Obscenity Revisited: Defending Recent Age-Verification Laws Against First Amendment Challenges

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On July 2, 2024, the Supreme Court of the United States granted certiorari in Free Speech Coalition v. Paxton*—a case involving a First Amendment challenge to Texas H.B. 1181. That statute, aimed at limiting youth exposure to sexual material online, requires pornography companies to verify that their users are at least 18 years old. Since 2023, 18 other states have enacted nearly identical age-verification laws with surprisingly bipartisan majorities. As of this Note's publication, analogous legislation is pending in at least 17 additional states. But according to the pornography industry, because these laws burden substantial amounts of protected speech, courts must apply strict scrutiny—a demanding standard which the laws allegedly cannot survive, especially in the wake of* Reno v. ACLU *and* Ashcroft v. ACLU II.

This Note challenges that argument. It argues that recent age-verification laws pose no serious First Amendment concerns and should be upheld against the industry's legal challenges. Contrary to the industry's suggestions, recent age-verification laws were carefully crafted to avoid the constitutional pitfalls of the provisions of the Communications Decency Act and the Child Online Protection Act that were invalidated in Reno *and* Ashcroft II. *The recent legislation—including Texas H.B. 1181, the focus of this Note—represents a concerted effort by state legislators of all political stripes to incorporate the judicial guidance previously provided by the Supreme Court. While this Note is sympathetic to a majority of the government's proffered defenses of the laws—involving the obscenity exception to the First Amendment and rational basis review under* Ginsberg v. New York*—it ultimately concludes that strict scrutiny is the appropriate*

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standard of review under existing precedent. Texas H.B. 1181, and all analogous laws, still survive this demanding standard of review because they (1) serve the compelling governmental interest of protecting children from online pornography, (2) are narrowly tailored to achieve that interest, and (3) are the least restrictive means of advancing it, notwithstanding the availability of parental-led content filtering software.

Part I of this Note describes the history of recent age-verification legislation and the modern reemergence of anti-pornography sentiments. It then analyzes the statutory requirements of age-verification laws, particularly of Texas H.B. 1181. The remainder of Part I recounts the history of obscenity jurisprudence in the United States and contemporary Congressional attempts to regulate sexual content on the internet. Part II considers a variety of defenses of the laws. It first examines whether the laws can be upheld under the obscenity exception to the First Amendment. It then contemplates the appropriate standard of review and analyzes whether H.B. 1181 survives the relevant tiers of constitutional scrutiny. Part III explores potential avenues for the Supreme Court to revisit its obscenity jurisprudence in light of original understandings of the First Amendment and consistent state practices following its ratification.

CONTENTS

INTRODUCTION 149
I. PORNOGRAPHY REGULATION IN THE UNITED STATES 154
A. The Consequences of Our Neglect: Pornography's Effects on Children 154
1. *The Problem: Pornography's Toll* 155
2. *Age Verification Laws and the Anatomy of H.B. 1181* 158
B. Traditional Obscenity Jurisprudence 161
C. Modern Obscenity Jurisprudence 165
D. Early Congressional Attempts to Regulate Online Pornography 168
1. *The Communications Decency Act (1996)* 168
2. *The Child Online Protection Act (1998)*.................171
II. FIRST AMENDMENT ANALYSIS 172
A. Online Pornography as Unprotected Obscenity? 173
B. Identifying the Correct Standard of Review 175
1. *Rational Basis Review Under Ginsberg: The Fifth Circuit's Holding* 176

2. *Although the Argument for Rational Basis Review Is Plausible, Courts Are Likely to Apply Strict Scrutiny* 179
C. Age-Verification Laws Survive Even Strict Scrutiny 181
III. OBSCENITY REVISITED? 187
CONCLUSION 191

INTRODUCTION

On June 15, 2022, the Louisiana House of Representatives voted on a bill requiring pornography companies to perform "reasonable age verification methods" before allowing individuals to access their websites.[1] The bill was directed at limiting youth exposure to pornography, which it described as a "public health crisis," and provided a civil remedy against commercial pornographers who failed to verify the age of their users.[2] The bill gained bipartisan support and passed 96 to one in the Louisiana House.[3] After it passed unanimously in the State Senate, John Bel Edwards, the Democratic governor, signed the bill into law that same month.[4] It went into effect on January 1, 2023.[5]

The Louisiana bill marked the opening legislative salvo in what some commentators have called "The New Pornography Wars"—a national backlash against the prevalence of online pornography, and an emerging bipartisan consensus on the need for a legislative response.[6] Shortly after the Louisiana bill's enactment, six other states passed "nearly identical" age verification legislation—including H.B. 1181 in Texas, the subject of this Note.[7] As of October 2024, a total of 36 states all across the country—with both

1. LA. STAT. ANN. § 9:2800.29 (2023).
2. *Id.*
3. *See* Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat.*, POLITICO (Aug. 8, 2023), https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148 [https://perma.cc/2T4X-Z627].
4. *See id.*
5. *See* LA. STAT. ANN. § 9:2800.29 (2023).
6. *See* Julie A. Dahlstrom, *The New Pornography Wars*, 75 FLA. L. REV. 117, 126 (2023). Prior attempts in "The New Pornography Wars" focused on holding commercial pornographers accountable for their complicity in human trafficking, which is the subject of Dahlstrom's article. *See id.* at 119. Although this Note discusses those important issues in more depth in the following pages, its primary focus is on a separate battle—protecting children from the harmful effects of online pornography.
7. *See* Novicoff, *supra* note 3.

Republican and Democratic majorities in their respective legislatures—have either introduced or enacted analogous legislation.[8]

This modern revival of the anti-pornography sentiments of the 1970s and 1980s is unsurprising: due to the growth and widespread adoption of the internet, online pornography has reached a level of near ubiquity.[9] Nowadays, for any American child with an internet connection, the "largest and most extreme adult video library in the history of the world" is just one click away.[10] The traditional measures that had restricted underage access to sexually explicit material in the past—like age requirements for purchasing nude magazines or videos at adult bookstores—became irrelevant with the advent of online pornography. Today, internet users, regardless of their age, can access such content instantly, anonymously, and often for free.[11] Perhaps as a result of the overwhelming amount of sexual material online—and the ease with which one can access it—the average age of pornography exposure has plummeted to 11 years old.[12]

The emergence of "The New Pornography Wars" reflects a growing concern among Americans about the deleterious effects of habitual pornography usage on the population, especially on minors.[13] It also reflects a concern about the consequences of its production and distribution, particularly as it relates to human trafficking.[14] It was against this backdrop that Louisiana and 35

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8. *See Age Verification Bill Tracker*, FREE SPEECH COAL. ACTION CTR., https://action.freespeechcoalition.com/age-verification-bills/ [https://perma.cc/ECZ6-SKX9].

9. *See* Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*, 45 VT. L. REV. 43, 50 (2020). In 2019, Pornhub alone transferred 6,597 petabytes of data, which represents "1.36 million hours (169 years) of new content [that] were uploaded to the site." *Id.*; *see also* Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html [https://perma.cc/W2EL-FLM8] ("Pornhub attracts 3.5 billion visits a month, more than Netflix, Yahoo or Amazon. Pornhub rakes in money from almost three billion ad impressions a day. One ranking lists Pornhub as the [tenth]-most-visited website in the world.").

10. Romney, *supra* note 9, at 46.

11. *See id.* at 49.

12. *See* Khadijah B. Watkins, *Impact of Pornography on Youth*, 57 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 89, 89 (2018); *see also* Chiara Sabina et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 CYBERPSYCHOLOGY & BEHAV. 691, 691–92 (2008) (reporting that participants as young as eight years old had already viewed online pornography and that 72.8% of participants had viewed it before turning 18).

13. *See generally* Dahlstrom, *supra* note 6.

14. *See* Romney, *supra* note 9, at 61 (discussing the victims of human trafficking who have been featured in Pornhub videos, as well as sex trafficking prosecutions against other pornography distributors).

other states, including Texas, either introduced or enacted legislation directed at limiting youth exposure to online pornography.[15] Similar to its counterparts in other states, Texas H.B. 1181 was proposed as a common-sense approach to protecting children: commercial pornography websites must verify, under threat of civil penalties, that their users are 18 years of age or older.[16] Verification generally requires users to "provide digital identification" through commercially available systems—similar to the systems used to purchase alcohol or tobacco online.[17] Importantly, websites subject to the statute are barred from "retain[ing] any identifying information of the individual."[18] In fact, H.B. 1181 "punishes entities $10,000 for each instance of retention of identifying information, possibly yielding heavier penalties than would the failure to age-verify."[19]

Almost immediately after enactment, the pornography industry challenged H.B. 1181 and similar laws in federal courts across the country.[20] Represented by the Free Speech Coalition—the adult industry's trade association—the challengers have argued that the age-verification laws are unconstitutional because they impermissibly restrict protected speech in violation of the First Amendment.[21] A number of these lawsuits have been dismissed on standing grounds in favor of the government-defendants, such as those in Louisiana and Utah, without reaching the merits.[22] But in the Western District of Texas, the Free Speech Coalition and the distributors it represents—like Pornhub, XVideos, and XXNX, among others—prevailed.[23] There, Senior Judge David Alan Ezra penned a 30-page opinion granting the plaintiffs' motion

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15. *See Age Verification Bill Tracker*, *supra* note 8.
16. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2023).
17. *Id.* § 129B.003(b).
18. *Id.* § 129B.002(a).
19. Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 271 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024).
20. *See, e.g.*, Complaint at 2, Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373 (W.D. Tex. 2023) (No. 1:23-CV-00917); *see also* Novicoff, *supra* note 3; *Free Speech Coalition Blog*, FREE SPEECH COAL., https://www.freespeechcoalition.com/blog [https://perma.cc/B6SL-UCVC] (cataloging blog posts about Free Speech Coalitions' challenges to age-verification bills).
21. *See* Appellees' Cross-Opening Brief at 1, *Free Speech*, 95 F.4th 263 (5th Cir. 2024).
22. *See* Free Speech Coal., Inc. v. LeBlanc, 697 F. Supp. 3d 534, 552 (E.D. La. 2023); Free Speech Coal., Inc. v. Anderson, 685 F. Supp. 3d 1299, 1304 (D. Utah 2023).
23. *See* Free Speech Coal., Inc., v. Colmenero, 689 F. Supp. 3d 373, 382 (W.D. Tex. 2023), *aff'd in part, vacated in part sub nom.* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024), *cert. granted* 144 S. Ct. 2714 (2024).

for a preliminary injunction, on the grounds that they were likely to succeed on their First Amendment claims.[24] That decision was appealed to the Fifth Circuit on an expedited basis.[25] Following oral argument on October 4, 2023,[26] the panel issued an order to stay the district court's injunction, allowing Texas to begin enforcing H.B. 1181 again.[27] On March 7, 2024, the Fifth Circuit issued its ruling on the merits, holding that H.B. 1181's age-verification requirement was subject only to rational basis review and did not violate the First Amendment.[28] The Supreme Court granted the pornography industry's petition for a writ of certiorari on July 2, 2024 and will consider whether the Fifth Circuit erred in applying rational-basis review instead of strict scrutiny in its upcoming term.[29]

This Note focuses on Texas H.B. 1181 for two reasons. First, the Texas proceedings are currently the furthest along in the legal battle over age-verification laws. Given the timing of the certiorari grant, the Supreme Court will likely hear the case in the early part of the 2024 term.[30] Second, H.B. 1181 provides a useful case study. It roughly tracks the language of similar laws across the country and incorporates all of the features most vulnerable to legal challenges, as explained *infra* in Part I.A.[31] Accordingly, it is likely that if the Texas law survives, they all survive.

This Note argues that Texas H.B. 1181—and, by extension, all analogous laws—pose no serious First Amendment concerns and should be upheld against the pornography industry's legal challenges. There are three independent potential routes for upholding the laws: (1) relying on the obscenity exception to the First Amendment, (2) surviving deferential rational basis review under *Ginsberg v. New York*,[32] or (3) surviving heightened scrutiny.

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24. *See id.* at 396.
25. *See* Order Granting Stay of Preliminary Injunction, *Free Speech*, 95 F.4th 263 (No. 23-50627).
26. Oral Argument, *Free Speech*, 95 F.4th 263 (No. 23-50627), https://www.ca5.uscourts.gov/OralArgRecordings/23/23-50627_10-4-2023.mp3.
27. Order Granting Stay, *supra* note 25.
28. *See Free Speech*, 95 F.4th at 269.
29. *See* Free Speech Coal., Inc. v. Paxton, 144 S. Ct. 2714 (2024).
30. *See id.*
31. *See infra* Part I.A.
32. *See* 390 U.S. 629, 641 (1968).

The obscenity exception argument, endorsed by the state of Texas,[33] is alluring for its simplicity: because a majority of the content distributed by companies like Pornhub is obscene under the *Miller v. California* framework,[34] it should not be afforded First Amendment protection.

The second argument analogizes to the statute at issue in *Ginsberg* and posits that rational basis is the appropriate standard of review. In that case, the Court upheld a New York statute that banned the sale of pornographic materials to minors.[35] There, the Court recognized the State's "exigent interest in preventing [the] distribution to children of objectionable material,"[36] and held that the statute survived First Amendment challenges because it had a "rational relation to the [State's] objective of safeguarding . . . minors from harm."[37] Texas has argued that *Ginsberg* controls here.[38]

This Note, while sympathetic to the obscenity and *Ginsberg* arguments, ultimately finds them unpersuasive in light of existing precedent. As the law currently stands, it is likely that courts reviewing the petitioner's First Amendment claims will disregard the first and second arguments, and instead apply strict scrutiny. Because the statute is a content-based regulation that appears to burden adults' access to constitutionally protected speech, the Supreme Court will likely default to its analysis from *Reno* and *Ashcroft II*—where it applied strict scrutiny and invalidated laws that were at least superficially similar to recent age-verification laws. Under this view, the "burden" to adults' access consists of the significant privacy concerns generated by H.B. 1181. Adults will naturally be hesitant to submit personally identifying information as a prerequisite to viewing pornography on the internet. Among other concerns, the fear of data breaches, blackmail and extortion, and general exposure of intimate information, such as one's sexual preferences, could potentially lead to some form of self-censorship by adult viewers.

33. *See* Brief for Appellant at 12, Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024) (No. 23-50627) ("The First Amendment does not protect Pornographers' obscenity.").

34. *See* 413 U.S. 15, 24 (1973).

35. *See Ginsberg*, 390 U.S. at 637.

36. *Id.* at 636 (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668 (N.Y. 1966)).

37. *Id.* at 643.

38. *See* Brief for Appellant, *supra* note 33, at 16.

Although a more demanding standard, strict scrutiny is not necessarily fatal to Texas H.B. 1181. This Note argues that the Texas age-verification statute and analogous legislation pass constitutional muster because they (1) serve the compelling governmental interest of protecting children from online pornography, (2) are narrowly tailored to achieve that interest, and (3) are the least restrictive means of advancing it.

Part I of this Note describes the impetus for the recent flurry of age-verification legislation in the United States. It outlines the laws' requirements and enforcement mechanisms, particularly those of Texas H.B. 1181, and recounts the history of pornography regulation and obscenity jurisprudence in the United States. Part II considers a variety of defenses of recent age-verification legislation. It first considers whether the laws can be upheld under the obscenity exception to the First Amendment. It then contemplates the appropriate standard of review and analyzes whether H.B. 1181 survives the relevant tiers of constitutional scrutiny. Part III explores potential avenues for the Supreme Court to revisit its obscenity jurisprudence in light of original understandings of the First Amendment and consistent state practices following its ratification.

I. Pornography Regulation in the United States

This Part begins with a discussion of the harmful effects of pornography exposure on children. It then describes the requirements of Texas H.B. 1811 and its various enforcement mechanisms. Finally, it recounts the history of pornography regulation and obscenity jurisprudence in the United States, as well as the fate of two Congressional attempts to regulate online adult content in the late 1990s.

A. The Consequences of Our Neglect: Pornography's Effects on Children

Pornography has become ubiquitous.[39] After three decades of a *laissez-faire* attitude regarding the growth of the online pornography industry,[40] social scientists and other researchers are

39. *See* Romney, *supra* note 9, at 50.

40. *See* Tim Alberta, *How the GOP Gave Up on Porn*, POLITICO MAG. (Nov. 1, 2018), https://www.politico.com/magazine/story/2018/11/11/republican-party-anti-pornography-

only now beginning to understand the consequences of the political community's inaction.[41] The following section outlines a number of those consequences—such as the pornography industry's contribution to human trafficking; the exposure of children to extreme, often violent, and even non-consensual sexual material at increasingly younger ages; the deleterious effects of pornography on youth mental and physical health; and the correlation between pornography consumption and intimate partner violence. This Note argues that the State has a legitimate concern in protecting children from exposure to sexual material online.

1. *The Problem: Pornography's Toll*

In the decades since the internet's widespread adoption, the material offered by commercial pornographers has become increasingly extreme, violent and even non-consensual. As *New York Times* columnist Nicholas Kristof explained in a 2020 essay about Pornhub, the "site is infested with rape videos. It monetizes child [pornography], revenge pornography, spy cam videos of women showering, racist and misogynist content, and footage of women being asphyxiated in plastic bags."[42] As Cali, a young girl who had been featured in videos uploaded to the website when she was nine years old, lamented: "Pornhub became my trafficker."[43] Another girl, who had sent her high school boyfriend nude videos at age 14, later found those videos on Pornhub, with hundreds of thousands of views.[44] A third girl, who had been reported missing at age 15, was located by authorities after her mother discovered 58 videos of her being raped on Pornhub.[45] Allegedly, the company

politics-222096/ [https://perma.cc/E8K3-F7KQ] (describing how strong political efforts to regulate pornography were largely deserted by the 1990s especially after failed Congressional attempts).

41. *See* Romney, *supra* note 9, at 51 ("The facts become concerning when one also understands that a minor's consumption of pornography is highly associated with psychological, social, emotional, neurobiological, and sexual harms.").

42. Kristof, *supra* note 9. In a statement to the *Times*, Pornhub said that it is "unequivocally committed to combating child sexual abuse material, and has instituted a comprehensive, industry-leading trust and safety policy to identify and eradicate illegal material from our community," adding that "any assertion that the company allows child videos on the site 'is irresponsible and flagrantly untrue.'" *Id.*

43. *Id.*

44. *See id.*

45. *See* Minyvonne Burke, *Florida Man Arrested After Videos of Missing Teen Surface on Pornography Website*, NBC NEWS (Oct. 25, 2019), https://www.nbcnews.com/news/crime-

had even gone so far as to "verify" the abducted underage victim for its ModelHub program,[46] a credential similar to a blue checkmark on X (formerly Twitter) and which allows creators to share in ad revenue.[47] This is only a small sample of stories in a catalog of hundreds, as documented by anti-pornography groups like #TraffickingHub and Exodus Cry.[48] All the while, Pornhub and websites like it monetized these non-consensual videos and blossomed into billion-dollar behemoths.[49]

Other popular categories of online pornography simulate illegal and non-consensual content. For example, Kristof found that Pornhub's recommended searches for "young" teens generated hundreds of thousands of results—some displaying actual child pornography, and others with younger looking (legal) performers who dressed to appear underage and imitated juvenile mannerisms.[50] Other suggested genres involved young women being "restrained, gagged, strangled, and slapped" while having intercourse with a group of men.[51] Due to highly sophisticated

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courts/florida-man-arrested-after-videos-missing-teen-surface-pornography-website-n1072141 [https://perma.cc/6LZW-K83A]; *see also Traffickinghub: A Timeline of Pornhub's Rapid Decline*, EXODUS CRY (Sept. 26, 2022), https://exoduscry.com/articles/traffickinghub-timeline/ [https://perma.cc/CZ6X-EVH5]; Laila Mickelwait (@LailaMickelwait), TWITTER (Feb, 20, 2023, 11:50 PM), https://twitter.com/LailaMickelwait/status/1627893460408606721 [https://perma.cc/R8YY-RSAD]. Laila Mickelwait is the founder of the global #Traffickinghub movement, a "decentralized global movement of individuals, survivors, organizations and advocates from across a broad spectrum of political, faith and non-faith, economic, and ideological backgrounds, all uniting together for the single purpose of shutting down Pornhub and holding its executives accountable. . . ." TRAFFICKINGHUB, https://traffickinghub.com [https://perma.cc/MV66-8AZ9].

46. *See Online Porn Videos of Missing Teen Lead to Man's Arrest*, AP NEWS (Oct. 24, 2019), https://apnews.com/general-news-fbc1fb17e4c8423194eb0aea7cab10b6 [https://perma.cc/2JAP-UYNJ]. Mickelwait also testified to Congress that Pornhub had verified the abducted girl for its ModelHub program. *See Ending Exploitation: How the Financial System Can Work to Dismantle the Business of Human Trafficking: Hearing Before the Subcomm. on Nat'l Sec., Int'l Dev. and Monetary Pol'y of the H. Comm. on Fin. Servs.*, 117th Cong. (2021) (testimony of Laila Mickelwait, MPD, Founder, Traffickinghub Movement and President, Justice Defense Fund).

47. The ModelHub program is an official list of "verified" amateur actors promoted by PornHub. *See* Andrew Fiouzi, *What Does it Mean to Be a Verified Amateur on Pornhub?*, MEL MAGAZINE (2019), https://melmagazine.com/en-us/story/pornhub-verified-amateur [https://perma.cc/K3ET-ZT79].

48. *See* TRAFFICKINGHUB, *supra* note 45; EXODUS CRY, *supra* note 45; EXODUS CRY (@ExodusCry), *Pornhub Exposed as #Traffickinghub*, YOUTUBE (June 30, 2020), https://www.youtube.com/watch?v=20x9xEzlODU [https://perma.cc/H454-4SHX].

49. *See* Kristof, *supra* note 9.

50. *See id.*

51. Brief for Appellant, *supra* note 33, at 2–3 (citing to the Record on Appeal); *see also* EXODUS CRY, *supra* note 45 (detailing Pornhub's "[number-four] most watched video" which featured a "teen girl with her hands and feet shackled down, gagged and abused with various objects, including being electrocuted and her body being burned with wax.").

algorithms that track user preferences, Pornhub and similar companies are able to recommend increasingly more "hardcore" forms of pornography to users, however tangentially related to their usual viewing patterns.[52] Accordingly, the list of available genres expands with each passing year.[53] As commercial pornographers enrich themselves by monetizing "dominance, aggression, disrespect, and objectification," unsuspecting habitual users, including children, are hurled into more intense and violent (and sometimes illegal) forms of pornography.[54]

In addition to the industry's complicity in human trafficking,[55] it has also become clear that the ubiquity of online pornography is having a devastating impact on the general health of children—who are, on average, exposed to pornography by age 11.[56] Initial findings by psychologists and other social science researchers suggest that adolescents who regularly view pornography exhibit a variety of mental health afflictions, including depression, social anxiety, dissociation, and decreased emotional bonding to caregivers and parents.[57] Furthermore, children exposed to

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52. *See 2023 Year in Review*, PORNHUB (Dec. 14, 2023). Each December, Pornhub releases a "Year in Review," a report detailing the most popular user trends and preferences, emerging genres, countries with the most traffic to the website, popular search terms and phrases, and the top five actors, among many other data points. *Id.* This is all made possible from the vast amount of user data that the company gathers each year. *See id.*; *see also* Sebastian Meineck, *Here's How Much Pornhub Knows About You*, VICE (Sept. 5, 2019), https://www.vice.com/en/article/kzmmpa/pornhub-xhamster-data-about-you [https://perma.cc/MU2M-PPT5]. ("What I discovered is that porn sites are selling the makeup of our sexual desires and automatically collecting data that could potentially be used to track individual users over time.").

53. *See 2023 Year in Review*, *supra* note 52.

54. Romney, *supra* note 9, at 43 ("Most of today's pornography does not reflect consensual, loving, healthy relationships. Instead, pornography teaches dominance, aggression, disrespect, and objectification.").

55. *See Pornhub Parent Company Admits to Receiving Proceeds of Sex Trafficking and Agrees to Three-Year Monitor*, U.S. ATTORNEY'S OFF., E.D.N.Y. (Dec. 21, 2023), https://www.justice.gov/usao-edny/pr/pornhub-parent-company-admits-receiving-proceeds-sex-trafficking-and-agrees-three-year [https://perma.cc/2DRE-VQTD]; *see* Sheelah Kolhatkar, *The Fight to Hold Pornhub Accountable*, THE NEW YORKER (June 13, 2022), https://www.newyorker.com/magazine/2022/06/20/the-fight-to-hold-pornhub-accountable [https://perma.cc/ZSR6-ER8V].

56. *See* Watkins, *supra* note 12, at 89.

57. *See* Zachary D. Bloom et al., *Male Adolescents and Contemporary Pornography: Implications for Marriage and Family Counselors*, 23 FAM. J.: COUNSELING & THERAPY FOR COUPLES & FAMS. 82, 84 (2015). Freshman legislator Laurie Schlegel, the drafter of the Louisiana bill, was inspired to learn more about the dangers of youth exposure to pornography after musician Billie Eilish commented on the phenomenon on *The Howard Stern Show*. Eilish told Stern: "I used to watch a lot of porn, to be honest. I started watching porn when I was like 11. . . . I think it really destroyed my brain and I feel incredibly devastated that I was exposed to so much porn." Novicoff, *supra* note 3.

pornography exhibit "lower degrees of social integration, increases in conduct problems, [and] higher levels of delinquent behavior,"[58] as well as dysfunctional stress responses and impairments to emotional regulation.[59] Perhaps most alarmingly, multiple comprehensive studies have shown that pornography use in adolescent boys is strongly correlated with sexual aggression.[60] For example, a 2019 study among tenth graders in the United States found that boys exposed to hardcore pornography were three times more likely to commit sexual violence against an intimate partner.[61]

2. *Age Verification Laws and the Anatomy of H.B. 1181*

In June 2023, Texas responded to the growing concerns about pornography's harmful effects on minors by enacting H.B. 1181.[62] The law echoes the language of similar age-verification legislation previously enacted in other states, beginning with Louisiana in 2022.[63] The triumph of the Texas law against current legal challenges would better position analogous age-verification legislation to succeed in subsequent litigation.

Turning to the text, H.B. 1181 applies exclusively to commercial entities that "knowingly and intentionally publish[ ] or distribute[ ] material on an Internet website, including a social

58. Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19 SEXUAL ADDICTION & COMPULSIVITY 99, 116 (2012).

59. *See* Bloom et al., *supra* note 57, at 85.

60. *See, e.g.*, *id.*; Jochen Peter & Patti M. Valkenburg, *Adolescents and Pornography: A Review of 20 Years of Research*, 53 J. SEX RSCH. 509, 522 (2016) (finding that pornography use is associated with both in-person and online sexual harassment and sexual assault by adolescent boys); Owens et al., *supra* note 58, at 108–09; Whitney L. Rostad et al., *The Association Between Exposure to Violent Pornography and Teen Dating Violence in Grade 10 High School Students*, 48 ARCHIVES SEXUAL BEHAV. 2137, 2141–44 (2019).

61. *See* Rostad et al., *supra* note 60, at 2144. The findings for college-aged males and older adults are equally as harrowing. A 2011 study of college-aged men found that those who had seen violent rape pornography (whether real or simulated) reported a "greater likelihood of committing rape and/or sexual assault, a greater acceptance of rape myths (e.g., that women invited the rape), and a decreased likelihood of intervening in a sexual assault than those who did not view pornography in the previous year." Bloom et al., *supra* note 57, at 85. Furthermore, for adults of all ages, there is "surefire sociological evidence" of pornography's "exacerbating influence" on those predisposed to violence, misogyny, or child sex abuse—as well as its contribution to "abusive relationships and the fracturing of families." Alberta, *supra* note 40.

62. *See Attorney General Ken Paxton Wins Major Victory Protecting Children from Obscene Materials*, ATT'Y GEN. TEX. (Nov. 17, 2023), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-wins-major-victory-protecting-children-obscene-materials [https://perma.cc/FE4R-HGRZ].

63. *See* Novicoff, *supra* note 3.

media platform, more than one-third of which is sexual material harmful to minors. . . ."[64] The statute's definition of "sexual material harmful to minors" incorporates the three *Miller* obscenity prongs; in order to qualify, the material, "taken as a whole," must (i) be "patently offensive with respect to minors" under "contemporary community standards," (ii) "appeal to or pander to the prurient interest" of minors and (iii) "lack[ ] serious literary, artistic, political, or scientific value for minors."[65] In practice, H.B. 1181 is immediately triggered by companies such as Pornhub because "more than one-third" of its website clearly features "sexual material harmful to minors," as defined by the statute.[66]

Once triggered, H.B. 1181 requires these websites to employ "reasonable age verification methods" to verify that users are "18 years of age or older."[67] Before granting access to their websites, the companies must require users to either (1) "provide digital identification" or (2) "comply with a commercial age verification system that verifies age using . . . government-issued identification . . . [or] a commercially reasonable method that relies on public or private transactional data to verify the age of an individual."[68] The first option, providing "digital identification," refers to information "stored on a digital network that may be accessed by a commercial entity and that serves as proof of identity."[69] The second option refers to a variety of available age-verification service-providers used commonly on dating websites, app-based sportsbooks, internet casinos, or for purchasing tobacco and alcohol online.[70] Regardless of which method is used, "this process is almost exclusively completed by third parties, who

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64. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2023).

65. *Id.* § 129B.001(6) (defining "sexual material harmful to minors"); *see* Miller v. California, 413 U.S. 15, 24 (1973).

66. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2023); *id.* § 129B.001(6).

67. *Id.* § 129B.002(a).

68. *Id.* § 129B.003(b).

69. *Id.* § 129B.003(a).

70. *See, e.g.*, *Tinder: Why Do I Need to Verify My Age?*, TINDER, https://www.help.tinder.com/hc/en-us/articles/360040592691-Why-do-I-need-to-verify-my-age [https://perma.cc/SY5P-23FB]; *DraftKings: Why Am I Being Asked to Verify My Identity?*, DRAFTKINGS, https://help.draftkings.com/hc/en-us/articles/360058767233-Why-am-I-being-asked-to-verify-my-identity-US [https://perma.cc/VE4N-YCUA]; *Zyn: Still Have Questions?*, ZYN, https://us.zyn.com/questions/ [https://perma.cc/994K-52SN]; *DoorDash: How Is My Age Verified for Alcohol Orders?*, DOORDASH, https://help.doordash.com/consumers/s/article/How-is-my-age-verified-for-alcohol-orders?language=en_US [https://perma.cc/T5EW-CKBN].

provide pornography websites *only* the answer to the question, 'Is this person over 18? Yes or No.'"[71] In any event, the statute bars pornography websites from retaining *any* identifying information beyond the age of their users.[72] Entities who retain a user's personal information may be punished by a fine of $10,000 for each violation.[73]

Finally, H.B. 1181 empowers the Texas Attorney General to bring civil enforcement actions for violations of H.B. 1181.[74] These actions may seek to "enjoin the violation, recover a civil penalty, and obtain other relief the court considers appropriate."[75]

Nothing in Texas H.B. 1881 prohibits anyone from producing, posting, sharing, or selling online pornography. Nor does the statute prohibit anyone from viewing online pornography. Instead, it requires commercial pornography websites, under the threat of civil penalties, to verify that their users are over 18 before granting them access to sexually explicit content.[76]

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71. Brief for Appellant, *supra* note 33, at 6 (citing to the Record on Appeal).

72. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(b) (West 2023).

73. *Id.* § 129B.006(b)(2). As discussed further in Part II.B, *infra*, the industry argues that H.B. 1181 generates significant privacy concerns and will inevitably chill protected speech. Understandably, adults will be hesitant to upload personal information as a prerequisite to viewing intimate sexual material on pornography websites, leading to self-censorship. Submitting such documentation runs the risk of intimate information—such as sexual preferences and desires—getting leaked in a data breach or used by hackers as blackmail or extortion, among other privacy concerns.

74. *Id.* § 129B.006(a). Age-verifications laws in other states, such as in Louisiana, exclusively create a private right of action—that is, individuals harmed by violations of the law may seek damages. *See* LA. STAT. ANN. § 9:2800.29 (2023). The constitutional significance of this difference, if any, is not the subject of this Note.

75. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.006(a) (West 2023). This Note does not discuss H.B. 1181's notice requirements, explained below, for two reasons: First, these mandated health warnings are unique to the Texas law. Second, to the extent that they are unconstitutional, they can be severed from the statute, without affecting the analysis of the age-verification requirements. *See id.* § 129B.004. Indeed, the Fifth Circuit affirmed the district court's injunction in regard to the health warnings and held that they unconstitutionally compelled the plaintiffs' speech. *See* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024). Finally, the industry's argument that Section 230 of the Communications Decency Act preempts the state age-verification laws is also outside of the scope of this Note. *See* Appellees' Cross-Opening Brief, *supra* note 21, at 52. For reference, the Fifth Circuit rejected this Section 230 argument. *See* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024).

76. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2023). Astute critics may note a discrepancy between the age of consent in Texas and H.B.1181: a 17-year-old can legally consent to sex but cannot access online pornography. *See* TEX. PENAL CODE ANN. § 21.11(a)(1) (West 1973). While this critique is unlikely to be constitutionally significant in the Court's analysis, it highlights inconsistencies common in public policy.

As explained above, one of Texas' primary defenses of H.B. 1181 is based on the obscenity exception to the First Amendment.[77] The state argues that because a majority of the content peddled by companies like Pornhub is obscene under the *Miller v. California* framework, pornography should not be afforded First Amendment protection.[78] Before assessing the strength of this argument in Part II, it is first necessary to consider the history of obscenity jurisprudence in the United States.

B. TRADITIONAL OBSCENITY JURISPRUDENCE

As originally understood, the First Amendment's protection against laws that "abridg[e] the freedom of speech" did not extend to every conceivable form of speech.[79] Instead, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[80] Obscenity is one such class of unprotected speech.[81] Indeed, when the Court formally adopted this "obscenity exception" to the Free Speech Clause in *Roth v. United States*, it relied primarily on Founding Era understandings of the First Amendment and consistent State practices following its ratification.[82]

Long before the enactment of federal obscenity statutes such as the Comstock Act,[83] state obscenity prosecutions were common throughout the early nineteenth century. In 1815, for example, Philadelphia tavern owner Jesse Sharpless was charged under state law with "exhibiting for a fee" an image of "a man in an

77. *See* Brief for Appellant, *supra* note 33, at 12.
78. *See id.*
79. U.S. CONST. amend. I.
80. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
81. *See* Roth v. United States, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").
82. *See id.* at 482–85 (1957) ("In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . [I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.").
83. The Comstock Act of 1873 prohibited the sending of "obscene, lewd or lascivious, "immoral," or "indecent" items via mail. Brandon R. Burnette, *Comstock Act of 1873*, FREE SPEECH CTR. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/comstock-act-of-1873/ [https://perma.cc/YC8N-ZPC7]. The law further "made it a misdemeanor for anyone to sell, give away, or possess an obscene book, pamphlet, picture, drawing, or advertisement." *Id.*

obscene, impudent, and indecent posture with a woman" in the backroom of his tavern.[84] In upholding his conviction, the Pennsylvania Supreme Court reiterated the classical understanding that "[w]hat tended to corrupt society, was held to be a breach of the peace and punishable by indictment."[85] In this pre-*Hicklin* era,[86] the Court drew on "true principles"[87] to define obscenity in simple terms: "an offence may be punishable, if in its nature and by its example, it tends to the corruption of morals," even if it is "not committed in public."[88] Because the image exhibited by Sharpless tended to "excite lust" and could potentially corrupt "the youth of the city" if they happened to be exposed to it, the image was clearly obscene and could be punished accordingly.[89] In fact, the major question on appeal was *not* whether the lewd image constituted obscenity—it obviously did to the Court—but whether Sharpless was deprived of certain procedural rights because the trial court had failed to enter a more thorough description of the image into the record.[90] The Court ultimately rejected this argument, holding that the picture was "sufficiently described [for the jury] in the indictment," and that, out of "respect to the chastity of our records," unnecessarily explicit details should be omitted.[91]

Other examples of early state prosecutions abound. In 1821, the Supreme Judicial Court of Massachusetts upheld the conviction of Peter Holmes for publishing "a lewd and obscene print" that "debauch[ed] and corrupt[ed]" the "morals [of the] youth [and] other good citizens," and "raise[d] and create[d] in their minds inordinate and lustful desires. . . ."[92] Similarly, in 1848, the Supreme Court of Michigan affirmed the convictions of defendants who had "unlawfully, wickedly and impiously" published "a certain wicked, nasty, filthy, bawdy and obscene

84. Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 103 (Pa. 1815).
85. *Id.* at 102.
86. *See infra* p. 164 (discussing the *Hicklin* test).
87. *Sharpless*, 2 Serg. & Rawle at 102 ("[T]he authority of that case [Queen v. Read, questioning whether the publication of an indecent book was indictable] was destroyed upon great consideration, in the King v. Curl. The law was, in Curl's case, established upon true principles.").
88. *Id.*
89. *Id.*
90. *See* Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 103 (Pa. 1815). One reason offered by Sharpless "in arrest of judgment [was], that the picture [was] not sufficiently described in the indictment." *Id.*
91. *Id.*
92. Commonwealth v. Holmes, 17 Mass. 336, 336 (1821).

paper. . . ."[93] The Supreme Court of Illinois likewise upheld the conviction of a man who mailed an "obscene and indecent drawing" to an unsuspecting woman.[94] Like *Sharpless*, each of these cases, and many others,[95] seemed primarily concerned *not* with adjudicating obscenity (the materials were plainly obscene in their minds), but with the propriety of "polluting" official court documents by entering descriptions of such material in the record.[96]

Nor did these prosecutions, consistently upheld by American courts throughout the early Republic, raise any significant free speech concerns. To be sure, in many of these early cases, the First Amendment had not yet been incorporated against the States.[97] Nonetheless, in these and later cases like *Fuller v. People*, or all of the *Hicklin*-era cases, courts and litigants alike assumed that laws regulating obscenity "do not 'abridg[e] the freedom of speech' because such speech is understood to fall *outside* 'the freedom of speech.'"[98] As explained by Justice Brennan in *Roth*, "the guaranties of freedom of expression in effect in [ten] of the 14 States . . . by 1792 . . . gave no absolute protection for every utterance."[99]

Beginning in 1879 and until the early 1930s, American courts in obscenity cases generally followed a rule from the early English case of *Regina v. Hicklin*, which asked whether the "tendency" of the material had a corrupting influence on the most vulnerable

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93. People v. Girardin, 1 Mich. 90, 90 (1848).

94. Fuller v. People, 92 Ill. 182, 184 (1879).

95. *See, e.g.*, State v. Brown, 27 Vt. 619, 620 (1855) (upholding conviction for selling "a certain lewd, scandalous and obscene paper, entitled 'Amatory Letters'. . . ."); Rosen v. United States, 161 U.S. 29, 36–39 (1896) (cataloging the series of early state cases that considered the tension between a defendant's procedural rights and polluting court documents with explicit descriptions of obscenity).

96. *Girardin*, 1 Mich. at 91 ("[T]here is another rule as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters.").

97. *Cf.* Gitlow v. New York, 268 U.S. 652, 630 (1925) (incorporating the First Amendment against the States).

98. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting) (alteration in original) (emphasis added) (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002)).

99. Roth v. United States, 354 U.S. 476, 482 (1957). Even prior to the Founding, "[a]s early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services." *Id.* (quoting THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 399 (T.S. WAIT & CO. 1814) (1712), https://archive.org/details/chartersgenerall00mass/page/n1/mode/2up [https://perma.cc/N93K-AJET]).

recipient's mind.[100] There, the Queen's Bench considered the plight of a man convicted under the Obscene Publications Act of 1857 for selling copies of *The Confessional Unmasked*—an erotic pamphlet of anti-Catholic propaganda that detailed the supposedly lurid questions posed to female penitents by priests during confession.[101] The pamphlet, distributed by the Protestant Electoral Union,[102] was emblematic of the broader Protestant effort to undermine the Roman Catholic Church through defamatory "lurid tales of sexual excess by Catholic priests."[103] The convicted seller of *The Confessional Unmasked* argued that the pamphlet was not obscene because his motive was to "expose the errors and practices of the Roman Catholic Church."[104] Lord Cockburn rejected this argument, holding that the proper standard for obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall," regardless of the motivations of the distributor.[105] This became known as the *Hicklin* test. It was adopted by American courts[106] and employed repeatedly in applying the Federal Anti-Obscenity Act of 1873 (the Comstock Act)—though with subsequent alterations by federal courts[107]—

100. William Crawford Green, *Hicklin Test*, FREE SPEECH CTR. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/hicklin-test/ [https://perma.cc/YN2S-39WS]. The *Hicklin* test was first adopted in the United States by a circuit court in the Southern District of New York. *See id.*; United States v. Bennett, 24 F. Cas. 1093, 1094 (C.C.S.D.N.Y., 1879) (No. 14,571). In that case, a defendant was convicted of mailing a "certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious, that the same would be offensive to the court here, and improper to be placed upon the records thereof." *Id.*

101. *See* Dominic Janes, The Confessional Unmasked*: Religious Merchandise and Obscenity in Victorian England*, 41 VICTORIAN LITERATURE & CULTURE 677, 679 (2013).

102. *See* Katy E. Mullin, *Unmasking* The Confessional Unmasked*: The 1968* Hicklin *Test and the Toleration of Obscenity*, 85 ELH: ENGLISH LITERARY HISTORY 471, 473 (2018).

103. PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE 21 (2002) (describing a variety of anti-Catholic, Protestant literature from the 1800s that painted the confessional as a place for Catholic priests to take advantage of young women).

104. Queen v. Hicklin, (1868) L.R. 3 Q.B. 360, 371.

105. *Id.*

106. *See* United States v. Bennett, 24 F. Cas. 1093, 1094 (C.C.S.D.N.Y., 1879) (No. 14,571).

107. *See*, *e.g.*, United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930) (requiring that a work be judged by its dominant theme, so as to avoid labeling works of medicine or science as obscene, even if, say, depictions of human anatomy arouse lustful thoughts in certain people); United States v. One Book Entitled Ulysses, 72 F.2d 705, 708 (2d Cir. 1934) (stating that the high estimation of a work by critics cuts against the work being obscene); Parmelee v. United States, 113 F.2d 729, 733 (D.C. Cir. 1940) (applying a proto-"contemporary community standards" test).

until the test was ultimately discarded by Justice Brennan in *Roth*.[108]

C. MODERN OBSCENITY JURISPRUDENCE

While the Court generally agreed that obscenity was unprotected, defining "obscenity" proved to be a much tougher challenge. In 1973, Chief Justice Warren Burger described the Court's prior attempts at articulating a precise and consistent definition of the term as a "somewhat tortured history."[109] Throughout the mid-20th century, the enunciation of an intelligible constitutional standard for obscenity repeatedly evaded the Court, resulting in warring factions of Justices each applying their own preferred obscenity test.

Compare, for example, Justice Stewart's infamous "I know it when I see it"[110] standard in *Jacobellis*, with Justice Brennan's slightly more robust attempt to limit "obscenity" to material that "deals with sex in a manner appealing to prurient interest" in *Roth*.[111] Although the standard announced in *Roth* initially seemed to resolve the definitional morass of obscenity jurisprudence, it instead spawned a new "torturous period of divided rulings"[112] and "hopeless confusion."[113] Furthermore, the Court's subsequent alterations to *Roth*—such as the additional requirement, announced in *Memoirs v. Massachusetts*, that unprotected obscene material be "utterly without redeeming social

108. *See* Roth v. United States, 354 U.S. 476, 489 (1957). Prior to subsequent alterations, the *Hicklin* test had the effect of assessing materials based on how an isolated portion would affect the most vulnerable members of society, such as children. *Cf.* United States v. Kennerley, 209 F. 119, 120–21 (S.D.N.Y. 1913) (Judge Learned Hand criticizing the *Hicklin* test for "reduc[ing] our treatment of sex to the standards of a child's library in the supposed interest of a salacious few. . . .").

109. Miller v. California, 413 U.S. 15, 20 (1973).

110. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

111. Roth v. United States, 354 U.S. 476, 487 (1957). Material is deemed obscene when "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. Brennan formulated this standard by cobbling together holdings from a number of lower court opinions. *See id.* at 487 n.26.

112. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 843 (16th ed. 2007).

113. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting).

value"[114]—rendered the *Roth* standard virtually unworkable in practice.[115]

Following years of grappling with this "intractable obscenity problem,[116] and mounting political pressure to formulate a coherent constitutional standard, the Court finally reached a consensus in 1973. In *Miller v. California*, the Court enunciated a three-prong test for obscenity, which still controls today.[117] The *Miller* test asks:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[118]

If the material in question satisfies all three of these requirements, that material is deemed obscene and is not afforded First Amendment protection.[119] In this way, *Miller* represented a shift away from the categorical approach of *Roth* and instead imposed a much more demanding framework.

Miller also modified certain requirements of the earlier obscenity standards that made application difficult. First, the *Miller* Court narrowed the range of potentially obscene materials to those that deal explicitly with "patently offensive 'hard core' sexual conduct."[120] Second, States could only regulate such "patently offensive" material to the extent that it was "specifically defined by the regulating state law, as written or construed."[121] Finally, when applying "contemporary community standards," the

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114. 383 U.S. 413, 418–19 (1966).

115. Sean Adam Shiff, Comment, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WILLIAM MITCHELL L. REV. 731, 739 (1996) (describing how the additional requirement from *Memoirs* significantly impeded prosecutions).

116. Miller v. California, 413 U.S. 15, 16 (1973) (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968)).

117. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 479 (2010) (applying *Miller*).

118. *Miller*, 413 U.S. at 24.

119. *See id.*

120. *Id.* at 27.

121. *Id.*

trier of fact was instructed to consider the material as a whole rather than in isolation.[122]

Later cases clarified the degree of deference due to jury findings on each of the three *Miller* prongs. In *Hamling v. United States*, the Court held that appellate courts should be deferential as to the contemporary community standards prong.[123] However, in *Jenkins v. Georgia*, the Court made clear that the "patently offensive" prong should be reviewed by appellate courts de novo—that is, a jury finding of "patently offensive" would not bind an appellate court.[124] Likewise, in *Smith v. United States*, the Court noted that a jury finding on the third prong—relating to "serious literary, artistic, political, or scientific value"—would be "particularly amenable to appellate review."[125] Lower courts understood this guidance to authorize independent review of the second and third *Miller* prongs.[126] This ensured that judges (and not juries) would be the ultimate arbiters of what constituted "patently offensive" and what qualified as "serious literary, artistic, political, or scientific value."[127] In practice, this would make it much harder for material to be deemed unprotected obscenity, as the legal elite at the time primarily endorsed a much more libertarian and absolutist conception of the First Amendment.[128]

Although *Miller* was a long-awaited definitive statement by the Court on obscenity, certain unresolved questions remain. What is "hard core"[129] sexual material? How does the bulk of modern

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122. Miller v. California, 413 U.S. 15, 24 (1973). For example, one should consider a controversial film *as a whole*, rather than focusing on an isolated erotic scene for purposes of an obscenity analysis.

123. *See* Hamling v. United States, 418 U.S. 87, 105–06 (1974).

124. *See* Jenkins v. Georgia, 418 U.S. 153, 160 (1974) ("Even though questions of appeal to the 'prurient interest' or of patent offensiveness are 'essentially questions of fact,' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'").

125. Smith v. United States, 431 U.S. 291, 305 (1977).

126. *See* United States v. Various Articles of Merch., 230 F.3d 649, 653 (3d Cir. 2000) ("Therefore, instructed by the Supreme Court's teachings in *Jenkins* and *Smith*, we hold that we have an independent review of parts (b) and (c) of the Miller test.").

127. *Id.*

128. *See* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1966 (2018) ("Despite the anti–New Deal origins of the new civil libertarianism, several factors in the late 1930s conspired to make it attractive to a growing number of moderate lawyers and politicians as well."); *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 171 (2022) ("However our current law of obscenity should be described, it is not a[n] originalist body of law. It is, at bottom, a product of the free speech revolution of the 1960s and 1970s. . . .").

129. Miller v. California, 413 U.S. 15, 27 (1973).

online pornography—featuring themes of rape, dominance, and aggression clearly intended to produce sexual arousal—square with the *Miller* Court's understanding of "hard core" content? Other important questions implicate the application of "contemporary community standards"[130] in obscenity cases—particularly whether triers of fact should be instructed to apply a national or local standard.[131] In the wake of *Miller*, and in the current age of ubiquitous online pornography, the Court has provided little to no guidance on these questions.

D. EARLY CONGRESSIONAL ATTEMPTS TO REGULATE ONLINE PORNOGRAPHY

Despite these historical practices and understandings, congressional attempts to regulate online pornography around the time of the internet's infancy did not fare well in the courts. The legal battles surrounding two federal statutes enacted in the late 1990s—the Communications Decency Act (CDA) and the Child Online Protection Act (COPA)—are of particular relevance to the debate over whether current age-verification legislation is constitutional. The Supreme Court confronted First Amendment challenges to provisions of the CDA in *Reno v. American Civil Liberties Union*.[132] It twice considered the constitutionality of COPA in *Ashcroft v. American Civil Liberties Union I* and *II*.[133] This section addresses the fate of each statute in turn.

1. *The Communications Decency Act (1996)*

Reno considered two statutory provisions of the CDA. The first, 47 U.S.C. § 233(a), prohibited "the knowing transmission of obscene and indecent messages to any recipient under 18 years of

130. *Id.* at 24.

131. The implications of the choice of a standard are significant. If national, should the libertinism of certain parts of New York City dictate what citizens of rural Idaho find acceptable—or vice-versa? If local, would this not force distributors of potentially obscene material to tailor their content to what would be acceptable in the most traditional and conservative communities? Under a local standard, would it be absurd if *identical* material was judicially deemed obscene in one community, but non-obscene in another? Is it reasonable to expect companies to minutely tailor the content that flows into each locality? Likely not.

132. *See* 521 U.S. 844 (1997).

133. *See* Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564 (2002); Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656 (2004).

age" on the internet.[134] The second, 47 U.S.C. 233(d), prohibited "the knowing sending or displaying [on the internet] of patently offensive messages in a manner that is available to a person under 18 years of age."[135] These broad provisions were qualified by two affirmative defenses.[136] The first shielded those who took "good faith, reasonable, effective, and appropriate actions"[137] to restrict minors' access to the covered communications. The other defense protected those who "restrict[ed] access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code."[138] Violations of § 233(a) and § 233(d) were punishable by a fine, two years imprisonment, or both.[139]

In a seven-to-two decision written by Justice Stevens, the Court held that these provisions of the CDA violated the freedom of speech guaranteed by the First Amendment.[140] The Court primarily objected to the statute's perceived overbreadth and vagueness.[141] For example, the statute's use of "indecent" and "patently offensive," both of which were undefined, had the capacity to "provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."[142] This vagueness was particularly concerning because the CDA was a "content-based regulation of speech"[143] and because it was a criminal statute.[144]

The *Reno* Court also took issue with the fact that (i) the CDA was not "limited to commercial speech or commercial entities" and instead covered all "entities and individuals posting indecent messages or displaying them on their own computers,"[145] (ii) that it covered "large amounts of nonpornographic material with

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134. 521 U.S. at 859.

135. *Id.*

136. *See* 47 U.S.C. § 223(e)(5).

137. *Id.* § 223(e)(5)(A).

138. 521 U.S. 844, 861 (1997); 47 U.S.C. § 223(e)(5)(B).

139. *See* 47 U.S.C. § 233(a)(2); 47 U.S.C. § 233(d)(2).

140. *See Reno*, 521 U.S. at 849.

141. *See id.* at 874 ("We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech.").

142. *Id.* at 871.

143. *Id.*

144. Reno v. ACLU, 521 U.S. 844, 872 (1997). The Court's fear was that this vagueness in a criminal statute had the possibility of chilling protected speech. As a hypothetical, it asked the question of whether a mother could be incarcerated for sending her 17-year-old daughter an email about birth control. *See id.* at 878.

145. *Id.* at 877.

serious educational or other value,"[146] (iii) that it left no option for parental consent,[147] (iv) that it unduly burdened adults' access to such materials,[148] and (v) that the CDA was not narrowly tailored and failed to consider less restrictive means, such as parental filtering software.[149] The Court also rejected the affirmative defenses as economically infeasible, given the state of technology and associated costs of verification at the time.[150] However, *Reno* was decided at a time of the internet's infancy, when it was far less developed than it is today: for example, the Court spent over three pages explaining to its readers what the internet even was.[151]

Finally, the Court rejected the Government's reliance on *Ginsberg v. New York*, an earlier case upholding a New York statute that banned the sale of pornographic materials to minors.[152] There, the Court recognized the State's "exigent interest in preventing [the] distribution to children of objectionable material,"[153] and held that the statute survived First Amendment challenges because it had a "rational relation to the [State's] objective of safeguarding . . . minors from harm."[154] The *Reno* Court distinguished the *Ginsberg* statute from the CDA on four different grounds.[155] First, the CDA did not permit parental consent.[156] Second, the CDA was not limited to commercial transactions.[157] Third, the CDA failed to limit its definition of "material that is harmful to minors" or provide an exception for material with serious social value.[158] Fourth, the CDA defined "minor" as those under 18, while New York's statute set the cutoff at 17.[159] After finding that the Government's reliance on *Ginsberg*

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146. *Id.*
147. *See id.* at 865.
148. *See id.* at 874.
149. *See id.* at 879.
150. *See* Reno v. ACLU, 521 U.S. 844, 881–82 (1997) ("[I]t is not economically feasible for most noncommercial speakers to employ such verification. . . . The Government thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays.").
151. *See id.* at 849–53 (explaining how to navigate the "web," how "email" worked, and what a "mouse" did, among other things).
152. *See* 390 U.S. 629, 631 (1968); *see also infra*, Part II.B.i.
153. *Id.* at 636 (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668 (N.Y. 1966)).
154. *Id.* at 643.
155. *See* Reno v. ACLU, 521 U.S. 844, 865 (1997).
156. *See id.*
157. *See id.*
158. *Id.*
159. *See id.* at 865–66 ("[T]he CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.").

was misplaced, the Court concluded that the CDA imposed an "unacceptably heavy burden on protected speech," failed to satisfy heightened scrutiny, and therefore abridged the freedom of speech guaranteed by the First Amendment.[160]

2. *The Child Online Protection Act (1998)*

Learning from its mistakes, Congress tried its luck again by enacting the Child Online Protection Act (COPA) in 1998, taking the Court's guidance from *Reno* into consideration.[161] The revamped statute imposed civil and criminal penalties against those who, "for commercial purposes," posted "material harmful to minors," defined using the three prongs from *Miller*.[162] Although COPA appeared to mend some of the constitutional defects of the CDA relating to vagueness and overbreadth, the American Civil Liberties Union (ACLU) immediately challenged the new statute—sparking a legal battle that would take ten years and two trips to the Supreme Court to resolve.

In the 2002 case *Ashcroft v. American Civil Liberties Union* ("*Ashcroft I*"), the Court considered the Third Circuit's holding that COPA's incorporation of "community standards" from *Miller* was unconstitutional because it would "effectively force all speakers on the Web to abide by the 'most puritan' community standards."[163] The Court ultimately rejected this argument and remanded, holding that the "community standards" provision alone did not render COPA unconstitutional.[164] Two years later, in *Ashcroft II*, the Supreme Court held that COPA was unlikely to survive strict scrutiny because the Government had failed to rebut the argument that parental filtering software was a less restrictive means to achieving COPA's ends.[165] As such, the Court upheld a preliminary injunction and remanded once more.[166] When the case

160. Reno v. ACLU, 521 U.S. 844, 882 (1997).
161. *See* 47 U.S.C. § 231 (West 1998).
162. *Ashcroft I*, 535 U.S. 564, 569 (2002).
163. *Id.* at 577 (quoting ACLU v. Reno, 217 F.3d 162, 175 (3d Cir. 2000)).
164. *See Ashcroft I*, 535 U.S. at 586 ("The scope of our decision today is quite limited. We hold only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.").
165. *See Ashcroft II*, 542 U.S. 656, 666–67 (2004).
166. *See id.* at 672.

was appealed for a third time, the Court denied certiorari, and COPA remained enjoined.[167]

This Part has outlined the history of pornography regulation and obscenity jurisprudence in the United States, as well as the failed congressional attempts to regulate online pornography with the CDA and COPA in the late 1990s. In light of this history, the question for the current Supreme Court is whether recent age-verification laws should suffer the same fate. The following Part offers various routes by which H.B. 1181, and all similar laws, can be upheld against First Amendment challenges.

II. First Amendment Analysis

In federal courts across the country, the online pornography industry has asserted facial challenges to recent age-verification laws, including against Texas H.B. 1181.[168] Its primary argument is that these laws are unconstitutional because they impermissibly restrict protected speech in violation of the First Amendment.[169] Because the laws "burden substantial amounts of undeniably protected speech," the industry argues that courts must apply strict scrutiny—a standard which the laws supposedly cannot survive, especially in the wake of *Reno* and *Ashcroft II*.[170]

This Part considers in turn the three potential routes for upholding the laws: (i) relying on the obscenity exception to the First Amendment, (ii) surviving deferential rational basis review under *Ginsberg v. New York*, or (iii) surviving heightened scrutiny. The first, which the State of Texas has proposed,[171] is the most straightforward of the three: because a majority of the content distributed by companies like Pornhub is obscene under the *Miller* framework, it should be afforded no First Amendment protection.

The second defense of the laws analogizes to the statute at issue in *Ginsberg* and insists that rational basis is the appropriate standard of review—a highly deferential standard which the laws easily surpass. This is the argument recently adopted by the Fifth Circuit in upholding the age-verification component of H.B.

167. ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

168. *See generally* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024), *cert. granted*, 144 S.Ct. 2714 (2024).

169. *See* Appellees' Cross-Opening Brief, *supra* note 21, at 1.

170. *Id.* at 15.

171. *See* Brief for Appellant, *supra* note 33, at 12.

1181.[172] The court explained that *Ginsberg*'s central holding—that "regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review"—was controlling and binding upon the court, and that H.B. 1181 had carefully avoided the constitutional pitfalls of both the CDA and COPA.[173]

This Note, while sympathetic to those arguments, concludes that they are unpersuasive in light of existing precedent. Because Texas H.B. 1181 is a content-based regulation that appears to burden adults' access to protected speech, courts will instead subject the laws to strict scrutiny. Although a more demanding standard, Texas H.B. 1181 and analogous legislation pass constitutional muster because they (i) serve the compelling governmental interest of protecting children from online pornography, (ii) are narrowly tailored to achieve that interest, and (iii) are the least restrictive means of advancing it, notwithstanding the availability of content filtering software.

A. ONLINE PORNOGRAPHY AS UNPROTECTED OBSCENITY?

Can H.B. 1181 and analogous age-verification laws be upheld under the obscenity exception to the First Amendment? The State of Texas, in its briefing at the Fifth Circuit, appeared to latch onto such an argument.[174] If the material distributed by companies like Pornhub is obscene, then recent age-verification legislation poses no serious First Amendment concerns because "obscene material is unprotected by the First Amendment."[175] Texas argues that the majority of online pornography falls plainly within the Court's statements on unprotected obscenity.[176] This Note, while sympathetic to that argument,[177] ultimately finds it unpersuasive in light of existing precedent and the actual text of the age-verification statute, which sweeps much broader than the *Miller*

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172. *See Free Speech*, 95 F.4th at 269 ("H.B. 1181's age-verification requirements are subject to rational-basis review. Applying that standard, we uphold them as constitutional.").

173. *Id.* at 270.

174. *See* Brief for Appellant, *supra* note 33, at 12.

175. Miller v. California, 413 U.S. 15, 23 (1973).

176. *See* Brief for Appellant, *supra* note 33, at 12.

177. Indeed, Part III of this Note is devoted to ways in which the Supreme Court could revisit its obscenity jurisprudence to allow states to better protect minors from the deleterious effects of online pornography.

framework.[178] As such, appellate courts reviewing the age-verification laws are unlikely to accept this obscenity exception argument and will instead subject the laws to some form of constitutional scrutiny.

As discussed *supra* in Part I.C, *Miller v. California* laid out the modern framework for obscenity.[179] There, the Court gave "plain examples" of what a state statute *could* regulate, including "patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated" and "patently offensive representation[s] or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[180] "At a minimum," the Court explained, "patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."[181] Texas argues that, because a majority of online pornography clearly surpasses the "plain examples" of obscenity given in *Miller*, and because it lacks any of the "value" contemplated by the Court,[182] it should be considered unprotected obscenity.[183]

The problem with this argument is that H.B. 1181's definition of "sexual material harmful to minors" captures much more material than the *Miller* test does.[184] Although the statute incorporates the three *Miller* prongs into its definition, it adds "with respect to minors" or "for minors" after each prong.[185] For example, the material in question, "taken as a whole," must merely be (i) "patently offensive *with respect to minors*" under "contemporary community standards," (ii) "*with respect to minors* . . . appeal to or pander to the prurient interest," and (iii) "lack[ ] serious literary, artistic, political, or scientific value *for minors*."[186] As a result, H.B. 1181 regulates beyond obscene materials (as defined by *Miller*) and sweeps in potentially non-obscene sexually

178. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 129B.001(6) (West 2023) (defining "sexual material harmful to minors" by adding "for minors" qualifiers after each prong of the *Miller* test) *with* Miller v. California, 413 U.S. 15, 24 (1973) (announcing the three-pronged test for obscenity).

179. *See supra* Part I.C.

180. *Miller*, 413 U.S. at 25.

181. Miller v. California, 413 U.S. 15, 26 (1973).

182. *Id.* at 25–26.

183. *See* Brief for Appellant, *supra* note 33, at 12.

184. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 129B.001(6) (West 2023).

185. *Id.*

186. *Id.* (emphases added).

explicit materials that would, under existing precedent, be protected speech for adults. As the district court found in the ongoing Texas litigation: "H.B. 1181 does not regulate obscene content, it regulates all content that is prurient, offensive, and without value *to minors*. Because most sexual content is offensive to young minors, the law covers virtually all salacious material. This includes sexual, but non-pornographic, content posted or created by Plaintiffs."[187]

Although the statute upheld in the earlier case of *Ginsberg v. New York* featured similar "for minors" language, such minor-specific variants of obscenity "came under more skepticism as applied to internet regulations" beginning in the 1990s.[188] Indeed, the Court in *Reno* noted that the CDA, which contained the "for minors" qualifiers, was a content-based restriction that censored speech from "some speakers whose messages would be entitled to constitutional protection."[189] Similarly, in *Ashcroft v. ACLU*, the Third Circuit explained that because COPA's "definition of harmful material is explicitly focused on minors, it automatically impacts non-obscene, sexually suggestive speech that is otherwise protected for adults."[190] As such, the courts declined to entertain the obscenity exception and instead subjected the laws to strict scrutiny.[191]

B. IDENTIFYING THE CORRECT STANDARD OF REVIEW

If recent age-verification legislation cannot be defended on obscenity exception grounds, federal courts will subject the laws to some form of judicial scrutiny. But which standard of review should apply? This section considers the two most likely candidates in turn—rational basis review under *Ginsberg* and strict scrutiny.

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187. Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 392 (W.D. Tex. 2023), *aff'd in part, vacated in part sub nom.* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024).

188. *Id.* at 390.

189. Reno v. ACLU, 521 U.S. 844, 874 (1997).

190. ACLU v. Ashcroft, 322 F.3d 240, 252 (3d Cir. 2003).

191. *See Free Speech*, 689 F. Supp. 3d at 391.

1. *Rational Basis Review Under Ginsberg: The Fifth Circuit's Holding*

The pornography industry argues that courts must apply strict scrutiny because the laws "regulat[e] and chill[ ] protected speech based on its content."[192] The fatal flaw of age-verification efforts, according to the industry, is that they fail to satisfy the "least restrictive means" prong of strict scrutiny, and are therefore incapable of surviving such a standard.[193] The industry primarily relies on *Reno* and *Ashcroft II* for this argument.[194]

However, because the laws regulate materials that states deem obscene *as to children*, the State of Texas has argued that rational basis review may be more appropriate.[195] The Fifth Circuit agreed in its recent opinion upholding the age-verification components of H.B. 1181.[196] This approach is based on *Ginsberg v. New York*—an earlier case upholding a New York statute that banned the sale of pornographic materials, such as "girlie" magazines, to minors.[197] There, the Court recognized the State's "exigent interest in preventing [the] distribution to children of objectionable material,"[198] and held that the statute survived First Amendment challenges because it had a "rational relation to the [State's] objective of safeguarding . . . minors from harm."[199]

Age-verification laws appear more analogous to the statute upheld in *Ginsberg* than the federal statutes invalidated in *Reno* and *Ashcroft II*. The statute upheld in *Ginsberg* criminalized the sale of "harmful" material to minors, which it defined as "any

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192. Appellees' Cross-Opening Brief, *supra* note 21, at 21.

193. *Id.* at 38–39.

194. *See, e.g.*, *id.* at 1 (stating that, in *Ashcroft* and *Reno*, the Court "upheld preliminary injunctions against laws that failed to adopt the least restrictive means. . . .").

195. Brief for Appellant, *supra* note 33, at 16; TEX. CIV. PRAC. & REM. CODE ANN. § 129B.001(6) (West 2023).

196. *See* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 269 (5th Cir. 2024).

197. 390 U.S. 629, 631 (1968).

198. *Id.* at 636 (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668 (N.Y. 1966)).

199. *Id.* at 643. In addition to protecting children, the Court also identified the State's interest in preserving the right of parents to direct the general upbringing of their children. *See id.* at 639. Justice Thomas has argued that this interest in parental authority is consistent with original understandings of the First Amendment. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting) ("The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood 'the freedom of speech' to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents.").

description or representation" of "nudity, sexual conduct, sexual excitement, or sadomasochistic abuse," when it predominantly "appeals to the prurient interest in sex *of minors*," is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable *for minors*," and lacks redeeming social importance *for minors*.[200] Similar to the New York statute at issue in *Ginsberg*, recent age-verification legislation likewise employs a minor-specific variant of the relevant obscenity test.[201] This concept, known as "variable" obscenity, implies that certain material may not be obscene as to adults, but can still be considered obscene as to children.[202] The *Ginsberg* Court endorsed the New York legislature's incorporation of this concept, holding that the State could "adjus[t] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests' of [ ] minors."[203] And because "obscenity is not protected expression," the New York statute could survive so long as the legislature's judgment regarding the harmful effects of children's exposure to such material "was not irrational."[204]

The pornography industry has rejected the comparisons between *Ginsberg* and modern age-verification laws, arguing that *Ginsberg* "says nothing about Internet regulation."[205] But the Court has never repudiated *Ginsberg* nor cabined it to the physical storefront. On the contrary, it reaffirmed *Ginsberg*'s central holding in *Brown v. Entertainment Merchants Association*—a case more recent than either *Reno* or *Ashcroft II*.[206] In *Reno*, the Court distinguished the CDA from the *Ginsberg* statute *not* because the

200. N.Y. PENAL LAW § 235.20 (McKinney 1967) (emphases added).

201. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 129B.001(6) (West 2023).

202. *See* William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 5 (1960) (advocating for a "variable" concept of obscenity, which would "make the validity of censorship depend upon the particular material's primary audience and upon the nature of the appeal to that audience").

203. Ginsberg v. New York, 390 U.S. 629, 638 (1968) (quoting Mishkin v. New York, 383 U.S. 502, 509 (1966)).

204. *Id.* at 641.

205. Appellees' Cross-Opening Brief, *supra* note 21, at 31.

206. *See Brown*, 564 U.S. at 793–94 (In *Ginsberg*, "[w]e held that the legislature could adjust the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of minors. And because 'obscenity is not protected expression,' the New York statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children 'was not irrational.'") (cleaned up) (citation omitted) (quoting *Ginsberg*, 390 U.S. at 638, 641).

CDA regulated pornography on the internet, but because the CDA (i) did not permit parental consent, (ii) was not limited to commercial transactions, and (iii) failed to limit its definition of "harmful material" to minors or provide an exception for material with serious social value.[207] Because of these distinctions, the *Reno* Court declined the Government's invitation to apply *Ginsberg* to the CDA.[208] But, in the present case of age-verification legislation, those distinctions are entirely absent. First, unlike the CDA, recent age-verification efforts are limited *exclusively* to commercial entities.[209] Second, laws like Texas H.B. 1181 limit their definitions of "harmful material" to minors, and provide an exception for material with "serious literary, artistic, political, or scientific value. . . ."[210] Finally, unlike the CDA, recent age-verification efforts do not prevent parental consent; nothing in these laws prohibits parents from logging into pornography websites on their children's behalf.[211] Accordingly, *Reno*—the case on which the pornography industry principally relies—would seem to suggest that *Ginsberg*'s rational basis review is the appropriate standard to apply here.

The recent laws easily satisfy this deferential standard of review. In order to survive under rational basis, the laws must be rationally related to a legitimate government interest.[212] Here, a government's interest in protecting children from online pornography is not seriously disputed, even by the pornography industry.[213] Indeed, in *Sable Communications v. FCC*, the Court held that the Government's interest in protecting children from sexually explicit material is not only legitimate, but "compelling"—the metric typically used when applying heightened forms of scrutiny.[214]

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207. *See* Reno v. ACLU, 521 U.S. 844, 877 (1997).

208. *See id.* at 865–68.

209. *See supra* Part I.A.

210. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.001(6) (West 2023).

211. *See supra* Part I.A.

212. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022) (discussing rational basis review).

213. *See* Brief for Petitioners at *3, Free Speech Coalition v. Paxton, 2024 WL 4241180 ("Petitioners agree that protecting minors is a compelling government interest. . . .").

214. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). The Court in *Sable* struck down an outright ban on "indecent" dial-a-porn services but upheld the prohibition of "obscene" telephone messages. *Id.* at 117. The Court held that there was a compelling interest in protecting minors, but that the ban was not narrowly tailored because the dial-a-porn services already had built-in safeguards, like credit card requirements for age-verification purposes. *See id.* at 119.

Furthermore, age-verification laws are rationally related to this compelling governmental interest. In order to protect children from sexually explicit material, states like Texas and Louisiana require pornography websites to verify their users' age, similar to the *Ginsberg* statute's requirement that vendors check their customers' age before selling them pornographic magazines.[215] The same logic behind I.D. checks at liquor stores underlies age-verification legislation; if you want to prevent minors from accessing a particular product, require its distributors to verify the age of their customers. Nor was Texas' (or any other State's) determination on the harmful effects of youth pornography exposure irrational.[216] As this Note detailed *supra* in Part I.A., research has identified links between pornography exposure and a host of mental health issues in children, including depression, anxiety, and dissociation, among others—as well as a strong correlation between adolescent male consumption of pornography and future sexual violence against intimate partners.[217]

2. *Although the Argument for Rational Basis Review Is Plausible, Courts Are Likely to Apply Strict Scrutiny*

Rational basis review of age-verification laws under *Ginsberg* is plausible in theory, but unlikely to be accepted by the courts. The general trend in the judiciary has been towards a highly speech-protective, quasi-absolutist conception of the First Amendment.[218] Accordingly, laws like H.B. 1181, which at least superficially resemble the CDA and COPA and involve undeniably content-based regulations of pornography on the internet, are likely to generate significant judicial skepticism. As a matter of course, reviewing courts are thus likely to subject recent age-verification legislation to heightened scrutiny.[219]

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215. *See* Ginsberg v. New York, 390 U.S. 629, 646 (1968).

216. *See id.* at 641 ("To sustain state power to exclude material defined as obscenity by [the challenged statute] 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.").

217. *See supra* Part I.A.

218. *See* Kessler & Pozen, *supra* note 128, at 1966.

219. *See* Free Speech Coal. v. Colmenero, 689 F. Supp. 3d 373, 390–91 (W.D. Tex. 2023), *aff'd in part, vacated in part sub nom.* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024), *cert granted*, 144 S. Ct. 2714 (2024). Indeed, the Southern District of Indiana recently departed from the Fifth Circuit's analysis and applied strict scrutiny to a nearly identical age-verification law. *See* Free Speech Coal. v. Rokita, 2024 WL 3228197, at *7–16 (S.D. Ind. June 28, 2024). There, the district court held that the law is a "dead ringer" for

Other considerations also complicate the argument for *Ginsberg*-style rational basis review. In particular, H.B. 1181 generates significant privacy concerns that were largely absent in the *Ginsberg* litigation. Whereas the statute in *Ginsberg* required storeowners to quickly check the physical IDs of customers who appeared to be minors, H.B. 1181's requirements force individuals to upload personal documentation to the internet to verify their age. The pornography industry argues that this age-verification requirement will inevitably chill protected speech—or more precisely, that it will discourage adults from accessing content that they have a constitutional right to view and receive.[220] Understandably, adults will likely be hesitant to upload personally identifying information in order to access pornography websites. Submitting this documentation involves the risk that an individual's intimate sexual desires and preferences will be exposed in data breaches, used by hackers for blackmail and extortion schemes, or monitored by the government—among a host of other privacy and security concerns.[221]

Precisely because of these concerns, Texas H.B. 1181 includes provisions designed to protect the privacy interests of adults. For example, pornography websites are barred from retaining any identifying information beyond the age of their users; violations may be punished with a $10,000 fine per each instance of unlawful retention of information.[222] But even with these statutory protections, it is not unreasonable to assume that the "specter" of data breaches and exposures will have a significant "deterrent effect" on potential adult viewers.[223] Therefore, the privacy issue remains a relevant constitutional concern insofar as it may chill protected adult speech—an issue not present to the same extent in *Ginsberg*. Indeed, the Supreme Court has affirmed that "[t]he Government's content-based *burdens* must satisfy the same

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COPA and rejected the state's arguments that deferential rational basis review should apply. *Id.* at *18.

220. *See* Appellees' Cross-Opening Brief, *supra* note 21, at 2. The Court has acknowledged that adults have a constitutional right to view non-obscene sexual material that would otherwise be inappropriate for children. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997) ("[T]he CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.").

221. *See* Brief for Petitioners at *8–9, Free Speech Coalition v. Paxton, 2024 WL 4241180 (discussing privacy concerns and the burden on adult access).

222. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.006(b) (West 2023).

223. Brief for Petitioners at *26, Free Speech Coalition v. Paxton, 2024 WL 4241180.

rigorous scrutiny as its content-based *bans*"—namely, strict scrutiny.[224]

The Fifth Circuit conceded that *Ashcroft II* "supplies [the pornography industry's] best ammunition against H.B. 1181" and that "despite Texas's protestations, H.B. 1181 is very similar to COPA."[225] But it justified its departure from *Ashcroft II*—which had applied strict scrutiny to COPA—on the grounds that the Court did not actually rule on the appropriate standard of review in that case.[226] Instead, according to the panel majority, the Court "merely ruled on the issue the parties presented: whether COPA would survive strict scrutiny."[227] In the Fifth Circuit's view, the government erroneously assumed that heightened scrutiny applied and therefore did not challenge the appropriate standard of review.[228] The pornography industry, in its merits brief currently before the Supreme Court, has argued that the Fifth Circuit's justification for its departure from *Ashcroft II* was exceedingly strained and a blatant violation of vertical *stare decisis*.[229]

In light of this departure from *Ashcroft II*, as well as the unique burdens and privacy concerns generated by Texas H.B. 1181, a reviewing court is likely to reject *Ginsberg*-style rational basis review and instead subject the statute to strict scrutiny.

C. AGE-VERIFICATION LAWS SURVIVE EVEN STRICT SCRUTINY

To survive strict scrutiny, a law must "(1) serve a compelling governmental interest, (2) be narrowly tailored to achieve it, and (3) be the least restrictive means of advancing it."[230] Under this

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224. United States v. Playboy Ent. Grp., 529 U.S. 803, 812 (2000) (emphases added).

225. Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 273 (5th Cir. 2024), *cert. granted* 144 S. Ct. 2714 (2024).

226. *See id.* at 274.

227. *Id.*

228. *See id.* ("In short, 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[ ].'") (quoting Cooper Indus., Inc. v. Aviall Servs. Inc., 543 U.S. 157, 170 (2004)).

229. *See* Brief for Petitioners at *27, Free Speech Coalition v. Paxton, 2024 WL 4241180 ("As a threshold matter, the Fifth Circuit squarely defied this Court's decision in *Ashcroft*, which the panel majority acknowledged applied strict scrutiny to a materially indistinguishable law.").

230. *See* Free Speech Coal., Inc., v. Colmenero, 689 F. Supp. 3d 373, 392 (W.D. Tex. 2023), *aff'd in part, vacated in part sub nom.* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024), *cert. granted* 144 S. Ct. 2714 (2024).

demanding standard, age-verification laws "must not only employ the least[ ] restrictive means" necessary to pursue their stated interest but must "actually serve [that purported governmental] interest."[231] Accordingly, under strict scrutiny, states bear the burden of showing that age-verification requirements are the least restrictive means to protecting children from online pornography exposure, and that such laws actually advance this goal. The pornography industry claims that states are likely to fail on both fronts.[232]

This Note challenges that conclusion. First, no one denies that the government has a compelling interest in protecting children from exposure to adult content.[233] Arguments to the contrary have been foreclosed by the Supreme Court in cases like *Sable Communications*.[234] In that case, the Court described the Government's interest in protecting children from sexually explicit material as "compelling"—language generally reserved for heightened forms of scrutiny.[235]

Accordingly, judicial review of recent age-verification legislation will likely center around the narrow tailoring and least restrictive means prongs of strict scrutiny, as was the case with COPA.[236] Relying on *Reno* and *Ashcroft II*, the pornography industry argues that state legislatures have impermissibly neglected "parental-led content-filtering" software as a less-restrictive alternative—that is, software that parents voluntarily install to block explicit content on their children's devices.[237] But those precedents merely expressed a preference for filtering software over verification, primarily because verification software was not technologically or economically feasible at the time and imposed substantial costs on non-commercial speakers.[238] Critically, both the CDA and COPA were enacted in the late 1990s, during the internet's infancy—when the digital landscape was

231. Appellees' Cross-Opening Brief, *supra* note 21, at 37.

232. *See id.*

233. *See id.* at 2 ("To affirm, this Court need not fault the goal of protecting minors, which the district court commended.").

234. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.").

235. *Id.*

236. *See Ashcroft II*, 542 U.S. 656, 664–67 (2004).

237. Appellees' Cross-Opening Brief, *supra* note 21, at 40.

238. *See* Reno v. ACLU, 521 U.S. 844, 881–82 (1997).

rudimentary and still struggling through growing pains, unrecognizable compared to the modern internet.[239] The plaintiffs' reliance on *Reno* and *Ashcroft II* ignores the antiquated understanding of the internet on display in those cases. It also fails to reckon with the Court's potential miscalculation regarding how pervasive the internet would become in daily life.

Twenty-five years later, economically and technologically feasible methods of age verification exist that preserve anonymity and do not require the disclosure of personal information to pornography websites.[240] These methods are already used for online dating and gambling sites, among others.[241] Notably, Pornhub itself has successfully implemented age-verification methods for users in Louisiana, after its lawsuit challenging the state's age-verification bill was dismissed.[242] As explained *supra* in Part II.B, this Note takes seriously the privacy concerns raised by age-verification laws, but argues that the pornography industry has strategically exaggerated them.[243] Likewise, the industry has also misrepresented the feasibility of implementing an age-verification regime on their websites, given the technological advances that have been made since *Reno* and *Ashcroft II*.

Furthermore, the industry's claim that state legislatures failed to even consider the option of content filtering software is inaccurate. The *Ashcroft II* Court recognized that there was a "serious gap in the evidence" regarding the effectiveness of such software.[244] During the trial stage of the Texas litigation, the state submitted evidence showing that, since *Ashcroft II*, filtering and blocking software has failed to effectively restrict minors' access to adult content.[245] This is unsurprising, given that "children are often more adept at circumventing such software than [parents] are at using it."[246] An Oxford study, for example, found that

239. *See id.* at 849–53 (taking three pages to explain then-cutting edge technology).

240. *See supra* Part I.A.

241. *See supra* note 70 and accompanying text.

242. *See* Jon Brodkin, *Pornhub Requires ID from Louisiana Users to Comply with State's New Porn Law*, ARS TECHNICA (Jan. 3, 2023), https://arstechnica.com/tech-policy/2023/01/no-porn-without-id-louisiana-law-forces-porn-sites-to-verify-users-ages/ [https://perma.cc/8PL6-4U5J].

243. *See supra* Part II.B.

244. *Ashcroft II*, 542 U.S. 656, 671 (2004).

245. *See* Brief for Appellant, *supra* note 33, at 25 (citing the record on appeal).

246. *Id.* Furthermore, such software is only effective if a child attempts to access pornography on home routers within the software's domain, and does not cover attempts at a "friend's house, library, or public WiFi network." *Id.*

"internet filtering tools" were "an insignificant factor in whether young people had seen explicit sexual content."[247] Because the quarter-century experiment with filtering software since *Ashcroft II* has proven to be a failure,[248] states are operating within constitutional boundaries by pursuing alternative mechanisms to protect children from explicit content online.[249]

More fundamentally, it is somewhat strange that the voluntary, hypothetical use of "content filtering software" by parents can even be considered for purposes of a least restrictive means analysis. It is counterintuitive for courts to compare the relative restrictiveness of a proposed governmental action (requiring age verification) against a hypothetical non-governmental action (parents taking it upon themselves to install filtering software) when applying strict scrutiny. When conducting a least restrictive means analysis, courts typically weigh one proposed governmental action against an alternative action that the government could have taken—and then strike down the law if that alternative governmental pathway was less restrictive and equally as effective.[250] Here, however, the pornography industry proposes something fundamentally different—one in which *no* regulation can be compared against *some* regulation. Under such a regime, it

247. *Id.* Researchers at Oxford University conducted 1,030 in-home interviews with 515 British parents and their children. *See* Andrew K. Przybylski & Victoria Nash, *Internet Filtering Technology and Aversive Online Experiences in Adolescents*, 184 J. PEDIATRICS 215, 215 (2017) ("Contrary to our hypotheses, policy, and industry advice regarding the assumed benefits of filtering we found convincing evidence that Internet filters were not effective at shielding early adolescents from aversive online experiences."). The lead author Andrew Przybylski, a psychologist and senior research fellow at the Oxford Internet Institute, reported that "Internet filtering, on its own, does not appear effective for shielding adolescents from things that they find aversive online." Ronnie Cohen, *Internet Filters May Fail to Shield Kids from Disturbing Content*, REUTERS (Mar. 15, 2017), https://www.reuters.com/article/business/healthcare-pharmaceuticals/internet-filters-may-fail-to-shield-kids-from-disturbing-content-idUSKBN16M1Z2 [https://perma.cc/2KD6-6ZVR].

248. *See* Przybylski, *supra* note 247, at 215.

249. Furthermore, age-verifications laws do not fail to actually advance the governmental interest of protecting children from online pornography. The industry claims that children can use VPN services to circumvent verification requirements, or can "even turn to the dark web using the 'Tor' browser, exposing themselves to the Internet's criminal underbelly." Appellees' Cross-Opening Brief, *supra* note 21, at 41. But modern technology can detect when a user is employing a VPN. *See* Courtney Rogin, *What is VPN Detection? How to Detect a VPN with an API*, FINGERPRINT (Sept. 22, 2023), https://fingerprint.com/blog/vpn-detection-how-it-works/ [https://perma.cc/FV89-3KHJ]. This form of VPN detection is already in use by companies like Netflix and could be extended to existing age-verification systems. *See Netflix says, 'You seem to be using a VPN or proxy.'*, NETFLIX, https://help.netflix.com/en/node/277 [https://perma.cc/E8HG-6AVE].

250. *See Ashcroft II*, 542 U.S. 656, 684 (2004) (Breyer, J., dissenting).

is hard to imagine a scenario in which the government would ever prevail. Presumably, the plaintiff could always point to *some* voluntary action that individuals could undertake that is less restrictive than the government stepping in.

As Justice Stephen Breyer noted, "[c]onceptually speaking, the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, *i.e.*, the backdrop against which Congress enacted the present statute . . . It is always less restrictive to do *nothing* than to do *something*."[251] Justice Breyer then outlined several "serious inadequacies" of content filtering software—observations which were surprisingly prescient for the time and remain true today.[252] First, filtering software is often faulty and "lacks precision," allowing some pornography to "pass through without hindrance," while inadvertently blocking valuable non-pornographic material.[253] For example, because filtering software relies on certain words and phrases, it may mistakenly block a scientific article on human anatomy due to the article's mention of human genitalia and reproductive systems.[254] Second, some parents may lack the economic resources to purchase filtering software; other parents, even if financially capable, may lack the technological prowess to install and effectively operate the software.[255] Third, and perhaps most critically, filtering software depends upon the unreasonable expectation that a majority of parents would expend the resources necessary to learn about the software, install it, and calibrate it to settings that they deem appropriate for their children.[256]

Finally, when both the *Miller* Court and earlier American courts spoke of obscenity, they spoke in terms of criminalizing the material at issue.[257] Similarly, both the CDA and COPA, at issue in *Reno* and *Ashcroft II*, featured criminal prohibitions.[258] In contrast, recent age-verification legislation is much more modest—

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251. *Id.*
252. *Id.*
253. *Id.* at 685.
254. *See id.*
255. *See id.*
256. *Ashcroft II*, 542 U.S. 656, 685 (2004) (Breyer, J., dissenting).
257. *See supra* Parts I.B and I.C.
258. *See* Reno v. ACLU, 521 U.S. 844 (1997); *Ashcroft II*, 542 U.S. 656 (2004).

violations are only subject to civil penalties.[259] This, in turn, lessens First Amendment concerns.[260] Furthermore, as explained *supra* in Part I.A, these laws do not actually proscribe any speech at all.[261] Commercial pornographers are still at liberty to produce and distribute as much content "as the market will tolerate,"[262] provided that they check the age of their users. Adult users, likewise, are still free to consume that content, provided that they submit to age verification. What pornography websites can no longer do is profit from the distribution of sexual material to children.

In that sense, H.B. 1181 is not a radical proposal at all.[263] Most commercial pornographers already acknowledge the need to limit their content to adults.[264] In fact, Pornhub's own Terms of Service state: "You affirm that you are at least 18 years of age or the age of majority in the jurisdiction you are accessing the Website from. . . ."[265] Therefore, at first glance, the industry's recent arguments against a more robust form of age-verification are somewhat surprising. Why refuse to submit to a regulation that would add substance to the standard Terms of Service used across the industry? At best, the pornography industry is genuinely concerned about the privacy of its adult users. At worst, it knows children are routinely accessing their materials, forming a major

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259. *See supra* Part I.A.

260. *See Reno*, 521 U.S. at 871–72 ("The vagueness of the CDA is a matter of special concern [because] the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater First Amendment concerns than those implicated by [ ] civil regulation. . . .) (internal citations omitted).

261. *See supra* Part I.A.

262. Brief for Appellant, *supra* note 33, at 14.

263. Internationally, the United States is an outlier. Many countries have required commercial pornography websites to implement robust age-verification procedures since the early 2000s. *See* Romney, *supra* note 9, at 64–94 (analyzing age-verification laws in the United Kingdom, Germany, Australia, New Zealand, South Africa, Poland, France, Canada, and other countries). Contrary to Pornhub's claims that it cannot realistically implement the age-verification required by H.B. 1181, the company has successfully operated in Germany, under a similar regulatory scheme, for decades. *See id.* at 78.

264. *See, e.g.*, *Terms of Service*, PORNHUB (Jul. 31, 2024) [https://perma.cc/XU8A-JH56]; *Terms of Service,* XNXX (Oct. 13, 2024) [https://perma.cc/F75D-TXYP].

265. *Terms of Service*, PORNHUB, *supra* note 264.

part of their customer base and driving advertising revenues,[266] and are naturally concerned about a significant drop in overall user numbers.

Because age-verification laws serve the compelling governmental interest of protecting children from online pornography, are narrowly tailored to achieve that interest, and are the least restrictive means of effectively advancing that interest, the pornography industry's First Amendment claims should be rejected.[267]

III. OBSCENITY REVISITED?

This Note has argued that recent age-verification legislation poses no serious First Amendment concerns and should be upheld against legal challenges. But this Note also acknowledges that, given the state of precedent and the demanding standard of strict scrutiny to which the laws will likely be subjected, the ongoing legal battle will be difficult for states to win, and will require sophisticated and vigorous legal advocacy by state governments. In the end, the outcome will likely turn on factual findings regarding the effectiveness of age-verification systems, the ineffectiveness of content filtering software, and repeated reassurances to the reviewing court about privacy concerns.[268]

Taking a step back, one might reasonably ask: does the Constitution mandate this difficulty? Does the First Amendment, properly understood, immunize pornography companies from a regulation prohibiting their distribution of sexual material to minors? Or has something gone seriously awry in modern First Amendment doctrine? Although district courts and appellate courts are not in a position to confront these questions, the Supreme Court may be interested in considering them.

This final section encourages the Supreme Court to revisit its approach to the regulation of internet pornography and to obscenity jurisprudence more generally in order to better align this

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266. *See* Sabina, *supra* note 12, at 691–92 (finding that participants as young as eight years old had already viewed online pornography and that 72.8% of participants had viewed it before turning 18).

267. This Note has intentionally limited itself to defending the constitutionality of recent age-verifications laws. The implications of that analysis on other issues—such as book bans in schools or other regulations of potentially sexual material—are outside of the scope of this Note.

268. *See supra* Part II.C.

area of doctrine with original understandings of the First Amendment. Importantly, this proposal may appeal to a majority of the justices regardless of their methodological commitments. While it draws on historical understandings of political responsibility, it has significant overlap with feminist legal critiques of pornography, particularly the scholarly work of then-Professor Elena Kagan.[269] It is also faithful to original understandings of the First Amendment and consistent state practices following its ratification. Revisiting this area of the law will allow states and the federal government to protect American children from harm and exploitation for profit.

Part I.B. of this Note introduced the history of traditional obscenity jurisprudence in the United States, from the pre-Founding era, through the *Hicklin* regime, and into the early 20th century.[270] Both state and federal obscenity prosecutions were commonplace, often for images and pamphlets significantly less degrading than the content disseminated online by modern pornography companies.[271] What can be distilled from this history?

First, early American courts embraced the traditional perspective that "one of the core tasks of political authority is to protect the health, safety, and morals of the public from those who would degrade them. . . ."[272] As the Pennsylvania Supreme Court noted in 1815, the exposure of the public, and children in particular, to "lewd and obscene pictures" must "necessarily be attended with the most injurious consequences, and in such instances, courts of justice are, or ought to be, the schools of morals."[273] Contrary to our modern commitments to neutrality and a "marketplace of ideas,"[274] early American courts enforced prohibitions on speech that harmed the physical, spiritual, and moral well-being of the community, insisting that "[n]o man is permitted to corrupt the morals of the people; secret poison cannot be thus disseminated."[275]

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269. *See generally* Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873 (1993).

270. *See supra* Part I.B.

271. *See id.*

272. VERMEULE, *supra* note 128, at 171.

273. Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 103 (Pa. 1815).

274. Cass R. Sunstein, *Pornography and the First Amendment*, 4 DUKE L.J. 589, 614 (1986).

275. *Sharpless*, 2 Serg. & Rawle at 105.

It is clear that the early jurists of the Republic had a more robust and substantive account of the law and political well-being—one that fits uncomfortably with modern First Amendment theory. To the extent that *Miller* ignores this heritage, and renders states incapable of regulating clear examples of obscenity, it is not "an originalist body of law," but merely an "innovation of the era after World War II," as Professor Adrian Vermeule has noted.[276]

Importantly, modern obscenity doctrine also remains vulnerable to feminist legal critiques—in particular, those flowing from John Stuart Mill's "harm principle."[277] As Professor Bernard Harcourt has explained, the anti-pornography feminist Catherine MacKinnon based her arguments in terms of the "multiple harms" that pornography production and distribution has on women and the broader public—particularly through its portrayal of women as subservient sexual objects of domination.[278] However, the anti-pornography feminism espoused by MacKinnon and Andrea Dworkin received considerable criticism by the late 1970s from "civil rights activists, anti-censorship or 'choice' feminists, and queer activists, who rejected their framing of pornography as harmful."[279]

In light of the invalidation of the Dworkin-MacKinnon anti-pornography ordinance in Indianapolis as impermissible viewpoint discrimination,[280] then-Professor Kagan proposed a novel approach—using the "long-established category of obscenity" to regulate sexually graphic materials that are harmful to women.[281] This approach had "come to assume the aspect of heresy in the ranks of anti-pornography feminism," because obscenity law "focuses on morality" while feminist anti-pornography efforts had

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276. VERMEULE, *supra* note 128, at 172; *see also id.* at 171 ("[Modern obscenity law] is, at bottom, a product of the free speech revolution of the 1960s and 1970s, which perhaps not coincidentally occurred roughly simultaneously with the sexual revolution.").

277. JOHN STUART MILL, ON LIBERTY 12 (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859) (defining the scope of human liberty as doing whatever we want without impediment "so long as what we do does not harm [other people], even though they should think our conduct foolish, perverse, or wrong").

278. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 111 (1999).

279. Dahlstrom, *supra* note 6, at 130. While the contours of these debates are outside of the scope of this Note, Dahlstrom's scholarship provides an excellent overview of the arguments on each side.

280. *See* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) ("The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.").

281. Kagan, *supra* note 269, at 892.

"focus[ed] on power" and the harm done to women by its production.[282] But Kagan rejected this distinction, recognizing that the Supreme Court's obscenity jurisprudence had prioritized both morality and harm at different points throughout its history.[283]

For those concerned with history and tradition, the content distributed by companies like Pornhub would have almost certainly been denied constitutional protection in the early Republic[284] and rightfully so—such "secret poison"[285] corrupts the physical, spiritual, and moral well-being of the community and should be severely restricted. And for the more liberal jurist, committed to the harm principle and perhaps wary of arguments from history and tradition, feminist legal scholarship provides a useful framework: the "harm" of pornography is the many harmful effects it has on children and adults, as well as its contribution to human trafficking and the victims it creates in its production.[286] Even content that is entirely consensual may still contribute to real-world harms, as pornography use in adolescent boys and young men is strongly correlated with sexual aggression and assault.[287]

As described *supra* in Part I.A, modern pornography websites are filled with extreme, violent, and even non-consensual content.[288] Other popular categories of online pornography simulate illegal and non-consensual content, such as brutal gang rapes, incestuous relationships, and torture.[289] The content of commercial pornography websites does not plausibly provide any "serious literary, artistic, political, or scientific value."[290] Instead, its primary purpose is to cause sexual arousal; and it is only "valuable" to its users insofar as it can be used as a masturbatory aid. The descriptions of certain videos in this Note are not cherry-picked for the purposes of strengthening its argument—studies have shown that as much as 88% of pornography's most popular

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282. *Id.* at 892–93.

283. *Id.* at 894 ("[T]he Supreme Court, in its fullest statement [on the regulation of pornography] . . . understood the obscenity category as emerging not merely from a body of free-floating values, but from a set of tangible harms, perhaps including sexual violence.").

284. *See supra* Part I.B.

285. *Sharpless*, 2 Serg. & Rawle at 105.

286. *See supra* Part I.A.

287. *See supra* notes 60–61.

288. *See supra* Part I.A; Kristof, *supra* note 9.

289. *See supra* Part I.A.

290. Miller v. California, 413 U.S. 15, 24 (1973).

scenes feature flagrant physical aggression and abuse.[291] Examples of mainstream videos of a much more disturbing nature abound online.[292]

If such content is not obscenity, nothing is—and the modern doctrine surrounding it a dead letter incapable of upholding even the most modest regulations. To be sure, a considerable amount of the content on pornography websites likely does not depict such extreme and non-consensual material.[293] But those who defend such material on the basis of autonomy and consent must seriously consider whether the undeniable amount of collateral damage is tolerable.

CONCLUSION

In the upcoming case of *Free Speech Coalition v. Paxton*, the Court will decide whether the Fifth Circuit erred in applying rational-basis review instead of strict scrutiny when considering a First Amendment challenge to Texas H.B. 1181. If the Court were to affirm the Fifth Circuit, and hold that rational basis is the appropriate standard of review, the pornography industry's challenges to the similar age-verification laws in other states would likely fail. Because a state's interest in protecting children from online pornography is not seriously disputed, even by the pornography industry, and because age-verification laws are rationally related to this compelling governmental interest, courts would almost certainly uphold the laws against First Amendment challenges.

Importantly, even a ruling by the Court that strict scrutiny is the appropriate standard would not necessarily be fatal to age-verification laws.[294] Instead, the laws likely survive even strict scrutiny because they serve the compelling governmental interest of protecting children from online pornography, are narrowly tailored to achieve that interest, and are the least restrictive

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291. *See* Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065, 1075 (2010).

292. *See* Kristof, *supra* note 9.

293. *See id.* ("A great majority of the 6.8 million new videos posted on the site each year probably involve consenting adults, but many depict child abuse and nonconsensual violence. Because it's impossible to be sure whether a youth in a video is 14 or 18, neither Pornhub nor anyone else has a clear idea of how much content is illegal.").

294. *See supra* Part II.C.

means of effectively advancing that interest, notwithstanding the availability of parental filtering software, which has been ineffective in the decades following *Reno* and *Ashcroft II*.

In considering the appropriate standard of review, the Court should also take the opportunity to revisit its obscenity jurisprudence more broadly. Preventing states from regulating children's access to such material is inconsistent with original understandings of the First Amendment and with historical practices following its ratification.[295] Furthermore, pragmatism counsels in favor of a reexamination of this area of doctrine—especially in light of the ubiquity of online pornography and the consequences of youth exposure to it. Accordingly, such a project should be appealing to all Justices, regardless of their methodological commitments. By reining in an ahistorical and absolutist conception of the First Amendment, the Court will rightfully return to the political authority a fundamental duty—the protection of the most vulnerable from enduring harms and exploitation.

295. *See supra* Part I.B.