No. 23-1122

In the Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

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

BRIEF OF *AMICI CURIAE* STATES OF OHIO, INDIANA, AND 22 OTHER STATES IN SUPPORT OF RESPONDENT

THEODORE E. ROKITA
Indiana Attorney General

JAMES A. BARTA
Solicitor General
JENNA M. LORENCE
Deputy Solicitor General
IGCS – 5th Floor
302 W. Washington St.
Indianapolis, IN 46204
317.232.0709

DAVE YOST
Ohio Attorney General

T. ELLIOT GAISER*
**Counsel of Record*
Ohio Solicitor General
KATIE ROSE TALLEY
Deputy Solicitor General
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215
614.466.8980
thomas.gaiser@ohioago.gov

Counsel for Amici Curiae
(additional counsel listed at the end of the brief)

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STATEMENT OF AMICI INTEREST

States have long exercised their police power to protect children from obscene and otherwise age-inappropriate material, requiring strip clubs and sellers of pornographic magazines to check identification. Today, children no longer have to visit the strip club or adult bookstore to see explicit sexual performances. The internet pipes obscene materials glorifying sexual violence directly into children's hands via smartphones and tablets. So Amici States have a strong interest in seeing this Court uphold States' traditional authority to protect children from exposure to sexual violence and explicit images whose only function is to appeal to the prurient interest. In fact, several of Amici States have laws similar to Texas's age-verification law on their books or comparable pending legislation. *See Free Speech Coal. v. Paxton*, 95 F.4th 263, 269 n.11* (5th Cir. 2024).

Amici States write to explain why petitioners' challenge to Texas's law should fail under this Court's recent decisions in *Moody v. NetChoice LLC*, 144 S. Ct. 2383 (2024), and *Counterman v. Colorado*, 600 U.S. 66 (2023). Petitioners, purveyors of pornography, cannot clear the high bar for a First Amendment facial challenge under *Moody* because the vast majority of

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* Amici States Indiana and Montana currently are defending their age verification laws in litigation brought by pornographers. *Free Speech Coal. v. Rokita*, No. 1:24-cv-00980 (S.D. Ind.); *Free Speech Coal., v. Knudsen*, No. 9:24-cv-00067 (D. Mont.). Although this case reaches the Court on only a preliminary record, these Amici States are engaged in discovery to develop the record fully.

modern internet pornography is obscene as to adults and children alike, and thus unprotected. Any subset of regulated pornography falling within the First Amendment's scope as to adults is low-value speech that does not trigger the chilling concerns necessary to support a facial challenge. As both the majority and dissent in *Counterman* agreed, courts should not treat "borderline" unprotected speech as core speech by prophylactically creating a buffer zone to the buffer zone. 600 U.S. at 81; *id.* at 112 (Barrett, J., dissenting).

Such misconstruction of the First Amendment would intrude upon the States' police power, preserved by our constitutional structure, to protect children from serious and widespread internet pornography. Amici States have an interest in ensuring that the First Amendment is not misinterpreted to foreclose their power to regulate the conduct of commercial pornographers holding themselves out as purveyors of obscene products.

SUMMARY OF ARGUMENT

The States' compelling interest in protecting minors is at its height here. Texas enacted a modest regulation of the multi-billion-dollar pornography industry, which inflicts harm on children along every dimension—"psychological, social, emotional, neurobiological, and sexual." Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*, 45 Vt. L. Rev. 43, 51 (2020).

Internet pornography is prolific. Pornography websites receive more traffic in the U.S. than social media platforms Instagram, TikTok, Netflix, and Pinterest combined. *Top 100: The Most Visited Websites*

in the US, Semrush Blog (2024), https://perma.cc/PS27-483B. Pornhub—the largest online pornography site—reported that it alone had over 42 *billion* visits from patrons and 169 years' worth of content uploaded on its site in just one year. *The 2019 Year in Review*, Pornhub (2019), https://tinyurl.com/mpv2bbju. Minors' access to online pornography is equally unlimited. The average child is exposed to internet pornography while still in elementary school. Romney, *above*, at 48. Texas's law addresses this epidemic without impermissibly intruding on protected speech.

Just last term in *Moody v. NetChoice*, this Court emphasized the high bar for facial challenges under the First Amendment. 144 S. Ct. at 2394. Petitioners cannot clear that bar because much online pornography today is not constitutionally protected. Much of petitioners' content depicts hardcore, explicit sex (often portrayed in a violent and degrading manner) that is obscene as to both minors and adults under the standard this Court articulated in *Miller v. California*, 413 U.S. 15, 24 (1973).

To the extent that a subset of pornography may fall within the outer periphery of the First Amendment, it is paradigmatic low-value speech. *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 71–72 & n.35 (1976). It does not implicate any of the core constitutional values that give rise to chilling concerns sufficient to support a facial challenge. The Court should decline, as it recently did in *Counterman*, to treat borderline unprotected speech as central to the First Amendment. Nothing in the First Amendment requires expanding the constitutional "buffer zone" to encompass hardcore, sexually violent pornography.

Structural constitutional considerations provide an additional reason not to overextend the scope of the First Amendment. Under our constitutional design, States retain the powers they did not expressly cede to the federal government, including the States' historic police powers. U.S. Const. amend. X; *Bond v. United States*, 572 U.S. 844, 854 (2014). States' duty and authority to ensure the well-being of minors is a deeply rooted and enduring component of those powers. *New York v. Ferber*, 458 U.S. 747, 756 (1982). Misreading the First Amendment thus offends the Constitution by depriving States of their sovereignty.

States have undisputed power to restrict minors' access to obscene content, including pornography. *Ginsberg v. New York*, 390 U.S. 629, 638–39 (1968). This Court has repeatedly upheld age- and identity-verification requirements as predicates to engaging in adult activities, even when the underlying conduct implicates core constitutional rights. *See, e.g.*, *Crawford v. Marion Cnty. Bd. of Elections*, 553 U.S. 181, 197–98 (2008) (plurality); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001).

Despite that history, petitioners claim that Texas cannot require online commercial pornographers to do what brick-and-mortar strip clubs must: check customers' ages at the door. But the internet brought the "gentlemen's club"—and far worse—into the home; it did not disturb States' power to regulate minors' access to obscene content. States had the power to require identification checks in the pre-internet age, and they retain that power now. Indeed, many other adult industries—gambling, tobacco, alcohol—already employ age-verification technology. If anything, the ubiquity of internet pornography makes the States's

interest in protecting children stronger now than ever before.

ARGUMENT

I. States enjoy broad power to protect minors from harm.

States have a compelling interest in protecting children's welfare and broad power to pursue that interest, as this Court has repeatedly recognized. Texas's age-verification law effectuates the State's deeply important interest in protecting minors from the psychological, physical, and social harms wrought by the hardcore internet pornography petitioners purvey—an interest all agree is compelling, and that this Court should hesitate to override.

A. States may constitutionally enact rules for minors that would be unconstitutional for adults.

It is well-settled that States may enact "legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, 458 U.S. at 756. That power includes laws limiting minors' access to adult spaces and content. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)); *see also Bellotti v. Baird*, 443 U.S. 622, 636 (1979). "States have long denied minors access to certain establishments frequented by adults" and to "speech deemed to be 'harmful to minors.'" *Reno v. Am. Civ. Lib. Union*, 521 U.S. 844, 887 (1997) (O'Connor, J., concurring) (collecting state laws). And States are uniquely equipped to regulate in this domain, in ways that their federal counterpart arguably is not. *Roth v.*

United States, 354 U.S. 476, 503–04 (1957) (Harlan, J., dissenting).

When it comes to internet pornography, the States have a layered interest in protecting children from obscenity. First, States have "an independent interest in the well-being of [their] youth." *Ginsberg*, 390 U.S. at 640. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Ferber*, 458 U.S. at 757 (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982)). That is because a "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince*, 321 U.S. at 168. Internet pornography inhibits that growth, as a growing body of research makes clear.

Second, the States have an interest in providing "the support of laws designed to aid" "parents and others" responsible for children's well-being in protecting children from ubiquitous internet pornography. *Ginsberg*, 390 U.S. at 639. Over two-thirds of parents in the U.S. believe that parenting is more difficult in the 2020s than it was in 2000, with many pointing to technology and internet access as causes. Brooke Auxier, et al., *Parenting Children in the Age of Screens*, Pew Research Center (July 18, 2020), https://tinyurl.com/ywza6un9. No longer do children have to visit a store to obtain pornography. They can access pornography directly on their devices or friends' devices. In the same way that parents are not left alone to keep their underage children from drinking alcohol or gambling, the State may provide institutional barriers to keep children from accessing harmful material.

B. There are compelling reasons that minors should not access hardcore pornography.

The internet has revolutionized pornography and magnified the harm it poses to children. Modern pornographers have moved from physical stores outside the home to cell phones in children's pockets. Pornography is now affordable (free), accessible (available at a single click), and plentiful (nearly unlimited content is available). Unlike the adult stores and theaters of the twentieth century, pornography websites make little-to-no effort to verify the age of their patrons. *See* Romney, *above*, at 49.

Children's unprecedented access to the internet means easy access to pornographic websites with "the most extensive and extreme adult video library in history." *Id.* at 46. Nearly every 13- to 17-year-old child has access to a smartphone. Alexus Bazen, *Cell Phone Statistics 2024*, Consumer Affairs (Dec. 12, 2023), https://tinyurl.com/ynpkmfhy. And there is no discernable limit to the amount of pornography children can access through their devices. In 2019 alone, Pornhub reported 42 billion visits to its site, 1.36 million hours (169 years) of new uploaded content, and 6,597 petabytes of data transferred. *The 2019 Year in Review*, Pornhub. Predictably, children are experiencing pornography at progressively younger ages. The average age of first exposure to internet pornography is 11. Romney, *above*, at 47. And by age 18, more than 72% of adolescents (and more than 90% of boys) say they have viewed pornography online. Chiara Sabina, et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 CyberPsychology & Behav. 1, 1 (2008).

Unlimited access to pornography jeopardizes children across every facet of their development. It harms children's mental and psychological growth, instills damaging outlooks on sex and peers, and increases violence—with particular danger for young girls.

Begin with the effects on sexual development and peer relations. "[C]hildhood exposure to sexually explicit material may contribute to antagonistic and psychopathic attitudes, likely the depiction of distorted views of human sexuality." Eric W. Owens, et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19 Sexual Addiction & Compulsivity 99, 109 (2012) (quotation omitted).

Adolescents exposed to pornography "may develop unrealistic attitudes about sex and misleading attitudes toward relationships." *Id.* at 104 (quotation omitted). A synthesis of two decades of studies "tended to show that adolescents' pornography use was related to the occurrence of sexual intercourse, more experience with casual sex behavior, and a higher likelihood to engage in sexual aggression as well as to experience it, notably among female adolescents." Jochen Peter & Patti M. Valkenburg, *Adolescents and Pornography: A Review of 20 Years of Research*, 53 J. Sex Rsch. 509, 523 (2016).

These effects worsen because of the violence pervading modern pornography. If children are exposed to "violent sexual materials"—content "showing a person appearing to be hurt, suffering or in pain during sexual activity"—it creates "significantly higher odds" that children will behave "in a sexually aggressive manner (defined as unwanted kissing/touching, explicit picture and text messaging and sexual information solicitation)." Goran Koletić, *Longitudinal*

Associations between the Use of Sexually Explicit Material and Adolescents' Attitudes and Behaviors: A Narrative Review of Studies, 57 J. Adolescence 119, 127 (2017) (citation omitted).

The themes of aggression prevalent in modern pornography create a strong relationship between pornography use and beliefs related to "male dominance and female submission," leading to a "power imbalance in sexual relationships." Romney, *above*, at 53. Pornography use is "strongly correlated with sexual aggression in boys and sexual victimization in girls." *Id.* at 54; Aina Gassó & Anna Bruch-Granados, *Psychological and Forensic Challenges Regarding Youth Consumption of Pornography: A Narrative Review*, 1 Adolescents 109, 117 (2021). It encourages adolescents to "create, send, and share" child sexual abuse material as well. Romney, *above*, at 56–57.

Consuming pornography also has a devastating effect on children's mental health and academic performance. "Youth who are exposed to pornography report lower degrees of social integration, increases in conduct problems, and higher levels of delinquent behavior." *Id.* at 53 (quotation and brackets omitted). They "are more likely to exhibit clinical symptoms of depression and lesser degrees of bonding with caregivers." Owens, *above*, at 112. And the more boys consume pornographic content, "the poorer their school grades." Ine Beyens, Laura Vandenbosch, & Steven Eggermont, *Early Adolescent Boys' Exposure to Internet Pornography: Relationships to Pubertal Timing, Sensation Seeking, and Academic Performance*, 35 J. Early Adolescence 1045, 1057 (2015). In sum, childhood exposure to pornography is highly associated with every form of harm—"psychological, social,

emotional, neurobiological, and sexual." Romney, *above*, at 51.

II. This case presents an especially clear example of permissible age-verification requirements.

Texas's age-verification law is not facially invalid because little, if any, of the material on the commercial pornography websites it regulates is constitutionally protected speech.

Material is obscene, and thus unprotected by the First Amendment, if it depicts patently offensive "sexual conduct" that "appeals to the prurient interest" and, "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. The Court articulated that prevailing obscenity standard in 1973. The "pornography" of the day involved "girlie" magazines, *Ginsberg*, 390 U.S. at 631, and erotic eighteenth-century literature, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 414–19 (1966).

The online commercial pornography of today is many light years away from that material; it falls far short of protectable speech under the *Miller* test. *See, e.g.*, Norman Doidge, *The Brain that Changes Itself*, 102–112 (2007); Jochen Peter & Patti M. Valkenburg, *The Use of Sexually Explicit Internet Material and Its Antecedents: A Longitudinal Study of Adolescents and Adults*, 40 Arch. Sex & Behav. 1015, 1015–16 (2011). Even adults have no constitutional right to access most content on the regulated websites—explicit sex intended to arouse, much of which depicts especially depraved conduct (e.g., graphic sexual violence or enacted nonconsensual sex).

A. Facial challenges to age-verification laws must be evaluated based on the full scope of regulated websites, including the most disturbing and violent content.

Petitioners' choice to attack Texas's law on its face presents additional hurdles to their First Amendment theory. Even assuming the continued viability of First Amendment facial overbreadth doctrine, that litigation strategy has consequences. A facial challenge to the constitutionality of a state law must be evaluated based on the full scope of the law and all its regulatory targets. After all, it is "impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008).

The question in any First Amendment facial challenge is "whether a law's unconstitutional applications are substantial compared to its constitutional ones." *Moody*, 144 S. Ct. at 2394. Making that judgment requires looking to "a law's full set of applications." *Id.* More specifically, "courts must make sure they carefully parse not only what entities are regulated, but how the regulated activities actually function before deciding if the activity in question constitutes expression and therefore comes within the First Amendment's ambit." *Id.* 2411–12 (Jackson, J., concurring in part and in judgment).

Here, that means the Court must consider the content of the regulated websites in their entirety—including the most violent and disturbing content. The commercial pornographers subject to Texas's law overwhelmingly peddle hardcore pornography that is obscene for all viewers, adult and child alike. *Below*

at II.B. Look no further than the dominant content on petitioners' websites to see why.

B. Many of the regulated websites are saturated with hardcore sex that is obscene for all ages.

Online pornography today bears no resemblance to the "girlie" magazines that this Court considered in the 1960s. *Ginsberg*, 390 U.S. at 631; *see, e.g.*, Doidge, *The Brain that Changes Itself*, 102–112. The type and breadth of dangerous—and in some instances, illegal—sexual activity offered on petitioners' websites is staggering. Much of the content depicts violent and degrading sex, and most of that degradation or violence is directed against women. Wherever the precise line between protected pornographic speech and obscenity, much of petitioners' content falls well outside the First Amendment.

Start with the statistics, which reflect that violent sexual scenes are prolific on commercial pornography sites. One study found that 45% of Pornhub scenes and 35% of Xvideos scenes contained aggression, most commonly "gagging, slapping, hair pulling, and choking," with women "the target of the aggression in 97% of the scenes." Niki Fritz, et al., *A Descriptive Analysis of the Types, Targets, and Relative Frequency of Aggression in Mainstream Pornography*, 49 Arch. Sex Behav. 3041, 3041 (2020). Another study—now over a decade old—reviewed over 300 of the top selling pornographic films and found that over 88% of them depicted physical aggression and nonnormative sexual acts. Ana J. Bridges, et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 Violence Against Women 1065, 1075 (2010). In 2021, the "largest study of online

pornographic content to date" reviewed over 150,000 video titles collected over a six-month period from videos advertised on the landing pages of the three largest pornography websites viewed in the U.K. (Pornhub, XHamster, and XVideos). Fiona Vera-Gray, et al., *Sexual violence as a sexual script in mainstream online pornography*, 61 Brit. J. Criminology 1243, 1244 (2021). The study found that "sexual violence is a normative sexual script in mainstream online pornography," and that "sexual practices involving coercion, deception, non-consent and criminal activity are described in mainstream online pornography in ways that position them as permissible." *Id.* at 1244, 1250; *see also* Gail Hornor, *Child and Adolescent Pornography Exposure*, 34 J. Pediatric Health Care 191, 192 (2019) (collecting studies).

Those general numbers are borne out in the specific context here. For example, a New York Times exposé revealed disturbing content from one petitioner's site: searching for "girls under18" or "14yo" yielded over 100,000 hits. Nicholas Kristof, *The Children of Pornhub*, The New York Times (Dec. 4, 2020), https://tinyurl.com/yemtkpyk. Titles for the videos included "Screaming Teen," "Degraded Teen," and "Extreme Choking." *Id.* Another of the petitioner's websites advertised content categories include "teen hardcore," "anal bondage," and "teen bondage," which collectively yield over 1 million results. Joint App. 175–76. A search for "teen bondage" auto-fills with "teen bondage gangbang" as the top result, which returned over 300,000 videos. *Id.*

Now consider a small sampling of what the sanitized language of statistics actually shows. Videos resulting from a search on one petitioner's site feature graphic, violent, sexual acts. One video depicted a

group of five men binding a woman with electrical tape before slapping and gagging her over more than half an hour. *Id.* The video had more than 670,000 views and a 98% rating. *Id.* Another of petitioner's sites features over 200,000 videos in the "Un Consesual [sic]" category and 198,000 videos in the "Non Consesual Porn Porn videos [sic]" category, featuring videos depicting scenes of rape. *Id.* at 158–60. Videos on another petitioner's site show "footage of women being asphyxiated in plastic bags." Kristof, *The Children of Pornhub*. These are not isolated instances. Such aggression targeted at women and girls is a regular occurrence in these online videos. *Id.*

The New York Times has further reported how online pornography reflects extreme content, such as necrophilia—"artificial snuff films" in which actors have sex with "fake corpses." Judith Shulevitz, *It's O.K., Liberal Parents, You Can Freak Out About Porn*, New York Times (July 16, 2016), https://tinyurl.com/37nk3sny. Other content increasing in popularity includes "fake … paedophilia [sic] or dramatized rape." Mark Hay, *Datagasm*, Aeon (July 14, 2016), https://tinyurl.com/34auwumz. Extreme as it may seem, the production of content showing hardcore sex is growing; for example, "fauxcest" videos (portrayals of incest), saw a 1,000 percent increase between 2011–2016, by one estimate. *Id.* Commercial pornographers are increasingly turning to extreme content because the proliferation of free explicit material online means they "can't make any money out of straight, vanilla sex anymore." *Id.*

By any measure, these hardcore sexual displays warrant no First Amendment protection because they are aimed at sexual arousal, are patently offensive, and lack any social value. In short, their "essential

character…is to degrade sex." *Roth*, 354 U.S. at 502 (Harlan, J., concurring). And it is difficult to see how the violent and deeply demeaning sexual content inundating sites like Pornhub could communicate any essential message. It is also unclear how that conduct could be more expressive than nude dancing, which the States may outright ban as obscene. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 282–83 (2000).

C. Websites promoting themselves as gateways to obscene materials enjoy no First Amendment protection.

"There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene." *Splawn v. California*, 431 U.S. 595, 598 (1977); *see also Mishkin v. New York*, 383 U.S. 502, 509 (1966). The First Amendment offers no protection for "commercial entities" in "the sordid business of pandering" by "deliberately emphasizing the sexually provocative aspects of their nonobscene products, in order to catch the salaciously disposed"—even if those products might otherwise satisfy the *Miller* standard. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) (quotation and brackets omitted) (collecting sources). And compilations of content that emphasize their obscene chapters may be treated as obscene across the board, regardless of whether they contain some amount of non-obscene material. *Ginzburg v. United States*, 383 U.S. 463, 470–71 (1966).

Put simply, when commercial pornographers hold themselves out as purveyors of "sexually provocative" material and aggressively market that aspect of their

product, courts may accept their representations at "face value." *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"*, 383 U.S. at 420. Courts are not required to ignore how pornographic websites portray themselves to users, and why most users visit those websites, simply because not every word or image on the websites is necessarily obscene. For these websites, "it is clear from the context" that neither the websites nor their users are "interested in the [pornography's] literary, artistic, political, or scientific value." *Playboy*, 529 U.S. at 832 (Scalia, J., dissenting); *see Ginzburg*, 383 U.S. at 470–71.

That is what the regulated websites offer here. Texas's age-verification requirement applies to commercial websites if "more than one-third" of their material, taken as a whole, is obscene as to minors under the modified *Miller* standard. Tex. Civ. Prac. & Rem. Code §§129B.001(6); 129B.002(a). Nearly all the petitioners here are commercial pornographers who argue that the law's regulatory focus is "the online pornography industry." Pet. Br.35. While petitioners wax poetic on the Constitution's protection for socially valuable erotic works, their discussion of Shakespearean and colonial "art and literature" is all atmospherics. *Id.* at 18.

Petitioners never suggest that the "online pornography industry" is publishing and advertising content akin to "Aristotle's *Masterpiece*" or erotic "art and literature" more generally. *Id.* at 18, 35. In fact, nowhere in the 100-plus pages across their certiorari petition, stay application, and merits brief do petitioners ever discuss any of the content marketed on their websites or by the "online pornography industry" writ large. Petitioners' only mention of content can be found in a few record affidavits, asserting that a

couple of the petitioner websites include "some" nude modeling qualifying as softcore porn. Joint App. 224, 228. That is a glaring omission. Even petitioners cannot say with a straight face that their millions of videos depicting explicit (often degrading and violent) sex offer "serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. There is no doubt that petitioners are commercially "marketing sex." *Playboy*, 529 U.S. at 834 (Scalia, J., dissenting). As such, they cannot claim First Amendment high ground.

One further point. Pornographers cannot save their "hubs" of pornographic sex videos from any regulation by sprinkling in a few protected instances of speech. That is because this Court's precedent repeatedly affirms that material "must be judged as a whole" on whether its "dominant tendency" is toward the obscene. *Roth*, 354 U.S. at 502 (Harlan, J., concurring). For instance, a "shockingly hardcore pornographic movie that contains a model sporting a political tattoo can be found, '*taken as a whole*, to lack serious literary, artistic, political, or scientific value.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 n.4 (quoting *Miller*, 413 U.S. at 24) (brackets omitted).

A contrary rule would yield absurd results. All obscenity would become protected speech if an audio speaker plays a few lines from a political debate during a nude dance, or a stock ticker of Shakespearean lines ran across the bottom of a pornographic video. That cannot be the standard, as this Court repeatedly has explained. "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). Nor would a "live performance of a man and woman locked in a sexual embrace at high noon in Times Square" suddenly gain

constitutional protection if "they simultaneously engage in a valid political dialogue." *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 67 (1973) (quotation omitted).

D. The minimal risk of chilling low-value speech does not support expanding the First Amendment buffer zone to encompass hardcore pornography.

Pornography operates on a continuum. At the far end, some "softcore" pornography of an earlier era—such as nude images—may have expressive properties with *de minimis* artistic, literary, or scientific value. Joint App. 224, 228. But most modern internet pornography is "hardcore"—graphic depictions of sexual acts. Peter & Valkenburg, *The Use of Sexually Explicit Internet Materials*, at 1015–16. And much of that involves degrading, violent, or highly fetishized sex. *See, e.g.*, Doidge, *The Brain that Changes Itself* 102–112. Thus, as explained above, the overwhelming majority of what is labeled commercial "pornography" qualifies as obscene under the *Miller* standard. 413 U.S. at 24. As this Court held, the "public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain," does not further the "unfettered interchange of ideas for the bringing about of political and social changes" that the First Amendment was designed to protect. *Id.* at 34–35.

To the extent that a subset of pornography earns any constitutional protection, then, it represents the outer limits of the First Amendment's ambit. That is so for several reasons. Most obviously, the "commercial exploitation" of explicit pornography is not the "commerce in ideas[] protected by the First Amendment." *Id.* at 36; *see also Young*, 427 U.S. at 70–71; *Pap's A.M.*, 529 U.S. at 294. To the contrary, "though

it amounts to words and pictures, its purposes and effects are far from the purposes and effects that justify the special protection accorded to freedom of speech." Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589, 617 (1986).

Pornography also has a "purely noncognitive appeal"; it "operates at a subconscious level" to provide a "form of social conditioning that is not analogous to the ordinary operation of freedom of speech." *Id.* at 603, 617. And the speakers—commercial pornographers—have the express purpose to sexually arouse and generate profit, rather than communicate ideas. *Id.* at 603–04. The point is not that pornography is wholly unexpressive, "but only that [it] constitute[s] 'no *essential* part of any exposition of ideas.'" *R.A.V.*, 505 U.S. at 385 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). So there is little risk of government suppression of viewpoints through regulation of pornographic products. Sunstein, *Pornography and the First Amendment*, at 603–04. These features place commercial pornography far from the central aims of the First Amendment; to the extent it is protected at all, it is to give core First Amendment speech "breathing space." *Cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

The minimal risk of chilling low-value speech on the obscenity borderline does not warrant an expansive buffer zone that would encompass vast swaths of hardcore pornography. Holding otherwise essentially draws a buffer zone around the buffer zone.

This Court rejected that position decades prior in the context of adult films: "The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression" does not mean

that "an exhibitor's doubts as to whether a borderline film may be shown" represents the "kind of threat to the free market in ideas" justifying an overbreadth challenge. *Young*, 427 U.S. at 61 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

And the Court recently reiterated its caution against piling prophylaxis on prophylaxis. Both the majority and dissent in *Counterman* recognized the importance of not over-extending buffer zones, and of evaluating the nature of the regulated speech to determine how great any risk of chilling is. 600 U.S. at 80–81; *id.* at 108–12 (Barrett, J., dissenting). Material just over "the [speech] side of the [obscenity] boundary line" is not "so central to the theory of the First Amendment" as to warrant the strong medicine of facial invalidation of any regulation that has some risk of chilling it. *See id.* at 81. In short, "the potency of that protection is not needed here." *Id.*

Petitioners get this exactly backward by reflexively treating internet pornography—categorically—as constitutionally protected. This Court should resist efforts to cast the farthest reaches of the First Amendment as core speech, and decline to "raise[] the bar for borderline unprotected" pornography because it is not "speech with high social value … and low potential for injury." *Id.* at 112 (Barrett, J., dissenting).

III. If States may constitutionally condition access based on age, it is constitutional to require commercial operators to verify age.

All parties agree that States may restrict minors' access to material obscene for children, even if some of that material may not be obscene for adults. *See* Pet. Br.1, 20; Cert. Pet.6. It logically follows that States may require commercial pornographers to check

customers' age at the metaphorical door. The existence of constitutional power to do something necessarily implies the government may constitutionally effectuate it. *See Glossip v. Gross*, 576 U.S. 863, 869 (2015). That means age verification is a constitutionally permissible means of achieving a constitutionally permissible aim.

A. States may require proof of age even to exercise constitutional rights.

States may require proof of age or identity to engage in adult-only conduct—even when the conduct implicates core constitutional guarantees, and even when the state regulation poses some barrier to exercising those rights. This Court has sustained an array of such laws against constitutional challenges, including in the First Amendment context.

Start with voting. In *Crawford v. Marion County Election Board*, for instance, the Court held that requiring photo identification to cast a vote was not constitutionally problematic. 553 U.S. at 197–98 (Stevens, J., plurality). Admittedly, the ID requirement "impose[d] *some* burdens on voters that other methods of identification do not share"—such as "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph." *Id.* (emphasis added). But that did not amount to a "substantial" burden on the fundamental right to vote. *Id.*

Turn to the right bear arms. The Court indicated that a license could be required to exercise core Second Amendment rights. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 38 n.9 (2022). As long as they do not entail onerous wait times or fees, the Court suggested that States may constitutionally enact "shall issue" permitting schemes requiring eligible citizens

to make a threshold showing in order to obtain a firearm permit. *See id.*

Both *Crawford* (right to vote) and *Bruen* (right to keep and bear arms) involved conduct in the constitutional heartland—a far cry from the right to distribute hardcore pornography without regulation.

In a closer analog, this Court upheld a state age-verification law for tobacco products, even though it arguably affected tobacco companies' commercial speech. *Lorillard*, 533 U.S. at 569. The state law restricted marketing locations and methods that would allow consumers to "access [tobacco] without the proper age verification." *Id.* The Court saw no First Amendment barrier to upholding that law.

Consider other neutral barriers to access, such as zoning ordinances restricting the permissible locations of adult theaters but not other theaters. *Young*, 427 U.S. at 62; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). Although these limitations affect consumers' ease of access to adult establishments, this Court explained that they "represent[] a valid governmental response" because they are neutral regulations of commercial operations with negative externalities, not designed "to suppress the expression of unpopular views." *City of Renton*, 475 U.S. at 48, 54.

Most salient here, a ban on minors' access to adult material passed First Amendment muster, even though it indirectly affected adults' access. *Ginsberg*, 390 U.S. at 639. By prohibiting sale of adult magazines to minors, New York's law presumably required adults to prove their age to access "girlie" magazines off-limits to children. *Id.* at 631. The Court "necessarily assumed" that creating an "adult zone…would

succeed in preserving adults' access while denying minors' access to the regulated speech" by relying on limiting features: "geography and *identity*." *Reno*, 521 U.S. at 889 (O'Connor, J., concurring) (citation omitted and emphasis added). That New York's law effectively required adult bookstores to verify customers' age was not a First Amendment problem. *Id.*

Texas's law just requires the online equivalent and likewise has no constitutional defect.

B. The internet does not obliterate State power to require proof of age to access hardcore pornography.

Moving the strip club and adult bookstore online does not mean that commercial pornographers may escape regulation. "[C]onduct that the state police power can prohibit on a public street do[es] not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage." *Paris Adult Theater*, 413 U.S. at 67. The same is true when operators move sexually explicit conduct from brick-and-mortar establishments onto servers that host online commercial websites. Texas's law simply requires pornography providers to obtain proof of age "before they [grant] access [to] certain areas of cyberspace, much like a bouncer checks a person's driver's license before admitting him to a nightclub." *Reno*, 521 U.S. at 890 (O'Connor, J., concurring).

If anything, the modern internet is *more* amenable to regulation. Technological advancements make age verification easy, effective, and affordable—and more necessary than ever. The internet today stands in stark contrast to the technology the Court assessed in its early internet decisions. Roughly 30 years ago,

"this Court felt the need to explain to the opinion-reading public that the 'Internet is an international network of interconnected computers.'" *Moody*, 144 S. Ct. at 2393 (quoting *Reno*, 521 U.S. at 849). "Things have changed since then." *Id.* When this Court decided *Reno*, "only 40 million people used the internet." *Id.* Now, "Facebook and YouTube alone have over two billion users each." *Id.*

It is no longer true that "the Internet is not as invasive as radio or television." *Reno*, 521 U.S. at 869 (quotation omitted). Rather, the internet is now "uniquely accessible to children," *cf. FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978), beyond the broadcast radio or cable television mediums of yesteryear. As of 2021, 97% of children ages 3–18 years old had home internet access. *Children's Internet Access at Home*, Nat'l Center for Educ. Statistics (Aug. 2023), https://tinyurl.com/2y6t6zes. Thanks to the ubiquity of smartphones and internet availability, children may access the internet virtually anywhere, anytime. And they do: today's children spend an inordinate amount of their lives online, *see* Romney, *above*, at 48, and have an internet fluency outpacing that of prior generations. According to a pre-COVID report, 55% of children under 5 years old use smartphones; the number increases to 63% for children between 5–11 years old. Auxier, *Parenting Children in the Age of Screens*. The "ease with which children may obtain access" to internet material, even at extremely young ages, "amply justif[ies]" age-verification requirements on commercial pornographers. *Pacifica*, 438 U.S. at 750. Children's access to smartphones and other screens also means that any device-based blocking strategy is a losing battle. Even if a parent blocks obscene

material on a child's device, that child may have easy access through a friend's or relative's unblocked phone.

In turn, the ease with which internet-based services can now verify age confirms that age verification remains constitutional in the internet context. Only very limited factual development and expert analysis has yet been done in this case regarding technology today. (And petitioners have sought to shut down discovery in another case that might have otherwise provided this Court with greater insight into the nature of their websites' content and the state of technology. Dkt. 69, *Free Speech Coal.*, No. 1:24-cv-00980.) Yet it is still clear that age-verification technology today bears no resemblance to what existed when this Court first encountered it. In the late 90s, there was "no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms" without "impos[ing] costs on non-commercial Web sites that would require many of them to shut down." *Reno*, 521 U.S. at 855–56 (quotation omitted). Credit card verification was feasible only "in connection with a commercial transaction in which the card is used, or by payment to a verification agency." *Id.* at 856. And when the Court decided *Ashcroft* during the next decade, age verification still imposed a significant monetary burden on adults. *Ashcroft v. Am. Civ. Lib. Union*, 542 U.S. 656, 682–83 (2004) (Breyer, J., dissenting).

Modern age-verification technology is inexpensive, accessible, and accurate. Earlier age-verification methods relied on third-party databases like credit reports, which could incur significant costs per check. Now, competition in the market has significantly lowered cost to a few cents per check. Developers have

created methods that allow people to use a one-time age-verification across multiple websites. *See, e.g.*, Romney, *above*, at 70 (describing "verified digital identities" that share a user's age but not identity); Matt Burgess, *This is How Age Verification Will Work Under the UK's Porn Law*, Wired (June 20, 2020), https://tinyurl.com/mr2zaah3; *Our Approach to Security and Privacy*, Yoti (Dec. 13, 2019), https://perma.cc/AG5W-2GV4. Many industries use online age-verification technology, including alcohol and tobacco sales, gambling, gaming, social media, and in some circumstances, pornography. Fergal Parkinson, *A Complete Guide to Online Age Verification*, TMT ID (Jan. 30, 2024), https://perma.cc/ZM7A-3N5Y. Indeed, Pornhub's parent company already has created its own age-verification system. Romney, *above*, at 70.

Texas gives websites a menu of age-verification options, including use of government-issued identification or other "commercially reasonable method[s]," such as facial recognition software that can analyze a consumer's facial image. Tex. Civ. Prac. & Rem. Code §129B.003(b)(2)(B). Texas also leaves regulated websites free to contract with third-party services to verify user's ages. Importantly, these age-verification services do not disclose a consumer's personal information other than date of birth, to respond to additional inquiries about the individual's age. *See* Romney, *above*, at 68–69; *see also* Privacy Notice, AllpassTrust, Section 5, https://perma.cc/B79X-T4XR. The service will tell the website only whether a user passed or failed an age check. Romney, *above*, at 68–69. This means that a person's identifying information is not linked to the specific content he or she was attempting to access. *See id.*

Some on the Court forecasted the evolution of age verification, noting that the "transformation of cyberspace is already underway" and predicting it would be "possible to construct barriers in cyberspace and use them to screen for identity." *Reno*, 521 U.S. at 890 (O'Connor, J., concurring). The intervening 20 years between *Ashcroft* and this case have proven those predictions true and worked a radical shift in the accessibility of the internet and viability of age-verification technology. Time and technology thus largely have abrogated the reasoning underlying this Court's early internet-speech decisions. And technological advances doubtlessly will continue to be made, as age-verification providers compete for business based on the ease, security, and cost of their services. The internet poses no barrier to States exercising their historic power to require age verification as a predicate to accessing adult content and activities.

CONCLUSION

The Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General

JAMES A. BARTA
Solicitor General
JENNA M. LORENCE
Deputy Solicitor General
Office of the Indiana Attorney General
IGCS – 5th Floor
302 W. Washington St.
Indianapolis, IN 46204
317.232.0709

Counsel for Amicus Curiae State of Indiana

DAVE YOST
Ohio Attorney General

T. ELLIOT GAISER
** Counsel of Record*
Ohio Solicitor General
KATIE ROSE TALLEY
Deputy Solicitor General
30 East Broad St. 17th Fl.
Columbus Ohio 43215
614.466.8980
thomas.gaiser@ohioago.gov

Counsel for Amicus Curiae State of Ohio

Additional counsel listed on the following pages.

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Additional Counsel

STEVE MARSHALL
Alabama Attorney General

TREG R. TAYLOR
Alaska Attorney General

TIM GRIFFIN
Arkansas Attorney General

ASHLEY MOODY
Florida Attorney General

CHRISTOPHER M. CARR
Georgia Attorney General

RAÚL R. LABRADOR
Idaho Attorney General

BRENNA BIRD
Iowa Attorney General

KRIS KOBACH
Kansas Attorney General

RUSSELL COLEMAN
Kentucky Attorney General

LIZ MURRILL
Louisiana Attorney General

LYNN FITCH
Mississippi Attorney General

ANDREW BAILEY
Missouri Attorney General

AUSTIN KNUDSEN
Montana Attorney General

MICHAEL T. HILGERS
Nebraska Attorney General

GENTNER DRUMMOND
Oklahoma Attorney General

DREW H. WRIGLEY
North Dakota Attorney General

ALAN WILSON
South Carolina Attorney General

MARTY JACKLEY
South Dakota Attorney General

SEAN D. REYES
Utah Attorney General

JASON MIYARES
Virginia Attorney General

BRIDGET HILL
Wyoming Attorney General

PATRICK MORRISEY
West Virginia Attorney General