

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 NURSE HEIDI OLSON AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Heidi Olson, RN, MSN, CPN, SANE-P is a Certified Pediatric Nurse and Certified Pediatric Sexual Assault Nurse Examiner (SANE), and the Founder and President of Paradigm Shift Training and Consulting, which equips healthcare workers with skills-based training to be able to identify human trafficking and exploitation. Ms. Olson has a wide range of experience in pediatric and forensic nursing and has taught as an adjunct clinical instructor for the University of Missouri at Kansas City and the University of St. Mary.

Ms. Olson previously managed a SANE Program at a large children's hospital where she performed or reviewed over 1500 pediatric forensic exams, many of them trafficking cases, communicated with law enforcement, child protective services, and a large multidisciplinary team, as well as educated hundreds of staff members on relevant topics regarding sexual violence. She also serves as an expert witness for the prosecution during trials for victims of sexual assault.

In 2019, Ms. Olson implemented an evidence-based screening process in the Emergency Department, which has resulted in hundreds of vulnerable children being identified as victims of exploitation. She started and led the human trafficking work group at a children's hospital and has organized and presented at multiple human trafficking events in Kansas City. She has testified in favor of bills that have been passed into law on the

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

state level, and at a briefing on Capitol Hill about protecting children online.

Ms. Olson has also done groundbreaking work to sound the alarm about the role of pornography in influencing child-on-child sexual assault. Over the last few years, she has presented internationally hundreds of times about recognizing human trafficking, child-on-child sexual assault, pornography, and exploitation. She has also been featured in several documentaries regarding these topics, including *Vulnerable Innocence*, which has won 24 awards. Ms. Olson won the Cry Purple award in 2023, which is given to citizens who are doing outstanding anti-trafficking work in their communities. In 2024, she testified before the United Nations to discuss the causation between exposure to online pornography and child-on-child sexual assault, and the importance of safeguards such as online age verification.

Ms. Olson submits this brief for two reasons. *First*, to emphasize how pornography is influencing child-on-child sexual assault, which is just one of the many harms caused by exposure to online pornography. *Second*, to propose that considering the extreme harm to children in being exposed to online pornography, the low First Amendment value of commercialized pornography, and the minimal burden imposed on adult access to such pornography by Texas' age-verification law (H.B. 1181), the law passes constitutional muster under any of several constitutional tests.

SUMMARY OF ARGUMENT

The harms caused by childhood exposure to pornography—which are the harms that H.B. 1181 seeks to counter—are not fictitious. Texas has not passed an unnecessary or unwarranted law. Instead, the problems caused by childhood exposure to online pornography are widespread, serious, and escalating. Many of these harms are well known and have received increased media attention in the last several years, even from the likes of notable celebrities such as Billie Eilish, Kanye West, Bill Maher, and others.² These problems include addiction, mental health crises, exploitation, exposure to violent sexual content, degradation of women, intimacy problems including impotence, and relationship challenges. The harms are also widespread given that most teenagers report having viewed pornography. Respondent’s Brief (“RB”) 8. But one of the more serious, yet lesser-known, problems caused by online pornography is the role it plays in child-on-child sexual assault. Study after study has confirmed that the two are causally related, with exposure to online pornography, including increasingly graphic, demeaning, and violent content, leading children to abuse other children.

Against this backdrop, Texas and other States have passed age-verification laws. Far from an outright ban on pornography, these laws simply seek to limit childhood exposure to harmful sexual material, while ensuring that the burden imposed on

² Jonathan Van Maren, *Celebrities Against Pornography*, First Things (Nov. 6, 2023), available at <https://www.firstthings.com/web-exclusives/2023/11/celebrities-against-pornography>.

adult access to such content is minimal. Because the harm to children caused by exposure to pornography is so widespread, pornographic content is so pervasive, and most kids have ready and easy access to such pornography through multiple devices at home, school, and elsewhere, there is no single, one-size-fits-all approach. No one pretends that age-verification laws will end childhood exposure to pornography, or the problems associated with said exposure. Nor should anyone pretend that content filtering or education will alone suffice (as they clearly have not for the past 20 years). Instead, to address the seriousness of the harm, every available remedy should be employed, including age-verification, content filtering, education, and every other constitutional means. Because age-verification is a safe, effective, inexpensive, and minimally burdensome response to a severe public-health crisis,³ H.B. 1181 passes muster under any level of First Amendment scrutiny.

This Court should also reject Petitioner's any-burden-on-adult-access-to-porn-is-unconstitutional argument. This is not, nor should it be, the constitutional standard. Instead, *amicus* proposes that the greater the burden, the greater the scrutiny. The lesser the burden, the lesser the scrutiny. Because the burden here is minimal—a minute or two to age verify—there is no constitutional violation.

Finally, this Court should again clarify that not all First Amendment rights are created equal. In the Fourth Amendment context, “the home is first among

³ Since 2016, at least 16 States have declared that pornography is a public-health crisis, *see* <https://fightthenewdrug.org/states-with-porn-public-health-resolutions/>.

equals.” *Lange v. California*, 594 U.S. 295, 303 (2021) (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013)). Likewise, when it comes to First Amendment Free Speech analysis, political speech occupies the “core of the protection afforded by the First Amendment” and the “First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346–47 (1995) (cleaned up, quotation omitted). On the other hand, “there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976); *see also id.*, at 70–71 (“[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.”) (opinion of Stevens, J., joined by Burger, C.J., and White and Rehnquist, JJ.). If the borderline between pornography and artistic expression receives less First Amendment protection than political speech, then surely the graphic, exploitative content that is part and parcel of the contemporary commercial pornography industry should receive even less protection.

Given the severe and widespread harm suffered by children at the hands of pornography, this Court should again reaffirm that, when the health and

safety of children are at stake, adults *do not* have an unfettered, unrestricted First Amendment right to obtain and view pornography. Instead, this Court should clarify that laws protecting children from sexual material harmful to minors are constitutional when they place only a minimal burden on an adult's ability to access commercial pornography.

ARGUMENT

I. ONLINE PORNOGRAPHY IS FUELING AN INCREASE IN CHILD-ON-CHILD SEXUAL VIOLENCE.

A. The Harm To Children Is Of A Different Degree And Magnitude Than In *Ginsburg*.

There is no dispute that Texas has a compelling interest in protecting the well-being of children by preventing them from accessing harmful sexual material. By conceding this point (Petitioner's Brief "PB" 3), Petitioner likely wants this Court to simply accept the government's compelling interest and move on. But the Court should not do that. Instead, the Court should closely examine the harm caused by online pornography—which many States have declared constitutes a public-health crisis—in analyzing what's at stake.

In *Ginsberg v. State of New York*, this Court "recognized that the State has an interest to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens." 390 U.S. 629, 640–41 (1968) (cleaned up). "The only question remaining," for this Court was

“whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by s 484—h constitutes such an ‘abuse.’” *Id.* Notably, the specific content at issue in *Ginsburg* were “girlie” magazines, which were not obscene for adults—aka, magazines which showed “female buttocks with less than a full opaque covering,” or the “female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.” *Id.* at 632 (cleaned up). Even though this Court acknowledged that there was significant scholarly debate about whether this content was indeed harmful to children, nonetheless, this Court upheld the statute, concluding that it was not an irrational piece of legislation. *Id.* at 641–43.

That the government has an interest—indeed, a compelling one—in protecting children from the harmful impact of sexual material has never been questioned by this Court in the intervening 68 years since *Ginsburg* was decided. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (“It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.”); *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 675 (2004) (“*Ashcroft II*”) (“our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials”) (Stevens, J., concurring).

At least three differences stand out regarding the world of *Ginsburg* and our world justifying greater protection of children, not less. *First*, the heyday of magazines has long since passed. Ours is a digital world. Children do not need to sneak off to the bookstore or magazine rack to obtain pornographic

material. It is most likely readily available on several devices inside their home, or in their pocket.

Second, as Respondent and other *amici* highlight, the type of content available to children is vastly different than the “girlie magazines” at issue in *Ginsburg*. See RB 3–6. Nor is the content primarily pictorial images. Instead, contemporary pornography involves hardcore pornographic *videos*. The days of boys getting their hands on a Playboy, or “girlie magazine” seem quaint compared to the grotesque, violent, and abusive hardcore video pornography available at nearly every child’s fingertip today.

Third, as discussed in more depth, *infra*, there is no longer a good-faith debate about the harm caused by childhood exposure to pornography. See RB 6–9. These harms are widespread, serious, and escalating and include mental health trouble, relationship problems, addiction, exploitation, and toxic attitudes about sexual intimacy.

In short, the last half century reveals the need for *greater* protection of children from harmful sexual material, not *less*. This is perhaps nowhere clearer than in the troubling increase of child-on-child sexual violence fueled by online pornography.

B. Child-On-Child Sexual Assault Is A Rising Crisis.

Across the United States (and globe) an alarming number of children are sexually assaulting other children. While research on this topic is very limited, especially in the United States, what exists is startling. A 2017 Associated Press investigation “uncovered approximately 17,000 instances of child-on-child sexual assaults which occurred in US schools

between fall of 2011 to spring 2015,” making sexual assaults on school property seven times more likely to be child-on-child rather than committed by adults.⁴

There is a correlative and causative link between exposure to pornography and child-on-child sexual abuse. For example, analysis at a Child Advocacy Center in the Midwest of intake and assessment data of children suspected of sexual or physical child abuse revealed that “children who disclosed exposure to pornography had 3.3 times greater likelihood of engaging in harmful sexual behavior compared to those who did not.”⁵ Further, a decade of data from the hospital where Ms. Olson works shows that anywhere from one-third to almost one-half of those committing a sexual assault against a child are minors themselves. In fact, the age range most likely to commit sexual assaults are 11–15-year-old-males,⁶ with 14-year-old males at the highest risk to engage in this behavior.⁷

This is not only a concern in the United States. The trend is being echoed across many different countries, including in the United Kingdom, which

⁴ Robin McDowell, et al., *AP Uncovers 17,000 Reports of Sexual Assaults at Schools across US* (May 1, 2017), available at <https://www.boston.com/news/national-news/2017/05/01/ap-uncovers-17000-reports-of-sexual-assaults-at-schools-across-us/>.

⁵ Rebecca Dillard, Kathryn Maguire-Jack, Kathryn Showalter, Kathryn G. Wolf & Megan M. Letson, *Abuse Disclosures of Youth with Problem Sexualized Behaviors and Trauma Symptomology, Child Abuse and Neglect* 201-211 (2019).

⁶ Children’s Mercy Kansas City, Redcap database (2015-2023).

⁷ David Finkelhor & Anne Shattuck, *Characteristics of Crimes Against Juveniles*, Crimes against Children Research Center (2012).

published data this year that confirms that the majority of their perpetrators are minors.⁸

Many people believe that children who sexually abuse other children are nearly always victims of sexual abuse themselves. This is not true. In some cases, the offender has a history of sexual abuse. But there are additional variables contributing to child-on-child sexual assault. This includes having a history of neglect, attachment trauma, or physical abuse.⁹ Increasingly, a common theme front-line responders are hearing from offenders is that pornography has influenced them to sexually harm other children.

Current research shows that adolescents who use pornography are more likely to commit sexual violence.¹⁰ Boys who regularly view pornography are at increased risk for sexual coercion and abuse.¹¹ In people aged 10-21, continuing exposure to violent pornography tends to lead to sexual harassment,

⁸ National Analysis of Police-Recorded Child Sexual Abuse & Exploitation (CSAE) Crimes Report (2024), available at <https://www.vkpp.org.uk/assets/Files/Publications/National-Analysis-of-police-recorded-CSAE-Crimes-Report-2022-external.pdf>.

⁹ National Center on the Sexual Behavior of Youth. Adolescents, available at from <https://www.ncsby.org/adolescents>.

¹⁰ Jochen Peter & Patti M. Valkenburg, *Adolescents and Pornography: A Review of 20 Years of Research*, *The Journal of Sex Research* 509, 522 (2016); Michele L. Ybarra & Richard E. Thompson, R, *Predicting the Emergence of Sexual Violence in Adolescence*, *Prevention Science: The Official Journal of the Society for Prevention Research* 403, 412 (2018).

¹¹ Nicky Stanley, Christine Barter, Marsha Wood, Nadia Aghtaie, Cath Larkins, Alba Lanau, A., & Carolina Overlien, C, *Pornography, Sexual Coercion and Abuse and Sexting in Young People's Intimate Relationships: A European Study*, *Journal of Interpersonal Violence*, 2919-2944 (2018).

sexual assault, coercive sex, attempted rape, and rape.¹² Finally, adolescents who view pornography are more likely to have been sexually assaulted themselves, and boys who regularly view pornography are more likely to perpetrate sexual assault.¹³ These statistics are sobering, but not surprising, given the amount of degrading and violent pornography readily available online.

Of course, behind the statistics are real people, real stories, and real trauma. For example, Ms. Olson's team took care of a 4-year-old male who disclosed a traumatic sexual assault to his parents that happened at the hands of his 11-year-old sister. She played pornography on her iPad during the assault, so he could watch and learn what to do during the next assault.

Her team also took care of a 12-year-old female elementary student, who was brutally raped in a parking lot by a 16-year-old male she had met online. She did not think she had been assaulted, because in her words she had been, "looking at and masturbating to porn every single day" for the last 7 years. This started when her parents gave her an iPad at the age of 5, and she accidentally stumbled on porn. The violent images had desensitized her to the point that she could not recognize her own abuse.

Like this five-year-old girl, many kids stumble upon porn accidentally the first time they see it, and what they are being exposed to is extremely violent

¹² Ybarra, *Predicting the Emergence of Sexual Violence in Adolescence*, at 412.

¹³ Kyriak Alexandraki, Vasileios Stavropoulos, Emma Anderson, Mohammed Qasim Latifi, & Rapson Gomez, R, *Adolescent Pornography Use: A Systematic Literature Review of Research Trends 2000-2017*, *Current Psychiatry Reviews* 47-48 (2018).

and shockingly degrading. According to a 2020 study, 45% of the content on Pornhub depicts physical aggression, with 97% of that violence directed at women.¹⁴ The five most common types of aggression seen in pornography are spanking, gagging, slapping, hair pulling, and choking.¹⁵ Other popular themes include debasing acts, including ejaculation on the face.¹⁶ Simply viewing this content would be bad enough. But children are particularly susceptible to what they see in pornography. The more they view pornography, the more they want to perform the violent acts they are seeing.¹⁷

As the New York Times recently pointed out, many teenagers are violently strangling each other during sexual encounters and assaults. These teens are copying what they see in pornography, without the faintest idea that strangulation can cause brain damage and even be lethal.¹⁸

¹⁴ Niki Fritz, Vinny Malik, Bryant Paul, & Yanyan Zhou, *A Descriptive Analysis of the Types, Targets, and Relative Frequency of Aggression in Mainstream Pornography*, Archives of Sexual Behavior 3041-3053 (2020).

¹⁵ Fritz, *A Descriptive Analysis of the Types, Targets, and Relative Frequency of Aggression in Mainstream Pornography*, at 3041-3053.

¹⁶ Chyng Sun, Matthew B. Ezzell, & Olivia Kendall, *Naked Aggression: The Meaning and Practice of Ejaculation on a Woman's Face*, Violence Against Women 1710-1729 (2017).

¹⁷ Paul J. Wright, *Pornography and the Sexual Socialization of Children: Current Knowledge and a Theoretical Future*, Journal of Children and Media 305-312 (2014).

¹⁸ Peggy Orenstein, *The Troubling Trend in Teenage Sex*, New York Times (2024). Available at <https://www.nytimes.com/2024/04/12/opinion/choking-teen-sex-brain-damage.html#:~:text=Herbenick's%20surveys%20girls%20and%20women,two%20and%20a%20half%20times>.

It should not be surprising that so many kids are acting out popular porn themes, because a recent study estimated that two-thirds of adolescents in the United Kingdom are currently *addicted* (not just exposed) to online pornography (which includes high rates of female addiction).¹⁹ Research confirms that pornography is addictive, and the adolescent brain is very vulnerable when it comes to seeing sexually explicit material.²⁰

The addictiveness of pornography is due in large part to mirror neurons in the brain. According to Dr. Sharon Cooper, a forensic pediatrician, “[i]magery definitely affects children . . . when a child sees this image of adult pornography the mirror neurons that are in their brain will convince them that they are actually experiencing what they are seeing.”²¹ That is a frightening reality when one in three kids state they have seen hardcore porn by the age of 12.²² When children see pornography, these mirror neurons cause children’s brains to become prematurely sexualized, which can cause children to act out or want to imitate

¹⁹ Padraic Flanagan, *Almost two-thirds of young people are addicted to online porn, research suggests*, Daily Mail (2024), available at <https://www.dailymail.co.uk/news/article-12988023/thirds-young-people-addicted-online-pornography.html>.

²⁰ See, e.g., M. Brand, *Theories, prevention, and treatment of pornography-use disorder*, *Suchttherapie*, 20(1), (2019).

²¹ K. Jenson, *Top two reasons why children’s brains are vulnerable to pornography* (2012), available at <https://www.protectyoungminds.org/2012/06/01/top-two-reasons-why-childrens-brains-are-vulnerable-to-pornography>.

²² Natahsa Singh, *Talk to Your Kids About Porn*, *The Atlantic* (2018), available at <https://www.theatlantic.com/ideas/archive/2018/08/talking-to-kids-about-porn/568744/>.

what they are seeing.²³ Ms. Olson and fellow sexual assault nurse examiners experienced this reality firsthand when they took care of a 13-year-old female who had been raped by her 16-year-old brother. He stated, “I was looking at porn in my room and couldn’t stop thinking about it” as he began his assault.

Not only is pornography affecting the brains of children, but it is also causing erectile dysfunction. One Canadian study showed that nearly one-third of 16–21-year-olds surveyed reported having experienced erectile or sexual dysfunction related to porn use.²⁴

While statistics vary on the age at which children are being exposed to pornography, a 2022 survey showed that 73% of 13–17-year-olds had seen pornography, 54% were 13 or younger when first exposed, and 5% had first seen porn at 10 or

²³ This understanding of mirror neurons is consistent with René Girard’s theory of mimetic desire, which is particularly instructive here. Why would a 14-year-old boy want to strangle, anally penetrate, or otherwise sexually assault a young girl? The answer, according to Girard, is mimetic desire—a desire imitated from a model. In short, our most intimate desires are copied from what we see around us. If you mostly observe monogamous, loving, selfless relationships, you are more likely to desire such a relationship for yourself. But if you watch readily available online porn that is sadomasochistic, violent, or otherwise perverse, it is more likely that you’ll be inclined to desire and participate in these types of sexual acts yourself. See generally René Girard, *Deceit, Desire, and the Novel: Self and Other in Literary Structure*, The Johns Hopkins University Press (1965); René Girard, *Anorexia and Mimetic Desire*, Michigan State University Press (2013).

²⁴ Lucia F. O’Sullivan, Lori A. Brotto, E. Sandra Byers, Jo Ann Majerovich, Judith A. Wuest, *Prevalence and Characteristics of Sexual Functioning Among Sexually Experienced Middle to Late Adolescents*, *Journal of Sexual Medicine* 630-641 (2014).

younger.²⁵ Even if parents or other guardians diligently limit access to pornography at home, many children have easy access to porn on school-issued devices. A study done last year showed that one in three children are accessing pornography at school and almost half of the children surveyed are using their school-issued device to do so.²⁶ Ms. Olson is aware of multiple stories of children showing each other porn in class, on the bus, and at sleep overs, making it nearly impossible for parents to monitor what kids are seeing when they are not at home.

Ms. Olson is also aware of a high school in rural, mid-America that monitored their students' school-issued laptops for one month. This school only had 140 students, and in one month there were *13,000 hits* to Pornhub. For perspective, that is every student going to Pornhub, three times a day, every day, for 30 days *on their school-issued device*. Clearly, education and content filtering, alone, are not working.

A recent study in the United Kingdom showed that when kids view porn, they think what they are seeing is a realistic portrayal of sex. Many boys in the study revealed that they wanted to imitate the behavior they had seen while watching porn.²⁷ If a large percentage of pornography shows violence towards

²⁵ Michael B. Robb & Supreet Mann, *Teens and Pornography*, Common Sense Media (2022), available at <https://www.common sense media.org/sites/default/files/research/report/2022-teens-and-pornography-final-web.pdf>.

²⁶ Robb, *Teens and Pornography*.

²⁷ "...I wasn't sure it was normal to watch it..." *A quantitative and qualitative examination of the impact of online pornography on the values, attitudes, beliefs, and behaviors of children and young people*, available at <https://dera.ioe.ac.uk/id/eprint/27973/1/MDX%20NSPCC%20OC%20pornography%20report%20June%202016.pdf>.

women, and pornography is setting the arousal template for children, the downstream prognosis of health, safety, and societal well-being is dire.

To give a concrete example, Ms. Olson and her team treated a 14-year-old female who was gang raped in a public bathroom by three 14-year-old males. Some of her peers were outside of the bathroom as the assault unfolded. Instead of her peers intervening, they cheered and clapped when she walked out of the bathroom, as if the gang rape was a badge of honor. Why? Because in porn it is.

Further, her team saw a 10-year-old male who had been brutally sexually assaulted by his 14-year-old cousin. His cousin live-streamed the assault on Instagram without a second thought. The 10-year-old had genital injuries, because the assault was so violent. Again, this assault is nearly unimaginable absent the pervasive and corruptive influence of online violent pornography.

Pornography is teaching kids that self-exploitation is normal and even desirable. Many kids are so desensitized to seeing naked bodies, it's not a red flag when strangers ask them for nudes online. In fact, it's a compliment, because someone thinks they are "hot." Ms. Olson's team has taken care of teenagers who are being sex trafficked through sites like OnlyFans, but who fail to recognize that they are being exploited, because the creation of pornography and the view of the body as a mere consumer product has not only become the norm, but the goal. Further unsettling is the fact that many teen girls aspire to quit school

when they turn 18, start an OnlyFans account, and live a supposed glamorous, wealthy lifestyle.²⁸

Her team has seen 11- and 12-year-olds who have exchanged hundreds of nude photos and videos in exchange for things like gift cards or money. Under many jurisdictions, this is considered sex trafficking for minors. However, due to the normalization of pornography, these children have no idea that they are being exploited.

As technology rapidly changes, so too do the trends with pornography exposure and exploitation. A recent survey of teens revealed that 1 in 10 of them have used artificial intelligence to generate nude photographs of their classmates.²⁹ The impact on both the perpetrator and victim of these so-called “deepfakes” cannot be overstated.

One of the most unsettling trends is females *asking for* sexual violence during sexual encounters. Teenage boys have recently disclosed that girls are asking to be strangled and to be ejaculated on their faces. Again, the imitation of online pornography accounts for these changing—for the worse—sexual mores. These young girls don’t want to be seen as “boring.” In their words, it’s lame if you only want “vanilla sex.”

The examples could go on and on, but by now the point should be clear: contemporary online

²⁸ Heidi Olson, *Why So Many Teen Girls Are Planning on Becoming OnlyFans Stars*, Fight the New Drug (Oct. 17, 2023), available at <https://fightthenewdrug.org/many-teen-girls-planning-on-becoming-onlyfans-stars/>.

²⁹ *REPORT: 1 in 10 Minors Say Peers Have Used AI to Generate Nudes of Other Kids*, available at <https://www.thorn.org/press-releases/report-1-in-10-minors-say-peers-have-used-ai-to-generate-nudes-of-other-kids/>.

pornography is fueling a public-health crises. Arguably the most concerning aspect of this crises is the role that pornography plays in child-on-child sexual assault. Governments should combat this crisis with every available constitutional means, including, as Texas has done, age-verification laws.

II. H.B. 1181 SURVIVES CONSTITUTIONAL SCRUTINY.

A. The Speech At Issue Has No—Or at Most Low—Constitutional Value.

Amicus agrees with Respondent that H.B. 1181 survives any level of constitutional scrutiny. *See* RB 30-38. But regardless of the level of scrutiny imposed, *amicus* respectfully asks this Court to again affirm that not all speech is created equal. Some speech has more constitutional value than other speech. As noted by Justice Stevens, this Court’s “First Amendment decisions have created a rough hierarchy in the constitutional protection of speech.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). Under this Court’s jurisprudence, “[c]ore political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.” *Id.*³⁰

³⁰ Thus, non-obscene pornography or other sexually explicit material, even if entitled to some First Amendment protection, has less value and receives less protection than core speech. *See, e.g., F.C.C. v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (concluding that while certain scatological and sexual references “may be protected, they surely lie at the periphery of First Amendment concern”) (Stevens, J., plurality); *Young v. Am. Mini*

The “speech” at issue here—“sexual material harmful to minors”—has at least two marks against it. *First*, at best it is “nonobscene, sexually explicit speech.” But in fact, much of the pornography targeted by the law is not only obscene for minors but obscene for adults as well.

Second, the law only targets *commercial* speech, again, entitling the speech to less protection than core First Amendment speech such as political, religious, philosophical, or scientific speech.

Justice Scalia believed, consistent with this Court’s decision in *Ginzburg v. United States*, “that commercial entities which engage in the sordid business of pandering by deliberately emphasizing the sexually provocative aspects of their nonobscene products, in order to catch the salaciously disposed, engage in constitutionally unprotected behavior.” *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 676 (2004) (Scalia, J. concurring) (cleaned up) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting); *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443–444 (2002) (Scalia, J., concurring); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 256–261 (1990) (Scalia, J.,

Theatres, Inc., 427 U.S. 50, 70–71 (1976) (Stevens, J., plurality) (“even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire’s immortal comment”); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 83–85 (1994) (Scalia, J., dissenting) (describing pornography as “material of minimal First Amendment concern”).

concurring in part and dissenting in part). There can be little doubt that online pornography producers and sellers, who use complex algorithms to intentionally addict users,³¹ including children, to their content, are engaged in the “sordid business of pandering . . . to catch the salaciously disposed.” Accordingly, far from being engaged in the height of First Amendment protected speech—as Petitioners would have this Court believe—they are arguably engaged in constitutionally *unprotected* behavior—aka, constitutionally valueless speech. *See id.* at 676 (“Since this business could, consistent with the First Amendment, be banned entirely, COPA’s lesser restrictions raise no constitutional concern.”) (Scalia, J., dissenting).

But to the extent that Petitioners’ First Amendment rights are implicated, *amicus* respectfully asks this Court to judge those rights against one of two tests: either 1) the *Ginsburg* rational-basis test, or 2) a less-than-substantial-burden-is-constitutional test. Under either test, H.B. 1181 passes muster.

B. H.B. 1181 Is Constitutional Under *Ginsburg*.

Amicus will not rehash the arguments in Respondent’s brief, and fellow *amici*, articulating why the *Ginsburg* rational-basis test applies. But *amicus* does wish to make two points about *Ginsburg*.

First, as noted *supra*, in the year 2024 there is greater need to protect children from harmful sexual

³¹ *See* RB 3 (citing Amy Adler, *Arousal by Algorithm*, 109 Cornell L. Rev. 787, 811 (2024)).

material, not less, compared to 1968. The “girlie” magazines at issue in *Ginsburg* are almost wholesome compared to the unlimited amounts of graphically violent, sexually explicit, morally profane matter on the internet. That pornography has moved from a physical news rack to an ethereal “cloud” only heightens the need to protect children from the near omnipresence of pornography in today’s online world.

Second, this Court should reject Petitioners’ claim that *Ginsburg* is inapposite because it allegedly “did not place any restriction on adults’ access to sexual materials; it did not, for example, require sellers to conduct age verification for adult customers.” Petitioners’ Brief (“PB”) 20. But the obvious import of the law was to require age verification, lest a seller of sexual material harmful to children wished to be criminally prosecuted.

Further, *Ginsburg*, the bookseller, argued that adult access to pornography *was* at stake, reasoning that “[p]ragmatic consequences also challenge the validity of the statute on the ground that such statute *restrains the distribution of literature to persons not affected by the literature.*” *Ginsberg v. New York*, Appellant’s Brief 1967 WL 113634, at *18–19 (1967) (emphasis added). Specifically, he argued that the “policing problem would become an impossible burden, leading the bookseller to abandon sale even to adults” and thereby “adults would be deprived of such literature, because it was not available for distribution to adolescents.” *Id.*; *see also id.* at *7 (“In addition, a practical reason renders this statute a restraint on expression: the burden placed on a bookseller, especially a busy one like *Ginsberg*, who periodically receives new titles and stocks 200 different ones, sells stationery, cigarettes, candy,

lunch, and other similar products, to ascertain whether the literature meets statutory clearance and also ascertain at his peril, the age of the purchaser, intimidates the vendor to the point where he would be discouraged from distributing publications to anyone.”).

These arguments are remarkably like the arguments raised by Petitioners, who claim that H.B. 1181 burdens adults’ right to access sexual material, not because of the seconds or minutes it takes to age verify, but by *secondary effects*. Specifically, Petitioners claim—without evidence—that “many adults” will be reluctant to submit their personally identifying information to age verify because of the risk of “inadvertent disclosures, leaks, or hacks.” PB 26. Not only is this claim utterly speculative and inconsistent with how age verification works (*see* Brief of *Amicus Curiae* Age Verification Providers Association), but it is like the arguments made by Ginsburg—and rejected by this Court. Ginsburg’s argument that the New York law restrained adult access to protected First Amendment sexual content by burdening the *booksellers’* obligations, is the mirror image of Petitioners’ argument that H.B. 1181 restrains adult access to protected First Amendment sexual content by burdening the *content-purchaser’s* obligations. In both instances, the *seller* of sexual material is raising the speculative constitutional rights of third-party purchasers. As in *Ginsburg*, this Court should reject the argument, apply rational-basis review, and uphold the constitutionality of the law.

C. H.B. 1181 Imposes A Minimal Burden On Adult Access To Protected Sexual Material.

Alternatively, this Court could uphold H.B. 1181 on the ground that it imposes a minimal—and perhaps *de minimus*—burden on adult access to protected sexual material. Conspicuously absent from Petitioners’ brief is any discussion of the *scope* of the burden imposed by H.B. 1181 on adult access to protected material. Again, Petitioners do not argue that the only *direct* burden on adult access imposed by H.B. 1181—the few seconds or minutes it takes to age verify—is constitutionally meaningful. Instead, Petitioners base their constitutional-burden argument solely on the *secondary effects* of the law, claiming that adults without a government-issued identification, and adults afraid of having their personal information hacked, will not age verify and thus will have more limited access to sexual material. Petitioners have not attempted to quantify the scope of the alleged burden, but instead appear to argue that *any burden* on adult access to protected sexual material triggers strict scrutiny. PB 23 (“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.”).

This Court should clarify that, in analyzing a law aimed at protecting children from harmful sexual material, the amount of burden on adult access to protected speech matters. The greater the burden on adult access to protected speech, the more scrutiny is justified. The lesser the burden, the lesser the scrutiny. Such an approach is consistent with the

notion, discussed *supra*, that not all Free Speech rights are created equal. It is also consistent with the indisputable grave harm that children suffer at the hands of pornography, as discussed *supra*.

If, as here, the speech at issue is low value speech, then this Court should require a party challenging the law to prove a substantial burden on adult access to the protected—but low value—speech to successfully challenge the law. But if a law only poses a minimal burden on adult access to low-value speech—as here—then ordinarily the law should pass constitutional muster. This approach is consistent with one proposed by leading First Amendment scholar, Professor Eugene Volokh.³²

In short, the Court should reject Petitioners’ any-burden-on-adult-access-to-pornography-is-unconstitutional argument. Instead, this Court should adopt the anything-less-than-substantial-burden-is-constitutional approach advanced here. Under this approach, H.B. 1181 is clearly constitutional.³³

³² See Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 Sup. Ct. Rev. 141, 195 (1997) (arguing that the “best solution” to the challenge of protecting children from sexually explicit content while also protecting adults’ right to access protected material “is one that tolerates certain less-than-substantial burdens on a narrow class of speech, but that categorically invalidates any burdens that are substantial”).

³³ See Volokh, 1997 Sup. Ct. Rev. at 183 (arguing that under this approach, the law in *Ginsburg* would be upheld because the “restriction bans only constitutionally valueless speech to minors, and imposes only a slight burden on valuable communications”).

CONCLUSION

For the foregoing reasons and the reasons stated in Respondent's brief, the Court should affirm the decision of the Fifth Circuit and uphold the constitutionality of H.B. 1181.

Respectfully submitted,

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