No. 23-1122

IN THE

Supreme Court of the United States

FREE SPEECH COALITION, INC., ET AL.
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

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

BRIEF OF *AMICI CURIAE* ETHICS AND RELIGIOUS LIBERTY COMMISSION, SOUTHERN BAPTISTS OF TEXAS CONVENTION, AND BAPTIST GENERAL CONVENTION OF TEXAS IN SUPPORT OF RESPONDENT

S. CHAD MEREDITH
Counsel of Record
201 E. Fourth St.,
Ste. 1900
Cincinnati, OH 45202
(513) 361-1235
chad.meredith@squirepb.com

TREVOR PIROUZ KEHRER
600 Travis St.,
Ste. 6700
Houston, TX 77002
trevor.kehrer@squirepb.com

SQUIRE PATTON BOGGS (US) LLP
Counsel for Amici Curiae

November 22, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE[1]

The Ethics and Religious Liberty Commission ("ERLC") is the moral-concerns and public-policy arm of the Southern Baptist Convention ("SBC"), which is the nation's largest Protestant denomination, with nearly 13 million members in more than 45,000 churches and congregations spread across all 50 States. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

At issue in this case are matters that go to the heart of the ERLC's mission—specifically, the sanctity of sexual relationships from a Biblical perspective, the rights and responsibilities of parents *vis-à-vis* their children, and the obligation of the State to protect vulnerable children from the harmful and dehumanizing effects of pornography. Consistent with its mission, the ERLC wishes to have its voice heard on these important issues.

The Southern Baptists of Texas Convention is a state convention entity that cooperates in ministry with the SBC. It has over 2,800 affiliated churches in Texas, and it shares the values of the ERLC and other Southern Baptists.

The Baptist General Convention of Texas is a state convention entity that cooperates in ministry with the SBC. It has over 5,300 affiliated churches in

---

[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by any party's counsel, and no person or entity other than *amici* made a monetary contribution intended to fund its preparation or submission.

Texas, and it shares the values of the ERLC and other Southern Baptists.

INTRODUCTION

The exhibition and distribution of media containing obscene portrayals of sexual conduct is nothing new in America. It has existed since the Founding—and before. But in the grand scheme of history, what *is* relatively new is the ubiquitous access that the internet provides to such materials. This gives rise to a host of moral, social, and health concerns, not the least of which is *minors'* access to these materials.

Minors' access to pornographic materials is particularly concerning to the *amici* for several reasons. First, in their statement of faith, Southern Baptists assert that humanity "is the special creation of God, made in His own image," and the "crowning work of His creation." Southern Baptist Convention, *Baptist Faith & Message 2000* at 4 (adopted June 14, 2000, as amended June 14, 2023), *available at* https://bfm.sbc.net/wp-content/uploads/2024/08/BFM2000.pdf. This gives each person intrinsic dignity and value. *Id.* Thus, the highest level of respect and reverence should be paid to both the body and mind. And so the *amici* implore individuals to eschew activities—like pornography—that view the human body as a vessel for hedonistic pleasure and which have lasting deleterious effects on the mind, and to instead treat their whole person with the reverence and respect that is due towards "the crowning work of His creation." *Id.*

Southern Baptists believe that pornography is harmful to everyone who consumes it, but minors are

a special case. *See* Southern Baptist Convention, *Resolution On the Plague of Internet Pornography*, (June 1, 2001), *available at* https://www.sbc.net/resource-library/resolutions/on-the-plague-of-internet-pornography/ (last visited Nov. 18, 2024). As articulated in their statement of faith, Southern Baptists believe that God gave all of humanity free choice when it comes to questions of morality. *See Baptist Faith & Message 2000* at 4. But minors often lack the developmental capacity or moral maturity to know how to exercise that free choice responsibly. Thus, Southern Baptists believe it is important to structure society and society's rules to maximize the ability to educate and train minors on their social and moral responsibilities. And while it is primarily the role of families to provide this education and training, the States certainly have an important role to play in this process—most significantly by protecting the ability of families to perform their role. *See generally* The Ethics & Religious Liberty Commission, *Teach Them Diligently to Your Children: A Biblical and Theological Foundation for Parental Rights*, *available at* https://erlc.com/wp-content/uploads/2024/06/ERL4168_ParentalRightsWhite Paper _061924.pdf. Indeed, one of the most important functions of the States is protecting children from products and stimuli—like pornography—that are known to negatively impact their development. Providing this protection has manifest direct benefits for children, but it also produces important indirect benefits by helping preserve the centrality of family-based influences on moral, social, and religious issues, and by preventing family-based teachings on these issues from being undermined.

The legislation at issue in this case—Texas H.B. 1181—is precisely this kind of public policy. It was enacted with the purpose and effect of shielding minors from the well-documented developmental harms of pornography. The *amici* believe it is an abundantly good law. But more importantly for the purposes of this case, it is also abundantly constitutional.

The States are "'laboratories' of democracy," *Evenwel v. Abbott*, 578 U.S. 54, 89 (2016) (Thomas, J., concurring in the judgment) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015)), and therefore have tremendous leeway to devise their own solutions to public-policy problems. Facing novel threats to the well-being of children, Texas has responded with H.B. 1181, a novel application of a time-tested approach to protecting minors from the ill effects of pornography (*i.e.*, age verification). From a constitutional standpoint, it is irrelevant that others might believe there are better ways to achieve the desired end. The choice is Texas's to make. And Texas did not exercise that choice in any way that contravenes the United States Constitution.

SUMMARY OF ARGUMENT

Texas H.B. 1181 requires that internet purveyors of pornography verify the ages of Texas residents who seek to view their websites. The Fifth Circuit upheld the law under rational-basis review. It was right to do so.

The Petitioners contend that H.B. 1181 must be evaluated under strict scrutiny instead. They claim the law intrudes on the First Amendment's guarantee of free speech. But their argument is detached from the critically important first principles underlying

that all-important right. And it ignores important historical context.

As originally understood, the First Amendment existed primarily to protect political speech and speech on matters of public concern. It was not originally understood to protect obscene expression, especially when such expression might be received by minors. To the contrary, it has been understood from the beginning of the Republic that States have broad discretion to use their police-power authority to protect minors from such expression. The Constitution has long given State policymaking a wide berth in this regard. Indeed, State power is near its zenith when so used to protect minors. Given this historical context, rational-basis review is the proper standard here.

ARGUMENT

The Fifth Circuit's decision is in accordance with our nation's history and tradition of respecting the broad police powers enjoyed by the States to protect children from obscene materials. It was right to analyze the issue through the lens of rational-basis review. Texas H.B. 1181 merely adapts time-tested rules and proven methods to the novel scenarios facing today's youth. It is thus plainly constitutional.

I. ENGLISH AND COLONIAL AMERICAN COMMON LAW VESTED STATES WITH POWER TO PROTECT CHILDREN FROM OBSCENE MATERIALS.

The social issue of obscenity is not new, and neither is the government's power to regulate obscene publications and lewd conduct that is harmful to minors. Many decades before the Declaration of Independence set the United States on its own course, the King's Bench in England determined that "publication

of obscene literature" was "indictable at common law." Robert E. Shepherd, *The Law of Obscenity in Virginia*, 17 Wash. & Lee L. Rev. 322, 322 (1960). In the case of *Rex v. Curl*, 2 Stra. 788, 93 Eng. Rep. 849 (K.B. 1727), the King's Bench determined that the defendant's publication of a pornographic book, *Venus in the Cloister*, was punishable not merely in the ecclesiastic courts, as had long been the case, but also at common law. The King's Bench recognized that publishing obscene sexual materials was properly sanctionable because such materials tended to corrupt the people's morals. As one of the three Justices who heard the case, Justice Edmund Probyn, explained: The book's publication was "punishable at common law, as an offense against the peace, in tending to weaken the bonds of civil society, virtue, and morality." *Id.* at 851; *see also* GEOFFREY STONE, SEX AND THE CONSTITUTION 61 (2017) & *id.* n.40 (discussing *Rex v. Curl*).

The principle that obscene entertainment was not entitled to any kind of protection from government regulation was not limited to English courts. In Massachusetts, a woman named Alice Thomas was convicted by a jury in 1672 for, among other things, "giving frequent secret and unseasonable Entertainm[en]t in her house to Lewd Lascivious & notorious persons of both Sexes, giving them oppertunity to commit carnall wickedness," and "Entertaining Servants and Children from theire Master's and Parent's Families." Juries Verdict Ags't Alice Thomas, Volume 29: Records of the Suffolk County Court 1671–1680 Part 1, pp. 82–83, *available at* https://www.colonialsociety.org/node/660 (last visited Nov. 19, 2024).

It is worth pausing here to note how Thomas's indictment highlighted the particular risk her conduct

posed to minors. She was not merely convicted of providing unlawful "Entertainm[en]t" to adults, but of doing so in the presence of children—indeed, perhaps even in a way that was calculated to draw those children in "from theire Master's and Parent's Families." *Id.* Thus, well before the First Amendment sprang to life at the tip of James Madison's quill, Americans understood that obscene "entertainment" could be regulated, and especially so when children were involved.

This critically important history is necessary to understand the common law backdrop against which Texas legislated when adopting H.B. 1181. After all, the common law provides the foundation upon which much of American law is built. As Justice Story explained in his COMMENTARIES ON THE CONSTITUTION, the "universal principle" is "that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it, which was applicable to their situation." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 157 (Thomas M. Cooley, ed., 4th ed. 1873). In short, "[t]he whole Structure of our present jurisprudence stands upon the original foundations of the common law." *Id.* Or, as Professor Stephen Sachs has more colorfully put it: Any rule that was not "abrogated by the Constitution's enactment simply kept on trucking after 1788"; that is, "the Constitution left most preexisting law alone." Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1823 (2012). The fact that obscene entertainment was punishable at common law, and particularly when children were involved, is essential to this case. The States' police power to regulate obscene publications in the interest of protecting minors is firmly rooted in

this Nation's common law tradition—and in good sense.

In sum, decades before the American people ratified the Constitution, American colonists rightly understood the special danger to children created by lewd entertainment and obscene publications. States were empowered to address that threat by the common law they inherited from England. Neither the ratification of the First Amendment nor of State constitutional analogues erased that understanding or abrogated the States' police power in this respect. Indeed, the States' power to regulate obscenity for the sake of children's well-being would continue to be a focal point of American law well after the Constitution was ratified.

II. NEITHER THE FIRST AMENDMENT NOR STATE ANALOGUES DENIED STATES THE POWER TO REGULATE PUBLICATIONS THAT ARE OBSCENE FOR MINORS.

a. The Original Understanding of the First Amendment Did Not Change the Common Law Backdrop.

As plenty of historical literature explains at great length, the First Amendment was not originally understood to grant a license to say or publish anything without consequence. Rather, it baked in "the liberty of the press, as understood by all England"; *i.e.*, "the right to publish without any previous restraint or license." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1885. Justice Story did not mince words about this: He wrote that the idea that the First Amendment "was intended to secure to every citizen an absolute right to speak, or write, or

print whatever he might please, without any responsibility," is "a supposition too wild to be indulged by any rational man." *Id.* § 1880. Rather, Justice Story explained, the First Amendment "imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint" so long as "he does not thereby disturb the public peace." *Id.*

Addressing what Justice Story described as "loose reasoning on the subject," he admonished that the press in America was not "like the king of England" such that "it could do no wrong, and . . . [be] afforded a perfect sanctuary for every abuse." *Id.* § 1884. "Such a notion," Justice Story explained, "is too extravagant to be held by any sound constitutional lawyer with regard to the rights and duties belonging to governments generally, *or to the state governments in particular*." *Id.* (emphasis added). The freedom of the press "consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." *Id.* (emphasis in original); *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 19 (1827) ("erecting barriers against any previous restraints upon publications" was "all that the earlier sages of the revolution had in view").

As the adage goes, "the exercise of a right is essentially different from an abuse of it." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1888. Publication of obscene materials that could make their way to minors was one such abuse recognized at common law both before and after the

Constitution and the Bill of Rights were ratified.[2] The public thus originally understood that States could rightfully regulate the publication and distribution of such materials.

b. State First Amendment Analogues Did Not Prevent Obscenity Prosecutions.

Two early post-ratification State cases provide important context. The first, *Commonwealth v. Sharpless*, involved the exhibition of "an indecent picture to divers persons for money." 2 Serg. & Rawle 91, 101 (Pa. 1815). The defendants were indicted for and convicted of "designing, contriving and intending the *morals, as well of youth as of divers other citizens of this commonwealth, to debauch and corrupt*, and to raise and create in their minds inordinate and lustful desires" by "exhibit[ing] and show[ing] for money" a "certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman." *Id.* at 91–92 (emphasis added). This conduct, according to the indictment, was "to the manifest *corruption and subversion of youth*, and other citizens of this commonwealth," and thus was "against the peace and dignity of the Commonwealth of Pennsylvania." *Id.* at 92 (emphasis added). The defendants claimed that this

[2] Obscene materials were legally disfavored in other ways, too. Justice Story noted in his COMMENTARIES ON EQUITY JURISPRUDENCE that "no copyright can exist" in—and so no injunction could protect—"any work of a clearly . . . obscene description." JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 936 (W. E. Grigsby ed., 1st English ed. 1884).

was "not an indictable offense" at common law and petitioned the Supreme Court of Pennsylvania for relief.

The Supreme Court of Pennsylvania upheld the indictment and verdict, explaining that the offense of exhibiting an obscene and lewd painting was punishable at common law. Chief Justice Tilghman first acknowledged that there was previously "some uncertainty in the law" in "discriminating between the offences punishable in the temporal and ecclesiastical courts." *Id.* at 101. But after surveying the leading English cases leading up to American independence and the writings of William Blackstone, he concluded that "actions of *public indecency*," such as "*exposure of* [one's] *person*," "were always indictable, as tending to corrupt the public morals." *Id.* (emphasis in original). Likewise, Chief Justice Tilghman explained that while "it was once doubted" whether "publication of *an indecent book* is indictable" at common law, any doubt "was destroyed upon great consideration" by *Rex v. Curl*. *Id.* at 102 (emphasis in original). "Hence, it follows, that an offence may be punishable, if in its nature and by its example, it tends to the corruption of morals." *Id.*

Even though the 1790 Pennsylvania Constitution in effect at the time contained a free press guarantee, Pa. Const. art. IX, § VII (1790), the Pennsylvania Supreme Court saw no conflict between that right and the indictment at issue. "[A]pplying these principles to the present case," Chief Justice Tilghman explained, "the *showing* of a picture is as much a *publication*, as the *selling* of a book," but it would be a "most pernicious" publication to take "all the youth of the city . . . one by one, into a chamber, and there inflam[e] their passions by the exhibition of lascivious

pictures." *Id.* (emphasis in original). The Chief Justice had little difficulty concluding that the indicted offense was one of "evil example, *tending to the corruption of the youth*, and other citizens of the commonwealth, and against the peace." *Id.* at 103 (emphasis added).

Justice Yeates, concurring, wrote that "[t]he corruption of the public mind, in general, and *debauching the manners of youth, in particular*, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences." *Id.* (emphasis added). "I cannot," Justice Yeates concluded, "bring my mind to doubt for a single moment, that the offence charged falls within cognisance of a court of criminal jurisdiction." *Id.* at 104. "No man is permitted to corrupt the morals of the people," and "if the painting, here, *tended to the manifest corruption of youth* and other citizens, and was of public evil example to others," that was sufficient. *Id.* at 105 (emphasis added).

Two features of the *Sharpless* case are noteworthy. First, the Pennsylvania Supreme Court placed special emphasis on the deleterious effects that exhibition of obscene materials would have on children in particular. Second, the court openly acknowledged that the defendants' conduct was "publication" of an obscene painting, but it observed no conflict between that fact and the Pennsylvania Constitution's guarantee that "every citizen may freely . . . print on any subject, being responsible for the abuse of that liberty." Pa. Const. art. IX, § VII (1790). The upshot? Publishing obscene materials and making them available to

children was understood to be an "abuse" of that right, which could rightly be punished.[3]

The second case, *Commonwealth v. Holmes*, 17 Mass. 336 (Mass. 1821), is similar. There, the defendant was indicted for and convicted of "publishing a lewd and obscene print, contained in a certain book entitled 'Memoirs of a Woman of Pleasure,' and also for publishing the same book." *Id.* at 336. The second count of the indictment alleged that the defendant, "contriving, devising, and intending, *the morals as well of youth* as of other good citizens of said commonwealth to debauch and corrupt," "did utter, publish and deliver to *A. B.* a certain lewd, wicked, scandalous, infamous and obscene printed book." *Id.* (first emphasis added).

Like the defendants in *Sharpless*, the defendant in *Holmes* claimed the court had no jurisdiction over the offenses in the indictment. *Id.* at 337. The Supreme Judicial Court of Massachusetts disagreed, explaining that "[a] short history of our judicial tribunals will show clearly that this objection must also fail." *Id.* at 338. The court determined that, "by tracing back our juridical history," the trial court clearly had jurisdiction over such criminal actions at common

---

[3] Chancellor James Kent explained just years after the *Sharpless* decision that State courts were "duty bound, to bring every law to the test of the constitution, and to regard the constitution, first of the United States, and then of their own state, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 421 (1826). The fact that the Pennsylvania Supreme Court did not indicate that there was any constitutional infirmity in Sharpless's prosecution is therefore telling.

law. *Id.* at 340. As in *Sharpless*, the court therefore affirmed the verdict. And also like *Sharpless*, the fact that the Massachusetts Constitution contained a free press guarantee was apparently of no consequence to the court. *See* Mass. Const. art. XVI (1780) (superseded by Article of Amendment, Article 77 (1948)).

The point here is that from the beginning of the Republic, it was understood that the nation's free-speech and free-press guarantees did not interfere with States' ability to regulate obscene materials, especially when they might be received by children. In other words, States had the power from the very beginning to protect children from obscene materials.

This is not surprising. After all, the First Amendment and the analogous free-speech and free-press guarantees in State constitutions were originally understood to exist primarily for the protection of political speech and speech on matters of public concern.

Justice Story traced this understanding of freedom of speech and freedom of the press back to Blackstone: "Mr. Justice Blackstone has remarked that the liberty of the press, properly understood, is essential to the nature of a free state." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1884. "No one can doubt the importance, in a free government, of a right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy and plans of the government." *Id.* § 1888. This "doctrine laid down by Mr. Justice Blackstone" was not "repudiated" by "any of the State courts," but rather was "repeatedly affirmed in several of the States, notwithstanding their constitutions or laws recognize

that 'the liberty of the press ought not to be restrained.'" *Id.* § 1889. In fact, Justice Story noted, "Mr. Chancellor [James] Kent, upon a large survey of the whole subject, has not scrupled to declare that 'it has become a constitutional principle in this country, that every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right* and that no law can rightfully be passed to restrain or abridge the freedom of the press.'" *Id.* (citation omitted) (emphasis in original).

This Court's precedents are in accordance with that robust understanding: "[T]he First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos v. Barry,* 485 U.S. 312, 318 (1988) (citation omitted). "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). In sum, "[s]peech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Lane v. Franks*, 573 U.S. 228, 235–36 (2014) (citation omitted). But that right flatly does not protect the dissemination of obscene materials to children: "[o]bscenity is not within the area of protected speech or press." *Ginsberg v. New York*, 390 U.S. 629, 635 (1968).

This case does not concern political speech or speech addressing matters of public concern in any way, much less restrictions on such speech. Rather,

H.B. 1181 addresses speech that is obscene for children, and it does not even prohibit such speech. No one is prohibited in any way from producing pornographic media, nor are adults prohibited from receiving it. Instead, H.B. 1181 merely restricts the *receipt* of such speech by *minors*—a segment of the population that States have always had the authority to protect from the ill effects of obscenities.

III. State Police Power is at its Zenith When Protecting Children

This Court's precedents leave no doubt that Texas H.B. 1181 is a constitutional attempt to protect children from the dangers of sexual material that is obscene for children. In *Miller v. California*, 413 U.S. 15, 18–19 (1973), this Court provided a definition of obscenity for adults and reaffirmed that "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of . . . exposure to juveniles." There is a thumb on the scale when children are involved: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor'" by preventing their access to obscene materials "is 'compelling.'" *See New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (citation omitted).

This Court also recognizes that what may not be obscene for adults may nonetheless be "obscene as to youths." *See Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975). And once something is obscene as to minors, a State has greater leeway to prevent it from harming children. *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968) ("because of its

strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults."); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (Because "[b]ookstores and motion picture theaters" may "be prohibited from making indecent material available to children," so too could George Carlin's "filthy words" monologue be limited to times when children were less likely to listen); *but see Butler v. Michigan*, 352 U.S. 380, 383 (1957) (a State may not effectuate that end by "reduc[ing] the adult population" to "reading only what is fit for children.").[4]

Further, this Court has always held that "obscenity is not within the area of constitutionally protected speech or press." *Ferber*, 458 U.S. at 754 (citation omitted). Indeed, consistent with the history discussed above, this Court has long recognized that "[t]he original States provided for the prosecution of libel, blasphemy, and profanity," in addition to obscenity, which is "utterly without redeeming social importance." *Id.* Thus, this Court has often "sustained

---

[4] Notably, this Court found it important in *Butler* that while Michigan had "a statute specifically designed to protect its children against obscene matter 'tending to the corruption of the morals of youth,'" the defendant "was not convicted for violating this statute." *Id.* Thus, this Court concluded, the broader offense under which the defendant was convicted was "not reasonably restricted to the evil." *Id.* But Texas H.B. 1181 is, in fact, so restricted. *See* TEX. CIV. PRAC. & REM. CODE § 129B.002-003 (limiting only children's access to "sexual material harmful to minors" via "reasonable age verification methods").

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." *Id.* at 757.

Indeed, this Court has been clear that even laws "protecting children from exposure to nonobscene literature" and laws mandating "special treatment of indecent broadcasting received by adults as well as children" are justified by "the Government's interest in the 'well-being of its youth,'" even if such laws implicate adult First Amendment rights. *Id.* (citations omitted). The State's interest in protecting children from corruption is especially "compelling." *Id.* at 756–57. Because of that, this Court's precedents establish that States enjoy special solicitude when legislating for the benefit of children in this arena, as Texas has done.

In one of the few cases where this Court has struck down State-law protections for children, this Court has said the State's "argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to" the material at hand. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 795 (2011) (violent video games). As demonstrated above, there is *exactly* that sort of tradition for material that is obscene for children.

In sum, American law understood the following simple principle long before the Declaration of Independence was signed and long after the Constitution was ratified: It is within a State's power to impose regulations that protect children from accessing lewd and obscene materials. As originally understood, the First Amendment did not limit that power. To the contrary, it was understood from the Founding that

State power is especially robust—perhaps even at its zenith—when used to restrict minors' access to such materials. The exercise of this power is important not only for protecting children directly, but also for preserving the centrality of family-based influences in training children on moral, social, and religious issues.

IV. RATIONAL-BASIS REVIEW IS APPROPRIATE.

Taking this Court's precedents and this Nation's history into account, there can be only one conclusion here: State laws that are calculated to protect children from content that is obscene as to them are constitutional. Incidental burdens on adult speech are constitutionally acceptable given the State's strong interest in protecting children. Such laws are reasonably related to a legitimate government objective. *See Ginsberg*, 390 U.S. at 641 ("To sustain state power to exclude material defined as obscenity" requires "only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."). The Fifth Circuit's use of rational-basis review accorded with this Court's precedents and good sense.

H.B. 1181 takes New York's age-verification measures, which this Court upheld under rational-basis review in *Ginsberg*, and applies them to the modern era. 390 U.S. at 639. Such measures ensured that adults could access materials that were not obscene as to them, while effectively preventing minors from accessing materials that would be obscene for youths. There is nothing remarkable about Texas's choice to adapt time-tested tools to a novel iteration of an age-

old problem. That decision is rooted in the State's police power under the common law, and so is constitutionally sound.

Unlike the federal laws at issue in *Reno v. ACLU*, 521 U.S. 844, 872 (1997) and *Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004),[5] H.B. 1181 is not the product of Congress's limited commerce clause power, but rather Texas's broad police power; it is also not "a criminal statute," and so it does not raise the unique "chilling effect on free speech" at issue in *Reno*. 521 U.S. at 872. This Court's rule from *Reno* was modest: A law may not create "an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875. This Court determined in *Reno* that the federal law's "sever[e]" two-year jail sentence "for each act of violation," along with the fact that the law was a "content-based blanket restriction on speech" that spanned "the entire universe of cyberspace," created such suppression, and so applied strict scrutiny. *Id.* at 868, 872, 882. Not so here. Because H.B. 1181 provides for only civil fines against pornography purveyors (*i.e.*, those commercial entities running websites whose content is at least one-third sexual material harmful to minors), and because its age-verification requirements create only an incidental burden on adults' access to pornography—unlike the "broad categorical prohibitions" at issue in *Reno*—there is no similar suppression of speech.[6] *Id.* at 867.

---

[5] *Reno* and *Ashcroft* do not resolve the level-of-scrutiny question for the reasons stated by the Fifth Circuit in its opinion below. *See Free Speech Coal. v. Paxton*, 95 F.4th 263, 271–75 (5th Cir. 2024).

[6] It should also be noted that under H.B. 1181, neither the pornography purveyor nor a third-party performing age

Texas was within its rights to adopt H.B. 1181 and require pornographic websites to verify the ages of their users in Texas. That law is a valid exercise of Texas's police power. It was within the bounds established by the common law and the original understanding of the First Amendment, and it does not intrude on any fundamental constitutional rights such that strict scrutiny is warranted. Unlike other laws that have come before this Court, H.B. 1181 does not impose serious criminal penalties on all of cyberspace. Rather, H.B. 1181 is the simple, limited application of proven legal principles to the newest form of an age-old social problem.

Like New York's age restrictions that this Court upheld in *Ginsberg*, H.B. 1181 is a valid exercise of broad State police power that bears a rational relationship to the compelling government objectives of protecting children from sexual material that is obscene for minors and of ensuring their health. Indeed, even though H.B. 1181 does not need to be, it is narrowly tailored to serve those compelling government interests by creating what is at most an incidental burden on adults while restraining only *children's* access to materials that are obscene *for children*. Unlike many of the laws and cases discussed herein, H.B. 1181 is civil in nature—not criminal. While Texas might have done more, it legislated only as much as

---

verification on its behalf may "retain any identifying information" used to verify a user's age. TEX. CIV. PRAC. & REM. CODE § 129B.002(b). Thus, any privacy or speech-chilling concerns for adults are *de minimis*—much like they are when handing over one's driver's license at a liquor store or using electronic age-verification techniques for online alcohol delivery services.

was necessary to protect children from exposure to harmful, obscene sexual materials. H.B. 1181 accords with the history of State regulation of material that is obscene for minors, and so it is plainly constitutional.

CONCLUSION

The Fifth Circuit's decision aligns with the history of State regulation of obscenity and this Court's tradition of respecting the broad police powers enjoyed by the States to protect minors from obscene entertainment. For the reasons set forth above, the Ethics and Religious Liberty Commission, the Southern Baptists of Texas Convention, and the Baptist General Convention of Texas urge the Court to conclude that rational basis is the appropriate tier of scrutiny for laws like Texas H.B. 1181 and that Texas H.B. 1181 is a constitutional exercise of Texas's State police power.

Respectfully submitted,

S. CHAD MEREDITH
Counsel of Record
201 E. Fourth St.,
Ste. 1900
Cincinnati, OH 45202
(513) 361-1235
chad.meredith@squirepb.com

TREVOR PIROUZ KEHRER
600 Travis St.,
Ste. 6700
Houston, TX 77002
trevor.kehrer@squirepb.com

SQUIRE PATTON BOGGS (US) LLP
Counsel for Amici Curiae

NOVEMBER 22, 2024