribution of "girlie magazines." *Ginsberg*, 390 U.S. at 639. These magazines were not obscene but not suitable material for minors. *Id.* at 633. Nonetheless, the Court upheld New York State's age verification restrictions on their purchase. *Id.* at 639.

These cases demonstrate that the Court looks with lenience towards laws aimed at restricting children's access to obscene as well as constitutionally protected sexually explicit material for adults. Petitioners' efforts to distinguish this case fail. They claim that "the law at issue in *Ginsberg* did not place any restriction on adults' access to sexual materials; it did not, for example, require sellers

to conduct age verification of adult customers." Pet. Br. 20. To the contrary, adult individuals who appeared below age to proprietors would have to produce identification. The New York law, therefore, clearly burdened adult access to speech—at least to those New Yorkers who retained their youthful looks.

In *Rowan*, 397 U.S. 728, the Supreme Court upheld on rational basis review, a federal law, Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 645, 39 U.S.C. § 4009, that allowed individuals to bar the post office from delivering sexually suggestive catalogs to their homes. The law's "declared objective . . . was to protect minors and the privacy of homes from such material." *Rowan*, 397 U.S. at 732. Rejecting that advertisers had a right to address children through the mail, the Court stated the Constitution left "with the homeowner himself the power to decide 'whether distributors of literature may lawfully call at a home.'" *Id.* at 736. The Court concluded that the Constitution "permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence." *Id.* at 738.

Of course, the social media platforms and websites that deliver pornography to kids are typically free—but paid for by advertisers. Like catalogs, internet platforms are advertisement delivery mechanisms.

And, even in cable television, where parents can control which channels enter the home, members of this Court have *not* automatically applied strict scrutiny, looking flexibly upon regulation that assists parents in their efforts. In *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996), the Court examined the

rights of cable public access channel programmers, i.e., the individuals who appear in or produce programs on cable systems' public access, education, government, and leased channels. They challenged the Cable Television Consumer Protection and Competition Act, which restricted both obscene and constitutionally protected indecent speech. *Id.* at 732.

Undercutting Petitioners' claim that all restrictions of protected speech receive strict scrutiny, the Court declined to automatically apply strict scrutiny to the Act's content-based restrictions. Calling these standards, "various verbal formulas," *id.* at 756, the Court said it "need . . . [not] here determine whether, or the extent to which, . . . [precedent] imposes some lesser standard of review where indecent speech is at issue." *Id.* at 755.

Justice Thomas wrote in his concurrence, "Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position." *Id.* at 832 (Thomas, J., conc.); *see also Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 821 (2011) ("the practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians.") (Thomas, J., diss.).

These precedents show that the claims of Petitioners that "the teaching of . . . [this Court's] cases is unmistakable: Strict scrutiny applies to laws that burden adults' right to access sexual expression that is constitutionally protected for them, even if those laws are aimed at preventing

minors' exposure to that content" is simplistic. Pet. Br. at 23. Petitioners ignore this Court's more nuanced approach to standards of review, allowing legislators to respond to new technologies that threaten the home in new ways.

B. The Need for Rational Basis Review for Statutes Restricting Secondary Effects of and Children's Access to Pornography.

H.B. 1181 responds to perhaps the greatest and most disruptive threat to the ability of parents to control what their kids see and hear: the smartphone. Few other technologies have had such disastrous effects upon children and adolescents, radically altering the source and content of what children see and hear. At the same time, the smartphone has become a necessary part of children's lives in the United States, with schools and children's sports activities relying on them, as well as parents relying on them for safety and communications.

The ground has shifted remarkably since this Court decided *Reno v. ACLU* and *Ashcroft*. In deciding these pre-smartphone cases, the Court was writing in a world in which desktop computers accessed the internet. The Court could reasonably assume that parents have over-the-shoulder monitoring abilities.

Now, however, given the near impossibility of parents to know, monitor, or control what their kids view on smartphones, the grotesque truth is that pornography is simply a part of today's American "digital childhood." Most children in America initiate watching sexually explicit material around the ages of 10 to 14 years of age. Willoughby, et al., *Exploring Trajectories of*

Pornography Use Through Adolescence and Emerging Adulthood, 55 J. Sex Rsch. 297, 302 (2018). This huge psychological experiment has had disastrous results. Increasingly, young people seek out violent pornography, as pornography with physical aggression against women has become ever more common on the web. Davis, et al., *What Behaviors Do Young Heterosexual Australians See in Pornography? A Cross-Sectional Study*, 55 J. Sex Rsch. 310, 317 (2018).

And it should surprise no one that this type of content harms children's normal and healthy development, diminishing lives and spreading unhappiness. Pornography use by children is linked to risky sex behaviors. *See* Koletic, et al., *Associations between adolescents' use of sexually explicit material and risky sexual behavior: A longitudinal assessment*, PLoS ONE, 14(6) (2019). Studies show that exposure to pornography is also linked to believing sexual violence myths as well as actual and anticipated dating violence and sexual violence. Rodenhizer & 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, 440 (2019).

Finally, pornography has been linked to mental health struggles among adolescents. Viewing pornography may have negative impacts on teens' self-esteem and body image. Maheux et al., *Associations between adolescents' pornography consumption and self-objectification, body comparison, and body shame*, 37 Body Image 89, 92 (2021). Pornography reduces successful romantic attachment and satisfaction with one's sex life and partner. Wright

et al., *Pornography Consumption and Satisfaction: a Meta-Analysis*, 43 Human Commc'n Rsch. 315, 336 (Jul. 2017). And this finding is consistent with the record levels of mental illness, loneliness, unhappiness—as well as radically diminished romantic attachment—that Gen Z faces. *See* Jonathan Haidt, The Anxious Generation: How the Great Rewiring of Childhood Is Causing an Epidemic of Mental Illness (2024).

H.B. 1181 responds to this crisis. Under this Court's precedent, it should be reviewed under the flexible standard that the Court extends to laws that either regulate kids' access to pornography or restrict pornography purveyors' access to the home. Just as the Constitution is not a "suicide pact," *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting), neither does it require children to grow up in a porn-addled world.

C. Under *Ashcroft*, H.B. 1181 Does Dot Burden Speech.

Petitioners claim that the Fifth Circuit's opinion ignores *Ashcroft.* Pet. Br. 28. There, this Court found the requirements in the COPA a burden on protected speech because it required users "to identify themselves [with government-issued ID] or provide their credit card information" 542 U.S. at 667. Justice Breyer's dissent clarified the nature of this burden: "in addition to the monetary cost, . . . the identification requirements inherent in age screening may lead some users to fear embarrassment. . . . Both monetary costs and potential embarrassment can deter potential viewers and, in that sense, the statute's requirements may restrict access to a site." *Id.* at 682-83.

In making these claims, the Court's reasoning was based on three conclusions: (1) users who use the internet and do not employ AV are anonymous and de-identified; (2) AV's required identification diminishes privacy and increases the chance for "embarrassment"; and (3) filters are an effective and less restrictive alternative than age verification. *Id.* at 667.

Ashcroft's reasoning shows that H.B. 1181 does not burden speech and passes constitutional muster. First, unlike 2004, when *Ashcroft* was decided, internet users are always carefully and ubiquitously tracked on the internet. Cookies and other tracking techniques allow internet firms to develop user profiles which are then sold to advertisers. These profiles can be easily linked to IP addresses or specific devices that, in turn, can be linked to actual persons. *Ashcroft* objected to age verification because it disrupted baseline internet privacy. Here, in 2024, with H.B. 1181, there is no baseline privacy that age verification disrupts.

Second, filters have proven wildly ineffective. Children and adolescents widely and freely access pornography. Willoughby, et al., at 297.

Third, numerous methods now exist for verifying age without revealing identity—so that individuals can age verify without surrendering appreciably more privacy. The *Ashcroft* Court, which existed at a time when age verification required revealing credit card numbers or government-issued identification, simply could not foresee these developments. Now, there are techniques that can verify age without privacy compromise.

For instance, our email addresses, which are stored all over the internet, create information about the networks in which individuals "live" online. Emails can be used to accurately estimate age. VERIFYMYAGE, *Age estimation using your email address*, https://verifymyage.com/email-address-age-estimation, (last visited Nov. 5, 2024).

Privacy-preserving biometrics can be used. Biometrics currently in use do not require face scans, fingerprints, or anything that reveals identity or meaningfully invades privacy. For instance, newly developed artificial intelligence techniques accurately estimate age by analyzing three types of hand movements in front of the webcam of their screen. Identity is not revealed nor is personally identifiable data produced, including fingerprints.[16]

Finally, techniques using trusted third parties can provide age verification without requiring users to identify themselves to the porn site. Electronic ID cards allow users to store in a digital wallet their attributes and credentials, such as age, and control what information to share and with what entities. It can verify age to a porn site without revealing *anything else* about its users.

The State of Louisiana already provides an electronic ID card through "LA Wallet." a third-party vendor. Those internet users who use LA Wallet can have it send a message to a porn site indicating that he or she is an

16. AGE CHECK CERTIFICATION SCHEME, *Border Age Model Testing*, https://accscheme.com/registry/age-assurance/needemand/ (last visited Nov. 5, 2024) (overall accuracy of testing data is 99%).

adult—and LA Wallet reveals *nothing* else about the user. This approach works. PornHub, a leading pornography website, embraced its use and works with its Louisiana users to gain access through LA Wallet. *See* GoValidate, LA Wallet, https://lawallet.com/.

Private firms, as well as governments, can issue reliable electronic ID cards. Already private firms are issuing these cards, e.g., Microsoft Entra Verified ID or MasterCard ID.[17] Because you must verify age with these third parties, they can provide trustworthy verification to other entities, such as pornography sites, without revealing users' identities.

D. Whether H.B. 1181 is Consistent With the First Amendment Turns On a Question of State Law and, Therefore, this Court Should Dismiss This Case and Wait for an As-Applied Challenge.

Petitioners and amici assume that Texas 1181's definition of "harmful to children" has the same meaning and scope that it has in COPA—and concededly their definitions are nearly identical. They both regulated "harmful to minors" as essentially the *Miller* test modified as "obscenity for minors" or "with respect to minors." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 267 (5th Cir.), *cert. granted*, 144 S. Ct. 2714 (2024) ("The newly enacted statute defines sexual material harmful to minors by adding "with respect to minors" or "for minors,"

17. Microsoft, https://www.microsoft.com/en-us/security/business/identity-access/microsoft-entra-verified-id (last visited Oct. 18, 2024); Mastercard, https://www.mastercard.us/en-us/business/overview/safety-and-security/identity-check.html (last visited Oct. 18, 2024).

where relevant, to the well-established *Miller* test for obscenity."); *Ashcroft*, 542 U.S. at 661.

There is, however, a notable difference between the statutes. COPA regulates material that is both "obscene" and "obscene relative to minors" while H.B. 1181 only regulates "obscene for minors." Clearly, by its statutory structure, COPA reaches both constitutionally unprotected obscenity and constitutionally protected sexually explicit material.

But, the same cannot be said for H.B. 1181. The statute *only* regulates matter that is "obscene for minors." It is far from clear whether this extends to constitutionally protected sexually explicit material. Whether it does is, at first instance, a question of state law. Judge Breyer stated in his dissent in *Ashcroft*, COPA's "harmful to children" standard "read literally, insofar as it extends beyond the legally obscene, could reach only borderline cases." 542 U.S. at 680. A state court could likely agree with Justice Breyer.

CONCLUSION

The Court should affirm the Fifth Circuit's judgment.

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