

No. 23-1122

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IN THE  
**Supreme Court of the United States**

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FREE SPEECH COALITION, INC., *et al.*,

*Petitioners,*

*v.*

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

*Respondent.*

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

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**BRIEF OF *AMICUS CURIAE* THE REWARD  
FOUNDATION IN SUPPORT OF RESPONDENT**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Reward Foundation is a non-profit body registered in Scotland, UK. It has provided research, including its own research, and educational resources on pornography risk awareness since 2014. The Reward Foundation is a leading supplier of training materials for professionals about problematic pornography use (accredited 2018-24 by the Royal College of General Practitioners- family doctors), and of (free) school lesson plans on sexting and on pornography's impact on health. In 2020 the organization ran the world's first professional online conference on age verification for pornography. This was attended by 140 delegates from 29 countries.

Mary Sharpe is a noted child-safety advocate and member of the Faculty of Advocates and College of Justice of Scotland. She was seconded by the Cabinet Office of the UK government in 1992-94 to work on consumer safety laws including the Product Liability Directive at the European Commission in Brussels. She tutored graduate students at the University of Cambridge from 2001 till 2010 and researched the mindset of suicide bombers on behalf of the NATO Science for Peace and Security program. In 2010, she began monitoring the impact of pornography use on consumers. Ms. Sharpe has delivered evidence-based training in person and online to thousands of healthcare, criminal justice and education professionals, students and civil society representatives in over a dozen countries, including the USA.

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1. Amici certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amici or their counsel made any monetary contribution to this brief's preparation or submission.

Dr. Darryl Mead is the senior researcher at The Reward Foundation focusing on the development of the consumer market for Internet pornography. He is a Fellow of the Chartered Institute of Library and Information Professionals in the UK. Dr. Mead helped to build the system the United Kingdom uses to archive the .uk domain under the country's legal deposit legislation. His recent research has been on pornography industry disinformation campaigns intended to undermine self-help initiatives offered by online communities of pornography consumers who wish to quit.

The 2021 paper by Mary Sharpe & Darryl Mead, *Problematic Pornography Use: Legal and Health Policy Considerations*, has been downloaded over 144,000 times. Current Addiction Reports, Sep. 1-12, <https://tinyurl.com/2eeprt96>.

Given amici's background, they have a vested interest in how international courts deal with laws that help prevent kids from accessing pornography and wish to provide their unique insights to the Court.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Internet pornography is not a safe product. It is a defective product by reason of its content. Brain changes resulting from intense and sustained use of Internet pornography over months and years are cumulative. Bingeing on strong stimuli on a regular basis drives addiction-related brain changes. Pornography sites, much like social media services, hook users with constant novelty and hyper stimulating sexual content.

Children are the most vulnerable to developing addictive disorders and mental health problems due to their stage of brain development. The adolescent brain is in a state of accelerated learning from puberty to mid-20s when the brain strengthens the most used pathways and prunes back unused ones. They also produce more of the ‘go-get-it’ neurochemical dopamine, and are more sensitive to it. In addition, they also produce more natural opioids and are more sensitive to them, driving craving for high levels of stimulation and risk.

Sexual dysfunction is increasingly common among teenagers and young adults. They can be aroused by hardcore pornography but not by real people. The arousal system (autonomic nervous system) becomes desensitized over time and needs stronger material. This means that the lesser stimulation of a real person does not register as strong enough in the brain of a person with problematic pornography use to create sexual arousal. This is a form of sexual conditioning. A young user doesn’t need to have an addiction to develop sexual dysfunctions.

We agree with this Court when it said that “The State has an interest to protect the welfare of children and to see that they are safeguarded from abuses.” *Ginsberg v. New York*, 390 U.S. 629, 640 (1968). It is why we argue here that Texas’s H.B. 1181 is a measured approach to combat the health emergency on our kids propelled by unfettered access to online pornography.

In this brief we make four basic points. *First*, we provide a review of the scientific literature that demonstrates why Texas’s efforts to protect children from this highly dangerous and addictive service is

not just an important interest, but a compelling one. *Second*, we provide insights on studies conducted among several federal agencies, organizations, and large tech companies showing that the use of multiple techniques, particularly artificial intelligence and facial recognition, are now more available than ever in allowing websites to determine age with precision. *Third*, we respectfully ask the Court to continue to maintain the integrity of the separation of powers that demands it to avoid a determination that categorically precludes a state from leveraging age verification technologies, which at its core, is a political endeavor, not a legal question as it pertains to this case. *Fourth*, we respectfully ask the Court to limit its evaluation to whether H.B. 1181’s definition falls under the *Miller* test as opposed to ruling on whether age verification is the most appropriate policy for legislatures to use.

## ARGUMENT

### **I. Unfettered Access to Pornography Causes Irreparable Damage to Children’s Psychological and Physical Health**

Pornography use has harmful health effects for many consumers. The negative health effects are now codified in the International Classification of Diseases – 11<sup>th</sup> Revision (“ICD-11”) which was published by the World Health Organization (“WHO”) in 2018 and became generally adopted by member states on 1 January 2022 (World Health Organization, 2022).

The U.S. healthcare system is still preparing its implementation. However, over 60 countries have already adopted ICD-11.

The relevant diagnosis for compulsive sexual behaviour disorder (“CSBD”) is at code 6C72. 6C72 includes:

“Compulsive sexual behaviour disorder is characterised by a persistent pattern of failure to control intense, repetitive sexual impulses or urges resulting in repetitive sexual behaviour. Symptoms may include repetitive sexual activities becoming a central focus of the person’s life to the point of neglecting health and personal care or other interests, activities and responsibilities; numerous unsuccessful efforts to significantly reduce repetitive sexual behaviour; and continued repetitive sexual behaviour despite adverse consequences or deriving little or no satisfaction from it. The pattern of failure to control intense, sexual impulses or urges and resulting repetitive sexual behaviour is manifested over an extended period of time (e.g., 6 months or more), and causes marked distress or significant impairment in personal, family, social, educational, occupational, or other important areas of functioning. Distress that is entirely related to moral judgments and disapproval about sexual impulses, urges, or behaviours is not sufficient to meet this requirement.” World Health Organization, *ICD-11 International Classification of Diseases 11th Revision*. (2022) <https://icd.who.int/en>.

In February 2022, the WHO updated the CSBD entry online to include additional clinical features including:

“Compulsive sexual behaviors disorder may be expressed in a variety of behaviors, including sexual behaviors with others, *masturbation, use of pornography*, cybersex (internet sex), telephone sex, and other forms of repetitive sexual behavior. *Id.* (Emphasis added). Individuals with compulsive sexual behaviors disorder often engage in sexual behavior in response to feelings of depression, anxiety, boredom, loneliness, or other negative affective states. Although not diagnostically determinative, consideration of the relationship between emotional and behavioral cues and sexual behaviors may be an important aspect of treatment planning.” *See Id.*

In other words, the WHO made it clear that pornography use and masturbation are typical behaviors that can be part of this condition. In fact, research indicates that more than 80% of people seeking treatment for CSBD have a pornography-related issue. Beáta Bóthe, et al., *Problematic pornography use across countries, genders, and sexual orientations: Insights from the International Sex Survey and comparison of different assessment tools*. ADDICTION 119.5 (2024): 928-950, available at <https://tinyurl.com/yc6unz4w>.

The WHO does not use the term ‘addiction,’ as it is considered stigmatizing, but rather refers to ‘addictive disorder.’ However, the general public uses the term ‘addiction’ more readily when they equate ‘pornography addiction’ with compulsive sexual behavior disorder.

The term most commonly used in the academic literature to talk of people with out-of-control pornography

use, unless they have been clinically assessed as having compulsive sexual behavior disorder, is problematic pornography use.

These effects are even more pronounced in children. When puberty arrives, a young person is biologically programmed to focus on learning about sex. Today's digital natives look primarily to free, streaming Internet pornography to learn about sex. Internet pornography has succeeded in creating dependency with negative consequences for millions of children who form a substantial percentage of users.

Children are the most vulnerable to developing addictive disorders and mental health problems due to their stage of brain development. The adolescent brain is in a state of accelerated learning from puberty to mid-20s when the brain strengthens the most used pathways and prunes back unused ones. They also produce more of the 'go-get-it' neurochemical dopamine, and are more sensitive to it. In addition, they also produce more natural opioids and are more sensitive to them, driving craving for high levels of stimulation and risk.

Sexual dysfunction is increasingly common among teenagers and young adults. They can be aroused by hardcore pornography but not by real people. The arousal system (*i.e.*, the autonomic nervous system) becomes desensitized over time and needs stronger material. This means that the lesser stimulation of a real person does not register as strong enough in the brain of a person with problematic pornography use to create sexual arousal. This is a form of sexual conditioning. A young user doesn't need to have an addiction to develop sexual dysfunctions.

Professor Gunther De Win, a urologist who specializes in adolescent sexual health, has done research on erectile dysfunction in adolescents:

“...It is clear that the erectile dysfunction (ED) seen in our study is situational, as many participants experiencing some ED during partnered sex did not experience ED nor climaxing difficulties while masturbating with pornography.” *“Of the participants who had started masturbating to porn at a very early age (<10 years), 58% (11/19) had some form of ED (P=.01), compared with 20.7% (61/295) in the group who started at 10-12 years old, 20.8% (173/831) in the group who started at 13-14 years old, 18.6% (97/521) in the group who started at 15-17 years old, and 24% (17/70) in the group who started at an age of 18 years or older...Conclusions: This prevalence of ED in young men is alarming high, and the results of this study suggest a significant association with problematic pornography consumption.”* (Emphasis added) Tim Jacobs, et al., *Associations between online pornography consumption and sexual dysfunction in young men: multivariate analysis based on an international web-based survey*. JMIR PUBLIC HEALTH SURVEILL. 7.10 (2021): e32542. <https://tinyurl.com/5n873kuy>.

This supports research by Cambridge clinician and researcher Professor Valerie Voon in 2014. This team found that “CSB [compulsive sexual behaviors] subjects compared to healthy volunteers had significantly more



difficulty with sexual arousal and experienced more erectile difficulties in intimate sexual relationships but not to sexually explicit material.” Valerie Voon, et al., *Neural correlates of sexual cue reactivity in individuals with and without compulsive sexual behaviours*. PLOS one 9.7 (2014): e102419. <https://tinyurl.com/3p8n4kt3>

Finally, researchers found that younger subjects had enhanced reward circuit activity when exposed to porn cues. Higher dopamine spikes and greater reward sensitivity are major factors in adolescents being more vulnerable to addiction. See Your Brain on Porn, *Why Shouldn't Johnny Watch Porn If He Likes?* (2011) <https://tinyurl.com/47sa9eh9>, and sexual conditioning. See Your Brain on Porn, *Adolescent Brain Meets Highspeed Internet Porn* (2013) <https://tinyurl.com/hwzhf2y9>.

A recent study of 6,093 US adolescents (Median age = 15.27 years) looking at relations between reality television, music videos, pornography, and active sexting behaviors (*i.e.*, requesting and sending) found “...pornography consumption was positively related to active sexting behaviors among all gender groups.” Jennifer S. Aubrey, et al., *Examining Relations Between Sexualizing Media Exposure and Sexting Attitudes and Behaviors among US Adolescents*. ARCH. SEX. BEHAV. (2024): 1-14. [https://tinyurl.com/2far7put\\_](https://tinyurl.com/2far7put_)

People presenting to clinicians with CSBD are developing it faster than previously, almost certainly due to the ubiquity of online pornography. Fifteen years ago, it took around 9-10 years for it to develop, now it's happening after 4-5 years. Mateusz Gola, *How long does it take for CSBD to develop?* YouTube. (2022), [https://tinyurl.com/2far7put\\_](https://tinyurl.com/2far7put_)

com/4rhu7xj7. Over 85 studies published between 2004 and 2024 link porn use to poorer mental-emotional health and poorer cognitive outcomes. See Your Brain on Porn, *Studies linking porn use to poorer mental-emotional health & poorer cognitive outcomes* (2024), <https://tinyurl.com/4j6zh66p>.

Recent Italian research shows that problematic pornography use was associated with higher levels of anxiety, depression, stress, loneliness, and suicide ideation, as well as lower life satisfaction. Mujde Altin, et al., *Problematic Pornography Use, Mental Health, and Suicidality among Young Adults*. INT. J. ENVIRON. RES. PUBLIC HEALTH 21.9 (2024): 1228, <https://tinyurl.com/5n8p83mz>. Gender comparison analysis revealed significantly higher scores for problematic pornography use and loneliness among men, while women scored higher in stress, anxiety, and life satisfaction. *Id.*

In sum, Internet pornography is not a safe product, especially for children. The Fifth Circuit in this case found that “[t]he record is replete with examples of the sort of damage that access to pornography does to children. One study finds that earlier use of adult pornography was correlated with an increased likelihood of engagement “with deviant pornography (bestiality or child).”“ *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 279 (5th Cir. 2024). A “review of literature from 2013–2018 finds a correlation between “frequent use of online pornography” and “distorted gender orientations, insecurities and dissatisfaction about one’s own body image, depression symptoms, assimilation to aggressive models,” and more.” *Id.* As experts in the field, we agree with those findings.

To be sure, pornography is a defective product by reason of its content. Brain changes resulting from intense and sustained use of Internet pornography over months and years are cumulative. Bingeing on strong sexualised stimuli on a regular basis drives addiction-related brain changes. Pornography sites, much like social media services, hook users with constant novelty and hyper stimulating sexual content.

Tolerance and escalation are characteristic features of brain changes in any addiction. As a brain desensitizes to one level of stimulation, it needs stronger stimuli to feel excited. Just as a drug user needs stronger doses of a given drug to obtain a “high”, the equivalent stronger dose in a pornography user is more intense material. This includes violent, coercive, and demeaning themes such as gangbangs or taboo subjects such as sex with children or family members or animals, to achieve sexual arousal. The pornography industry provides endless amounts of such harmful content. Using this material is damaging children at a critical stage of their mental and physical growth, and their social sexual development.

Given all of this, we respectfully urge the Court to continue to apply, as the Fifth Circuit has, rational basis review to allow states to protect children from this scourge.

## **II. Age Verification Measures Are Not Burdensome**

Petitioner admits that H.B. 1181 may not raise speech concerns if “certain age-verification measures were employed,” because its aim is directed at preventing children from accessing pornography, not adults. Pet. Br.

Pgs. 22-23. So, let's begin with the obvious point—age verification technology is far superior now than it was in 1997 or 2004. This means that these websites are now far more able to comply with an age verification regulation than those operating when the Court decided *Reno v. ACLU* and *Ashcroft v. ACLU (Ashcroft II)*. 521 U.S. 844, 859-61 (1997); 542 U.S. 656, 665-66 (2004).

Therein lies the rub for Petitioner's argument: they need the digital world to emulate the one when *Reno* was decided for their case to hold water. In 1997, this Court believed that there "is 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." *Reno*, 21 U.S. at 856. All of that may have been true in 1997, but with the advent of artificial intelligence and a whole host of biometric data these companies collect, it is just not the case any longer.

Studies conducted among several federal agencies, organizations, and large tech companies demonstrate that the use of multiple techniques, particularly artificial intelligence and facial recognition, are now more available than ever in allowing websites to determine age with precision. *See generally*, NIST Report; *see* Erica Finkle, et al., *Bringing Age Verification to Facebook Dating*, Facebook (Dec. 5, 2022), <https://about.fb.com/news/2022/12/facebook-dating-age-verification/>; *see also*, John Ehrett & Clare Morrell, *Age Verification Policy for States*, Institute for Family Studies and Ethics and Public Policy Center (2023), <https://eppc.org/wp-content/uploads/2023/09/Age-Verification-Policy-Brief-web.pdf> ("IFS & EPPC Report"). The Institute for Family Studies and Ethics and Public Policy Center performed a study

that outlined several data points websites can use to determine a user's age non-invasively. *See* IFS & EPPC Report, ps. 2-3. Websites can easily ask the user to upload a government issued ID before entering the site. *Id.* Or require the user to provide a credit card. *Id.*

To quote Bob Dylan, “the times they are a changing.” And so has the Internet market. For instance, today's AI is so powerful that it could guess a person's age within three years using *only* facial data. *E.g.*, Kayee Hannaoka, et al., *Face Analysis Technology Evaluation: Age Estimation and Verification*, Nat'l Inst. of Standards and Tech. Internal Report, NIST IR 8525 (2024), <https://nvlpubs.nist.gov/nistpubs/ir/2024/NIST.IR.8525.pdf> (“NIST Report”).

Porn websites' data collection practices, too, have evolved since 1997. These websites, that profit directly from collecting personal data, already collect age data. In today's market, consumers are the product websites sell to advertisers. It is why websites' current data collection practices are far more invasive than those operating in 1996 and 2004. Indeed, the rise of digital advertising has inspired large and small websites to collect personal, even intimate data from their users using a host of mobile devices, browsers, operating systems, and apps.

It is why Petitioner citing privacy concerns to challenge H.B. 1181's age verification requirement just does not cut the mustard and borders on parody. According to its own reporting, Pornhub alone transferred 6,597 petabytes of personal data in 2019 alone. Fight the New Drug, *Here's What Porn Sites Do with All the Info They Gather from Consumers*, (last visited November 22, 2024), <https://>

fightthenewdrug.org/heres-what-porn-sites-do-with-all-the-info-they-gather-from-consumers/. Worse for the porn sites' case is that they assist large tech companies, like Google, Meta, Oracle, and Cloudflare, create intimate profiles on their users to sell to advertisers. Elena Maris, et al., *Tracking Sex: The Implications of Widespread Sexual Data Leakage and Tracking on Porn Websites*, Microsoft (2019), <https://arxiv.org/pdf/1907.06520>. The data porn websites' collect is extremely personal. Researchers found that nearly 45% of pornography URLs "expose or strongly suggest the site content" which may reveal a visitor's sexual preferences, sexual identity, or orientation. *Id.* Armed with this data, websites of any size can not only easily assess age in a substantially more accurate way than the websites during the time of *Reno* and *Ashcroft*, but likely already know the user's age to develop ad profiles for the tech companies.

Even if the website provider does not have or want the capability to conduct such determinations, there are a whole host of cost-effective, third-party service providers, such as FaceTec and Yoti, they can use. IFS & EPPC Report, ps. 2-3. According to its privacy policy, Pornhub already uses these services. § 2 of Pornhub Privacy Policy (last visited, Nov. 22, 2024), <https://www.pornhub.com/information/privacy>. It says explicitly that "[s]ome users may be asked to provide identifiers (including government-issued photo identification as well as other documentation) to verify that they are over the age of majority required to have access to Pornhub and to view their contents. In such cases, this information *is processed by trusted third-party age verification service providers* [emphasis added]." *Id.* This significantly cuts against Petitioner's claim that such measures are overly burdensome.

In sum, the age verification techniques are far more accurate than anything the Court evaluated in *Reno* or *Ashcroft II*.

### **III. Petitioner's Relief Requires the Court to Stand in the Shoes of the Legislature**

Petitioner's primary argument is premised on age verification being technologically, financially, or effectively impossible to perform; or that there are alternative technologies that the Texas legislature did not consider. Thus, all Respondent must demonstrate here is that the legislature performed its due diligence, because then Petitioner's speech concerns are inconsequential.

This should be a low bar given the Court's general position towards evaluating a statute's constitutionality. The Court's general posture towards democratically enacted statutes is to save them not to destroy them. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). It follows that courts typically do not want to stand in the shoes of the legislature.

Hence why Petitioner's relief is so problematic because it requires this Court to destroy a democratically enacted law created by a bipartisan group of lawmakers. Specifically, Petitioner is asking the Court to overrule Texas's decision to use age verification over filters as a technological requirement. A decision of this type is precisely what the Chief Justice and Justice Alito cautioned the Court against in *Brown v. Entertainment Merchants Ass'n.* 564 U.S. 786, 807 (2011) (Alito, J. & Roberts, J. concurring). There, Chief Justice Roberts and Justice Alito stated that the Court "should not hastily

dismiss the judgment of legislators, who may be in a better position than [the Court is] to assess the implications of new technology.” 564 U.S. 786, 807 (2011) (J. Alito & J. Roberts concurring).

In general, if there exists a “fairly possible” construction to save the statute’s language, the Court must adopt it. *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 180 (2003) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). In other words, the Court must exercise humility when it comes to the legislature’s findings. Why? Justice Breyer in *Ashcroft II* provides some insight. He explains:

“[T]he undoubted ability of lawyers and judges,” who are not constrained by the budgetary worries and other practical parameters within which [legislatures] must operate, “to imagine *some* kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being.” *Ashcroft II*, at 689 (citing *Playboy Entertainment Group*, 529 U.S., at 841, 120 S.Ct. 1878 (Breyer, J., dissenting)).

More succinctly, state legislatures may simply have a better system to determine how best to protect its own population than courts’.

In this case, Texas certainly has. Texas’s bipartisan state legislature conducted several investigative hearings, brought in experts to advise on technological means to achieve the State’s compelling state interest in protecting children, and voted almost unanimously to pass H.B. 1181. See TX HB1181, 88th Legislature, <https://legiscan.com/TX/votes/HB1181/2023>.



It is also clear that the Texas legislature did not act arbitrarily and ensured its age verification measure was not overly burdensome. Based on a fairly extensive legislative record and myriad hearings from experts, the bipartisan legislature wisely included websites a plethora of options to comply with its age verification requirement. H.B. 1181 Legislative Record, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB1181>. H.B. 1181 explicitly says that websites may use “digital identification,” “government issued identification,” or “a commercially reasonable method that relies on public or private transactional data.” Tex. Civ. Prac. & Rem. Code §§ 129B.002(a), 129B.003. As discussed earlier, this is all consistent with scholars, tech companies, and federal agencies’ findings with respect to age verification as outlined above. *See supra* § II. Better yet, some porn sites are already collecting age data and using third-party verifiers as indicated by Pornhub’s privacy policy. *Id.*

Given the insurmountable evidence, it is no wonder why children are acting out the violence and coercion they see online. Protecting children from this highly dangerous and addictive service is not just an important government interest, but a compelling one. Indeed, “[t]he State has an interest to protect the welfare of children and to see that they are safeguarded from abuses.” *Ginsberg*, 390 U.S. at 640.

Texas’s legislative record even reflects that the legislature considered (and rejected) the use of filters as an effective way to protect kids from accessing pornography. *Free Speech Coal., Inc. v. Colmenero*, 689 F.Supp.3d 373, 405 (W.D. Tex. 2023) (acknowledging that early draft bills of H.B. 1181 included parental incentives and penalties to encourage the use of website filters). Thus, the legislature

has already assessed what we experts have known for a while: filters do not work.

Adam Candeub rightly points out that “twenty years have gone by, and that experiment has failed.” Adam Candeub, *Free Speech Coalition v. Paxton: Age Verification for Porn Sites Is Common Sense Policy and Constitutionally Sound*, Federalist Society (Nov. 6, 2024), <https://fedsoc.org/commentary/fedsoc-blog/free-speech-coalition-v-paxton-age-verification-for-porn-sites-is-commonsense-policy-and-constitutionally-sound>. He points out that children “are more tech-savvy than their parents, and filters are difficult to control and update. Only the most dedicated parent—probably with a computer science Ph.D.—can keep adequate control.” *Id.*

Mr. Candeub is not alone in questioning the wisdom of filters as a legitimate alternative to age verification. Justice Bryer, too, was skeptical back in 1997 when criticizing the Court’s holding in *Ashcroft II*. He ironically suggested that filters could be a successful alternative to age verification if “the Government could give all parents, schools, and Internet cafes free computers with filtering programs already installed, hire federal employees to train parents and teachers on their use, and devote millions of dollars to the development of better software.” *Ashcroft II*, at 689. All of these are far outside the scope of Texas’s financial means and enforcement capabilities. Thus, filters are just not a viable option to protect kids compared to age verification, which the legislative record reflects.

The District Court erred that Texas did not consider the issue because it could not show the “difficulty” for

parents implementing this measure. *Colmenero*, 689 F.Supp.3d at 405. As Justice Breyer rightly put: “the Constitution does not, because it cannot, require the Government to disprove the existence of magic solutions, *i.e.*, solutions that, put in general terms, will solve any problem less restrictively but with equal effectiveness.” *Ashcroft II*, at 689. What is more, the First Amendment “does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities...” or other outside sources. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 52 (1986).

These reasons are why a legislature’s decision to leverage age verification as a political solution should be entirely outside the scope of the judiciary’s discretion. Put another way, the Court’s personal technological preferences should not be a factor if the legislature has done their due diligence. The separation of powers even demands it. The Court acknowledges this in *Barnes v. Glen Theater* when writing that “[i]t is not for [the Court] to resolve empirical uncertainties underlying state legislation...” 413 U.S. 49, 61 (1973). Or, as the Court held in *Renton*, “[i]t is not [the Court’s] function to appraise the wisdom of [the legislature’s] decision” when imposing certain requirements. 475 U.S. at 53. Or in *American Mini Theaters* where it held that the “city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” 427 U.S. at 71.

Judicial humility in favor of a legislature’s decisions are also reflected in other court doctrines, too. The Court’s political question doctrine, by analogy, is predicated on this exact notion that lawmakers may know more than judges

when it comes to these types of decisions. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). It is why the Court assesses whether a party’s relief requires it to consider whether “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion” or “an unusual need for unquestioning adherence to a political decision already made” as part of the political question analysis. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

This Court, in particular, has made a stalwart effort to maintain the integrity of the separations of powers and has kept it at the forefront in recent decisions. Notably, in *West Virginia v. EPA*, the Court further articulated the major-questions doctrine to deter executive agencies from regulating issues that concern “vast economic and political significance” without an explicit congressional delegation. 597 U.S. 697 (2022). In *Loper Bright Enterprises v. Raimondo*, with respect to regulatory actions, the Court restored the responsibility of statutory interpretation of ambiguous statutes back to the judiciary as opposed to an executive agency. 144 S.Ct. 2244 (2024). These decisions are rooted in the wisdom of our constitution’s structure, which unequivocally leaves political decisions to legislatures, not courts.

As the Court has done previously, it should continue to maintain the integrity of that system. This demands that the Court should avoid a determination that categorically precludes a state from leveraging age verification technologies, which at its core, is a political endeavor, not a legal question as it pertains to this case.

#### **IV. To Resolve this Case, the Court Need Only Clarify the Application of the *Miller* Test to H.B. 1181's Definition Concerning Sexual Materials Harmful to Minors**

Large porn website owners have perverted our First Amendment. Third Circuit Judge Matey in his concurring opinion in *Anderson v. TikTok* succinctly explains pornography websites' argument well. He wrote that "a host of purveyors of pornography, self-mutilation, and exploitation...smuggles constitutional conceptions of a 'free trade in ideas' into a digital 'cauldron of illicit loves' that leap and boil with no oversight, no accountability, no remedy." 116 F.4th 180, 186-87 (3rd Cir. 2024) (Matey, J. concurring). However, the Court here can move the needle in the right direction by addressing key lapses in First Amendment analysis.

Absent the confusion *Ashcroft II* has inspired on the use of age verification, this case would be unequivocally within the bounds of obscenity as defined in *Miller v. California*. As the Fifth Circuit correctly asserts, Texas's "statute defines sexual material harmful to minors by adding "with respect to minors" or "for minors," where relevant, to the well-established *Miller* test for obscenity." *Free Speech Coalition*, 95 F.4th at 278.

Given the statute's emphasis towards protecting children, the pornography at issue may be categorized as "hard core" materials. The Court requires the following conditions for it to deem content as "hard core" materials and, by extension, obscene:

- (1) An “average person, applying contemporary community standards [must] find ... the work, taken as a whole, appeals to the prurient interest”;
- (2) “the work [must] depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and”
- (3) “the work, taken as a whole, [must] lack serious literary, artistic, political, or scientific value.” *Id.*, at 24 (internal quotation marks omitted).

Before *Reno* and *Ashcroft II*, H.B. 1181 would have passed constitutional muster with ease because the courts would leverage this analytical framework first before jumping to the legislature’s chosen compliance model, in this case age verification. The Fifth Circuit correctly held that “regulations of the distribution to *minors* of materials obscene for *minors* are subject only to rational-basis review.” *Free Speech Coalition*, 95 F.4th at 270 (citing *Ginsberg*, 390 F.4th at 640 and *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 793-94 (2011)).

Petitioner knows it has a fact problem, because Petitioner understands that advances in age verification technology undercuts its First Amendment case. Hence why Petitioner wants the Court to go back in time to a world where the case law best fits its narrative. As discussed earlier, the fact that we do live in 2024 and age verification techniques are incredibly accurate means that *Ashcroft II*’s strict scrutiny standard is inappropriate. See

*supra* at § II. This is because these technological advances make the situation look a lot more like the one in *Ginsberg* where the Court applied its rational-basis test. *Ginsberg v. New York*, 390 U.S. 629 (1968).

Additionally, these advances in age verification technology justify the Court reconciling the application of the *Miller* test and the *Ashcroft II* test with respect to obscenity for minors. Up until *Reno*, the Court consistently upheld state laws preventing children from accessing obscene materials. In *Ginsberg*, the Court upheld age verification to limit the access of “girlie magazines” to children even though it was non-obscene and protected speech for adults. *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Young v. American Mini Theaters*, this Court upheld a zoning ordinance that prohibited adult theaters to be within 1,000 feet of any two other “regulated uses” or within 500 feet of any residential zone. 427 U.S. 50 (1976). Like *Young*, the Court in *Renton v. Playtime Theatres, Inc.* upheld zoning laws that prohibited “adult motion picture theatres from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.” 475 U.S. 41 (1986). It is important to note that the Court did not use strict scrutiny in any of the above-mentioned cases.

This all changed after *Reno* and *Ashcroft II*. In both of those cases, the Court decided to apply strict scrutiny to those statutes.

However, neither of those cases overturn *Ginsberg* or the use of rational basis to evaluate age verification for obscene Internet materials for children. As the Fifth Circuit aptly noted, the question of “the appropriate

standard of review in *Ashcroft* is a “[q]uestion[ ] which merely lurk[s] in the record, neither brought to the attention of the court nor ruled upon” and consequently is not “to be considered as having been so decided as to constitute precedent[ ].”“ *Free Speech Coal.*, 95 F.4th at 275. Even a liberal reading of *Ashcroft II* and *Reno*, as Petitioner’s is, does not indicate that laws preventing children from accessing sexually explicit online materials immediately warrant a strict scrutiny review. *Ashcroft*, 542 U.S. at 665-66; *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989).

There remains a problem still. Though *Ginsberg* is good law, it is difficult to discern when courts should apply it. Courts’ presumption that the mere presence of age verification triggers strict scrutiny only serves to taint the legality of the policy prescription in favor of destroying those statutes. Why? Because courts presume that *Reno* and *Ashcroft II* apply without seriously considering *Ginsburg*. All this without having any analysis as to whether the material is, indeed, obscene for kids.

This lapse of analysis has wreaked havoc on the legislative process when it comes to protecting kids. Today’s framework has the practical effect of limiting the legislative tools lawmakers can use to even protect kids from online pornography. This is an absurd result.

The Court can easily rectify this by clarifying the application of the *Miller* test to laws designed to protect children from accessing obscene materials. For laws targeted at protecting kids, courts would analyze the specific materials the government does not want kids to access *before* addressing the appropriateness of how



lawmakers decide to quell the concern. The Court first determining that the material is obscene for kids under *Miller* adds a necessary “step one” to allow a court to more appropriately determine whether to apply *Ashcroft II* or *Ginsberg*.

Such an analytical method would have likely ameliorated Justice Scalia’s misgivings with *Ashcroft II*’s application of strict scrutiny to the Child Online Protection Act (“COPA”). He stated, “[n]othing in the First Amendment entitles the type of material covered by COPA to [strict scrutiny].” *Ashcroft II*, at 677 (Scalia, J. dissenting). This suggested review is also in line with Justice Breyer’s in his dissent in *Ashcroft II*. There, he proposed that the Court must “construe the statute narrowly...removing nearly all protected material from its scope.” *Id.* at 691. Justice Breyer believed this framework “would “save” the statute, “not ... destroy” it...[a]nd permit Congress to achieve its basic child-protecting objectives.” *Id.* at 692.

This framework also reaffirms *Ginsberg* as good law and reconciles the Court’s previous decisions with respect to upholding state laws that protect kids from obscene materials with *Reno* and *Ashcroft II*. *E.g.*, *Ginsberg*, 390 U.S. at 640 (holding that “well-being of its children is of course a subject within the State’s constitutional power to regulate...availability of sex material to minors under 17”); *Paris Adult Theatre I*, 413 U.S. at 70 (holding “States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including [sic] so-called ‘adult’ theaters from which minors are excluded”); *Young*, 427 U.S. at 71-72 (holding that “the State may legitimately use the content of these materials as the basis

for placing them in a different classification from other motion pictures.”); *Renton*, 475 U.S. at 53 (holding that “cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton....”).

When applying the standard here, the Court should find that H.B. 1181 fits perfectly within the definition of obscenity as applied to minors. To start, pornography has long been viewed as being obscene materials for children. *Ginsberg v. New York*, 390 U.S. 629 (1968); *see also, Brown v. Entertainment Merchants Ass’n*. 564 U.S. 786, 793-94 (2011). Importantly, H.B. 1181 does not ban the distribution of pornography entirely, which would implicate adult speech according to both *Reno* and *Ashcroft II* if it did. 521 U.S. at 859-61; 542 U.S. at 665-66. Thus, because the material H.B. 1181 would be deemed obscene for minors and the intent of the regulation is only to prevent minors from accessing that material, a review under *Ginsberg* would be the appropriate standard for H.B. 1181’s age verification requirement; not *Ashcroft II*.

Under *Ginsberg*, H.B. 1181 easily meets the rational basis test. The science and evidence show that the Texas legislature acted rationally when enacting H.B. 1181. Specifically with respect to the lack of preventative measures, it opens the door to a whole host of harmful behavior from unfettered access to this damaging content. *See supra* at § I.

Even the use of age verification further ensures H.B. 1181’s constitutionality because it narrows the regulation to the protection of children, not inhibit adults’ access to pornography. *See supra* at § II. Theoretically, all a covered website would need to do is ask and verify the user’s

age and they would be compliant. Moreover, the adult is free to access pornography to their hearts' content once their age is verified. Thus, the restriction only applies to children's access to pornography that, under the *Miller* test, is obscene material for them. *Miller*, 413 U.S. at 93; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975); *Roth v. United States*, 354 U.S. 476, 77 (1957).

As the Respondent's brief accurately articulates, audience matters as it relates to obscenity. Res. Br. P. 19 (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 125-26 (1989)). Applying this framework would allow the Court to restore the traditional analysis that was noticeably omitted in *Ashcroft II*, while harmonizing it with *Ginsberg*.

## CONCLUSION

For the reasons above, the Court should decide for Respondents and apply rational basis scrutiny to H.B. 1181.

Respectfully submitted,

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