

No. 23-1122

In the Supreme Court of the United States

FREE SPEECH COALITION, ET. AL.,
Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF THE STATE OF TEXAS, ET AL.,
Respondents.

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

**BRIEF OF AMICI CURIAE
CLARE MORELL AND BRADFORD LITTLEJOHN
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

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¹ Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief.

² <https://eppc.org/program/technology-and-human-flourishing/>.

Smartphones, to be published by Penguin Random House in June 2025.

Mr. Littlejohn assists EPPC's Technology and Human Flourishing Project. For more than ten years as a researcher in the fields of social ethics and political science, he has written and lectured on the challenges posed by digital technology, including internet pornography, and the proper role of parents, churches, schools, and governments in helping restrain its abuses.

Amici present this brief to summarize the current landscape of online pornography and content filtering and show why filters alone are not enough to empower parents to protect their children from internet pornography and its harms. *Amici* submits that this overview shows why parents need government help, the sort of help H.B. 1181 would provide.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners claim the court below erred by applying rational-basis review and by disregarding what this Court said about the merits of content-filtering software in 2004. Petitioners emphasize that in *Ashcroft v. ACLU*, this Court found that “the use of ‘blocking and filtering software’ would be an effective and less restrictive means of restricting minors’ access to online sexual content inappropriate for them.” Pet. at 23 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 657 (2004)). Petitioners claim *Ashcroft* “explained” that “content-filtering software empowers parents to control the kinds of material their children are able to view,” “provides better tailoring than a blunt governmental mandate,” and is “more effective than age verification, which is ‘subject to evasion and circumvention.’” *Id.* at 40 (quoting *Ashcroft*, 542 U.S. at 657). Petitioners further claim that the reasons *Ashcroft* gave for preferring content-filtering software over age verification “ring even truer today,” noting that “filtering software has only improved” since *Ashcroft*. *Id.* at 40–41.

Respectfully, Petitioners’ reliance on *Ashcroft* misses the point. The constitutionality of Texas’ age-verification law does not turn on what this Court said in 2004, based on a factual record that closed in 1999,³ about the relative merits of content-filtering software.

³ The factual record was already five years old when the Court decided *Ashcroft* in June 2004. *Ashcroft*, 542 U.S. at 671.

That world is long gone. Indeed, when the factual record in that case closed, this Court didn't even have its own website.⁴

What matters here are the facts on the ground today. How do children access the internet? How do children access internet pornography, intentionally or unintentionally? What is the nature of the porn children see? How does it affect them? And also, alongside these questions, *how effective has content-filtering been* at empowering parents to protect their children from these harms?

It is only in the light of the answers to these questions that a court can assess whether Texas was right to conclude that H.B. 1181's age-verification requirement is warranted "to protect kids from some of the most prurient sexual content imaginable." Resp. at 2.

This brief summarizes the key changes in the landscape of online pornography and content filtering since *Ashcroft*. It offers this overview to explain why parents find that filters alone are not enough to empower even the most educated and tech-savvy

⁴ Roy M. Mersky & Kumar Percy, *The Supreme Court Enters the Internet Age: The Court and Technology*, Law Library Resource Xchange, June 1 2000, <https://www.llrx.com/2000/06/features-the-supreme-court-enters-the-internet-age-the-court-and-technology/> ("The Supreme Court recently took a major step into the electronic era by unveiling its first web site on April 17, 2000.").

among them to protect their children from explicit material online.

Over the past quarter century, the technological landscape has changed profoundly. In 1997, this Court observed in *Reno* that accessing pornography required “a series of affirmative steps” that would be difficult for children to navigate. *Reno v. ACLU*, 521 U.S. 844, 854 (1997). But that is no longer the case. Pornography has become far more pervasive, invasive, violent, and harmful to minors. Moreover, smartphones and social media platforms and apps—none of which existed at the time of *Ashcroft*—have made it much harder for parents to protect their children through content filters.

In short, the challenges parents are facing today are nothing like the challenges *their parents* were facing when this issue was last before the Court. The *Ashcroft* Court may have had good cause to believe that content filtering would be enough to protect children’s access to explicit content at the time. But that is certainly not the case today.

For too long, parents have been left to fight a one-sided war against Big Tech and Big Porn on their own. Parents need all the help they can get, including from legislators willing to pursue a multi-layered approach, including parental education, device filter mandates, site-based age verification, and device-based age verification. Texas has done just that while respecting First Amendment protections for speech.

When a freight train full of dangerous chemicals derailed and catches fire, the government can and should do more than encourage parents to buy water filters. When storm waters threaten to overwhelm a levee, the government can and should do more than encourage parents to fill sandbags. And given the “public health crisis,” Resp. at 1, that internet porn has wrought, it is more than reasonable for government to conclude that it can and should do more than just encourage parents to install filters.

H.B. 1181 is an appropriate and constitutional government response that is by any measure proportionate to the problem that legislators and parents are facing today. The status quo has not been enough to advance the government’s interest in protecting children from porn. Age-verification laws add an important layer of protection over and beyond what content filters can offer. Parents need this help. *Amici* trust that understanding the nature of the challenge parents are up against will help the Court better evaluate the standard of review for Texas’ efforts to help parents, protect children, and advance the common good.

ARGUMENT

I. Parents are struggling to protect their children from internet pornography and its harms.

At the time of *Reno* and *Ashcroft*,⁵ no one could have imagined how technology, the internet, and online pornography would morph over the next quarter century. Back then, minors accessed the internet in computer labs or on the family desktop computer; today, most kids have a high-speed internet connection in their pocket wherever they go. The prevailing notion then was that children would need to actively search out internet pornography to find it. Today, internet pornography finds them.

These days, online pornography is ubiquitous. It's still found on porn sites, but today those sites have proliferated and extended their reach through social media feeds, online advertisements, and smartphone apps. But it's not just the reach of porn that has changed—it's also the pornography itself and its physical, mental, and social harms, especially on minors.

A. Internet pornography is now far more invasive and ubiquitous.

In the last 25 years, internet pornography has become ubiquitous. This is due in large part to the way

⁵ *Reno v. ACLU*, 521 U.S. 844, 854 (1997); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

internet access has shifted from a family's front room to a teen's front pocket.

At the end of the twentieth century, if a family had internet access at all, it was only through a single portal: a family desktop computer, complete with a bulky cathode ray monitor and a dial-up modem. Thus, when this Court was considering the adequacy of content filters in 1997, it was asking whether filters could "help parents control the material that may be available on a home computer with Internet access." *Reno v. ACLU*, 521 U.S. 844, 854-855 (1997); see also *id.* at 878 ("a parent allowing her 17-year-old to use the family computer.").

The Court also presumed that internet pornography was something the user had to go looking for. It claimed the internet was "not as 'invasive' as radio or television" and cited the district court's finding that "communications over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident." *Reno*, 521 U.S. at 844, 869 (cleaned up). Indeed, the Court observed that "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." *Id.* at 854.

The challenges parents face today are radically different. First, the internet has become the most

invasive, portable communications technology in history, placing nearly any information, image, or video just a few clicks, taps, or swipes away. Children have access to a wide-range of internet-connected devices at home or at school, including smart TVs, computers, laptops, iPads, gaming consoles, a child's smartphone, parents' smartphones, and friends' smartphones. Each of these "smart" technologies might have hundreds of apps, many with their own in-app internet browsers.⁶ That is a lot more for parents to oversee.

Second, parents can no longer presume that their children would only encounter pornography if they went looking for it. In the late 1990s, the user interface of web browsing was so slow, clunky, and complicated that few children could navigate it on their own. But today, it is more often parents who need their children's help understanding devices whose user interfaces have been made intuitive for children.⁷

The smartphone in particular has fundamentally changed our relationship with technology, with handheld devices and apps "pushing" notifications to keep users, especially teens, engaged.

⁶ Thomas Claburn, *In-app browsers are still a privacy, security, and choice problem*, The Register, Mar. 27, 2024, https://www.theregister.com/2024/03/27/inapp_browsers/.

⁷ Anton Barba-Kay, *A Web of Our Own Making: The Nature of Digital Formation* 23 (2023).

Moreover, pornography is not cordoned off in pornography-specific sites or apps. The porn industry has adopted the influencer model, with performers using accounts on TikTok, YouTube, X, Facebook, Instagram, and other platforms to tease explicit content and lure users (many of them minors) into following links to their own sites.⁸ Popular video gaming community platforms like Twitch and Discord also serve as gateways to pornographic content.⁹

When a child is tempted into clicking a link to a porn site, the site’s “sophisticated algorithms are designed to ‘mousetrap’ users, surveying and manipulating their preferences and presenting them with ever more extreme content in order to keep them engaged.”¹⁰

⁸ Sophie Pezzutto, *How the gig economy and social media created the ‘pornotropreneur’*, Startup Daily, Jan. 23, 2020, <https://www.startupdaily.net/advice/opinion/how-the-gig-economy-and-social-media-created-the-porntropreneur>; Ashley Carman, *OnlyFans stars say TikTok is making them rich*, The Verge, Sept. 17, 2020, <https://www.theverge.com/2020/9/17/21439657/onlyfans-tiktok-subscribers-videos-fans>.

⁹ Kevin Webb, *Twitch, the world’s most popular streaming service, is dealing with a porn problem*, Business Insider, Aug. 12, 2019, <https://www.businessinsider.com/twitch-porn-streaming-moderation-problem-2019-8>.

¹⁰ Center to End All Sexual Exploitation (CEASE), *Expose Big Porn: Uncovering the online commercial pornography industry and the urgent need for regulation (2021)* at 5, https://cease.org.uk/wp-content/uploads/2021/07/210607_CEASE_Expose_Big_Porn_Report.pdf.

Porn sites are good at what they do. Even as the internet has become increasingly pervasive, pornography has proliferated as the internet's single largest product. In 2020, porn sites received more website traffic than Twitter, Instagram, Netflix, Zoom, Pinterest, and LinkedIn *combined*.¹¹

These changes have more than doubled the chance that children encounter internet pornography. In 2000, 25% of youth that used the internet regularly were unwillingly exposed to pornography¹²; today that number has risen to 58%.¹³

B. Internet pornography is now far more dangerous and extreme.

The content that circulates on most common pornography sites today is also different in kind than what parents were concerned with a generation ago. According to a sixteen-year-old writing in the Free Press,

¹¹ See *id.* at n.16.

¹² Kimberly J. Mitchell, et al., *The Exposure of Youth to Unwanted Sexual Material on the Internet: A National Survey of Risk, Impact, and Prevention*, 34 *Youth & Soc'y*, 330, 340 (2003), <https://www.unh.edu/ccrc/sites/default/files/media/2022-03/the-exposure-of-youth-to-unwanted-sexual-material-on-the-internet-a-national-survey-of-risk-impact-and-prevention.pdf>.

¹³ Michael B. Robb & Supreet Mann, *Teens and Pornography*, *Common Sense Media* (2022), at 11, <https://www.commonsensemedia.org/sites/default/files/research/report/2022-teens-and-pornography-final-web.pdf>.

When I talk to adults [about porn], I get the strong sense they picture a hot bombshell in lingerie or a half-naked model on a beach. This is not what I stumbled upon back in fourth grade. I saw simulated incest, bestiality, extreme bondage, sex with unconscious women, gangbangs, sadomasochism, and unthinkable physical violence. The porn children view today makes Playboy look like an American Girl doll catalog.¹⁴

Mainstream porn sites “position[] material depicting sexual violence as normative and legitimate.”¹⁵ A survey by Common Sense Media, a nonprofit organization that makes entertainment and technology recommendations for concerned parents, found that most teens who have viewed pornography “have been exposed to aggressive and/or violent forms of pornography. This includes 52% who reported having seen pornography depicting what appears to be rape, choking, or someone in pain.”¹⁶

¹⁴ Isabel Hogben, *I Had a Helicopter Mom. I Found Pornhub Anyway*, The Free Press, Aug. 29, 2023, <https://www.thefp.com/p/why-are-our-fourth-graders-on-pornhub>.

¹⁵ Fiona Vera-Gray, et al., *Sexual Violence as a Sexual Script in Mainstream Online Pornography*, 61 *British J. Crim.* 1243 (2021), <https://academic.oup.com/bjc/article/61/5/1243/6208896>; see also CEASE, *Profits Before People: How the Pornography Industry Is Normalizing and Monetising Sexual Violence* (2024), https://cease.org.uk/wp-content/uploads/2024/09/CEASE_Profits_Before_People_2024.pdf.

¹⁶ Robb & Mann, *supra* note 13, at 7.

Pornography has also become interactive. Porn today is not just looking at pictures or watching a movie but taking part in a simulated interactive sexual experience. So-called POV (point of view) or JOI (“jerk-off instruction”) videos encourage users to place themselves directly into the scenario. Many sites are partnering with virtual reality providers to produce fully immersive sexual content.¹⁷ The rise of the “cam girl” model has transformed a large swath of online pornography into something akin to virtual prostitution.¹⁸ Models perform specific sex acts live on demand in return for elaborately priced “tips.”¹⁹ To allow, much less invite, children into such interactive videos is a form of child sexual abuse.

C. Parents are rightly concerned for their children’s health and well-being.

Not surprisingly, with children spending more and more time online and online pornography becoming

¹⁷ Leighton Evans, *Virtual Reality Pornography: a Review of Health-Related Opportunities and Challenges*, 15 *Current Sexual Health Reps.* 26 (2023), <https://link.springer.com/article/10.1007/s11930-022-00352-9>.

¹⁸ Jennifer Graham, *Perspective: OnlyFans’ soft prostitution is ruining lives in real time*, *Deseret News*, Sept. 11, 2023, <https://www.deseret.com/2023/9/11/23859829/onlyfans-porn-degradation-culture-reframed/>.

¹⁹ Culture Reframed, *OnlyFans is Only Porn: The Online Ecosystem of OnlyFans and Webcamming* (2023), <https://culturereframed.org/wp-content/uploads/2023/04/culture-reframed-whitepaper-022023-draft2.pdf>.

more intense, children’s exposure to pornography has led to a “public health crisis.” Resp. at 1.

Pornography, especially violent and dehumanizing sexual interactions, has profound effects on children’s mental and physical health. As Respondents note, more than half of boys think that online porn depicts sexual reality, and girls exposed early to pornography are more likely to suffer sexual abuse, coercion, and aggression. Resp. at 7. Indeed, “42% of 15-16-year olds expressed the desire to mirror pornography.” *Id.* This maps with nurses who report a growing trend of children sexually abusing other children.²⁰

Recent studies have also found that pornography is powerfully addictive, analogous to addictive behaviors (gambling) and substances (tobacco, alcohol), where age-verification laws already protect children.²¹ The World Health Organization now recognizes compulsive sexual behavior disorder, which is commonly induced by pornography, as a real and widespread mental health disorder.²²

²⁰ *The Influence of Pornography on Child Sexual Assault*, Culture Reframed, July 27, 2023, <https://culturereframed.org/the-influence-of-pornography-on-child-sexual-assault/>.

²¹ Your Brain on Porn, *Brain Studies on Porn Users & Sex Addicts*, <https://www.yourbrainonporn.com/relevant-research-and-articles-about-the-studies/brain-studies-on-porn-users-sex-addicts/#brain>. (collecting findings from more than 35 neurological studies).

²² Shane W. Kraus, et al., *Compulsive sexual behavior disorder in the ICD-11*, 17 *World Psych.* 109 (2018), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5775124/>; Judy

The reality is that most children *are* encountering porn, and many are quickly becoming hooked. Accidental exposure can quickly become intentional, and that intentional use soon becomes a weekly or daily habit or addiction.²³

These findings make it all the more critical that parents have the help they need to protect their children from porn.

II. Parents have found existing content filters insufficient.

In *Ashcroft*, the Court determined that content filters, which “impose selective restrictions on speech at the *receiving* end,” were “likely more effective” at protecting children than age-verification requirements, which set “universal restrictions at the *source*.” 542 U.S. at 667 (emphasis added). While content filters have improved, they are still imperfect, stuck playing cat-and-mouse with the multi-billion-dollar-a-year online porn industry.

A content filter is a technology that filters out, or blocks access to, designated material—in this case, pornographic images and websites. Content filters can operate at different levels. For example, they can

Silverstein, *Q&A: Compulsive sexual behavior disorder added to ICD-11 as mental disorder*, Heallo News, July 17, 2018, <https://www.heallo.com/news/psychiatry/20180717/qa-compulsive-sexual-behavior-disorder-added-to-icd11-as-mental-disorder>.

²³ Robb & Mann, *supra* note 13, at 12.

operate at the internet router level, the Domain Name System (DNS) server, or device level. Protective routers block porn websites automatically, while a clean DNS server can be set up on any router or any internet device to block access to IP addresses associated with inappropriate hostnames. Content filters at the device level, or software that is either built into the device settings or installed, blocks access to pornography websites on the device. Built-in options include Screen Time on Apple devices, Microsoft Family on Windows, and Google Family Link on Android devices (which enables “safe search” (Google) and “block mature sites” (Chrome)). Parents can also purchase additional third-party content-filtering software. Common options include Canopy, Covenant Eyes, Net Nanny, Mobicip, and BlockerX.

Content filters help parents protect their children by blocking access to pornography. However, as discussed below, these filters are far from perfect: they have significant loopholes, are prone to glitches and bugs, and often don’t work well together. Because of these shortcomings, many experts advise parents to layer several different content filters on top of each other. But it takes a lot of know-how, time, and effort to get these technologies to work well together, even under the best of circumstances.

In short, the accessibility of internet pornography coupled with the technological complexity of creating an effective filtering regime render parents in practice unable to proactively protect their children from pornography’s harms. This is reflected in statistics

that show that children are increasingly exposed to pornography and suffering as a result, despite the content filters lauded by Petitioners and by the Court in *Ashcroft*.

A. Content filters have significant loopholes.

While content filtering technology has become more sophisticated since *Ashcroft*, see Pet. at 40, so has the porn industry and the digital ecosystem more broadly. Filtering technology is always playing catch-up with the aggressive and deep-pocketed pornography industry. New porn sites are launched all the time, large quantities of new explicit and degrading content are being uploaded and distributed, and bad actors are developing clever ways to disguise this content so that it slips by filters, making it easier for minors to stumble upon or find.

One loophole in most content filters is that they “underblock” because they filter porn sites by their url, not by their content. That means that a determined child can sidestep filters by viewing a porn site through another root url. For example, one such workaround is the widely used Archive.org, which stores “snapshots” of webpages from all around the internet, including snapshots of porn sites. Yet filters still categorize Archive.org as a safe website, which lets minors reach explicit content on an otherwise-

filtered device merely by typing a porn site's address into Archive.org's Wayback Machine.²⁴

Software-based content filters are also less effective on mobile devices, which is where around 84% of pornography is viewed these days.²⁵ Content filters operate on internet browsers, which on desktops and laptop computers serve as *the* means of accessing the internet. But for smartphones, the internet is often accessed via apps that possess their own in-app browsers, which are generally outside the purview of content filters. This makes it easy for minors to access porn on their phones, even if their parents have protected the phone's browser, like Safari or Google Chrome, with a filter.²⁶

Consider Snapchat, a popular social media platform whose app is rated 12+ on Apple's App Store. A minor with the Snapchat app on his phone can get

²⁴ James Everard, *How to Unblock Porn Sites—Watch Safely in 2024*, VPN Mentor, Nov. 8, 2024, <https://www.vpnmentor.com/blog/how-to-safely-watch-porn-sites-online/> (“You can use the Wayback Machine's archived snapshots to unblock porn sites * * * . It bypasses network blocks because your ISP only sees the Wayback Machine's URL, so it can't block your connection.”).

²⁵ Fight the New Drug, *What Devices Do Consumers Use the Most to Watch Porn?* (2024), <https://fightthenewdrug.org/what-devices-do-consumers-use-to-watch-porn/>.

²⁶ Jake Cutler, *What are Embedded Web Browsers? A Guide for Parents*, Gabb Now, Nov. 1, 2023, <https://gabb.com/blog/embedded-web-browsers/>.

to PornHub in just five clicks.²⁷ Third-party filters would be of no help because Snapchat—like TikTok and Discord—blocks them.²⁸

Apple’s iOS filter in its “Screen Time” settings has recently been upgraded to filter most content within in-app browsers, but Android’s equivalent does not yet do so.²⁹ But even then, the settings that allow these parental control apps to operate are not hidden behind the phone’s password-protected menu of device settings, so a child can disable them without a parent’s

²⁷ Canopy cannot filter content within non-browser apps. Canopy, *Internet Safety FAQs*, <https://canopy.us/internet-safety-faq/>; Covenant Eyes has said they are not permitted to filter in other third-party browsers, including hidden in-app browsers, though some users have had mixed results on this; Covenant Eyes, *Hidden browsers in apps*, *Covenant Eyes Serv. Ctr.*, <https://support.covenanteyes.com/hc/enus/community/posts/15019233976987-Hidden-browsers-in-apps>; Chris McKenna, *Warning: Pornhub is on Snapchat. And Parents Have No Idea, Protect Young Eyes*, June 30, 2019, <https://protectyouneyes.com/warning-pornhub-is-on-snapchat-and-parents-have-no-idea/>.

²⁸ Some companies, like Bark, have found workarounds on Androids to access app data from the device itself, but this is not possible on Apple’s closed system, which means since the majority of teens have iPhones, third party monitoring software has no access to their social media activity on apps like Snapchat that block access. Bark, *What Bark Monitors*, <https://www.bark.us/what-bark-monitors/> (comparing iOS and Android devices).

²⁹ Reddit, *Can I turn off ALL internal browsers?*, https://www.reddit.com/r/AndroidQuestions/comments/yrhnxc/an_i_turn_off_all_internal_browsers/ (last visited Nov. 22, 2024).

permission or knowledge.³⁰ This loophole means parents must constantly police their child's phone to ensure that the filters they installed are still working as intended.

B. Content filters are prone to glitches and bugs.

Content filters are also susceptible to bugs and glitches. Filters can even deactivate entirely after a software update.³¹ As a *Wall Street Journal* reporter who tested Apple's controls wrote:

My son's iPad is set to restrict him from visiting most websites. And yet I was able to use it to access the most X-rated parts of the internet. Porn, violent images, illicit drugs. I could see it all by typing a special string of characters into the Safari browser's address bar. The parental controls I had set via Apple's Screen Time? Useless. Security researchers reported this particular software bug to Apple multiple times over the past three years with no luck. * * *

³⁰ Protect Young Eyes, *Apple (iOS) Parental Controls* (last updated Oct. 3, 2024), <https://protectyouneyes.com/devices/apple-ios-iphone-ipad-parental-controls/>.

³¹ See, e.g., Apple Community (NeilKY), *iOS Updates disable Parental Controls/Downtime on Kids phone (iOS 16+)* (Feb. 17, 2024, 6:07 AM), <https://discussions.apple.com/thread/254647836?sortBy=rank>; Apple Community (sarwag13), *parental controls keep resetting after 16 update* (Jan. 16, 2023, 1:55 PM), <https://discussions.apple.com/thread/254561788?sortBy=rank>.

The bug is a bad one, allowing users to easily circumvent web restrictions.³²

Other parents have likewise discovered that the restrictions they have set on their children's iPhones sometimes don't stick.³³ Apple admitted, "We are aware that some users may be experiencing an issue where Screen Time settings are unexpectedly reset."³⁴ Microsoft's version, Microsoft Family Safety, has also recently suffered from similar bugs, with filters completely deactivating without notification.³⁵

Given the addictive pull of pornography and the profound impact that even one exposure can have on

³² Joanna Stern, *How Broken Are Apple's Parental Controls? It Took 3 Years to Fix an X-Rated Loophole*, Wall St. J., June 5, 2024, www.wsj.com/tech/personal-tech/a-bug-allowed-kids-to-visit-x-rated-sites-apple-took-three-years-to-fix-it-17e5f65d.

³³ See, e.g., Apple Community (parentalcontrolsnotworking), *Parental Controls keep resetting and turning off on their own* (Jan. 5, 2023, 1:41 PM) <https://discussions.apple.com/thread/254530018?sortBy=rank>.

³⁴ Julie Jargon, *Apple Admits to Bug in Screen Time Parental Controls*, Wall St. J., July 29, 2023, <https://www.wsj.com/articles/apples-parental-controls-are-broken-55a2aa52>.

³⁵ See, e.g., Microsoft Community (Stephen_Elmer), *Microsoft Family Safety not reporting activity* (Aug. 2, 2024), <https://answers.microsoft.com/en-us/windows/forum/all/microsoft-family-safety-not-reporting-activity/561d54fa-0090-45d8-81e9-3fe5a675f877>; Microsoft Community (DGriffith_45), *Microsoft Family Safety stopped working* (Sept. 29, 2024), <https://answers.microsoft.com/en-us/windows/forum/all/microsoft-family-safety-stopped-working/71d3d560-7abb-4900-b8c6-d800cdacbf>.

adolescent brains, these issues are far more serious than your run-of-the-mill software hiccup. A single loophole, glitch, or bug can inadvertently leave an innocent or curious child exposed to pornography for the first time. Due to porn's addictive qualities, a single encounter often is enough to push a child to undertake significant efforts to find more ways to find porn, even after the initial software failure is patched.

C. Content filters often do not work well together.

Because of all the possible portals of entry introduced by smartphones and apps, and all the possible loopholes and bugs, experts advise concerned parents to use multiple layers of protection, and several different software solutions to effectively cover all of a family's devices. One parents' advocacy group, Protect Young Eyes, recommends "4 layers of iPhone protection."³⁶

No one software provides the complete solution for everything a parent would like to be able to block or monitor on a device. For example, Bark is best for monitoring children's communications, texts, and social media,³⁷ while Covenant Eyes excels at filtering pornography and providing accountability for any access.³⁸ However, parents have found that these

³⁶ See Protect Young Eyes, *supra* note 30.

³⁷ Bark, *supra* note 28.

³⁸ Covenant Eyes, *How It Works*, <https://www.covenanteyes.com/how-it-works/>.

different technologies do not work well with each other.

These conflicts occur because content filters work by routing a device's data through a Virtual Private Network or VPN. A VPN is an encrypted connection over the internet that directs data to and from a device through a safe intermediate stage, known as a VPN server, before reaching the wider internet. Many people use a VPN to hide a user's private information or pretend a user is logging on from another location. Parental control software uses a VPN server to either block certain kinds of websites or to flag concerns for parents.

But the nature of VPN technology is such that a device (whether smartphone, tablet, or laptop) can only connect to one VPN at a time. Parents can choose to have more than one filtering *program* on a device, but so long as the filtering service operates via VPN, only one can *run* at a time. To choose, a parent will have to select which VPN they want to be operating at a given time through each device's settings.

Just as VPNs can be used by parents to facilitate filtering on smart devices, tech-savvy kids can counter by installing VPN apps that evade filters, evade parental controls, hide browsing history, and enable porn access. App Stores often rate VPN apps for

children (4+), undermining parental controls for app downloads.³⁹

The limits of VPN filters have pushed some parents to seek out other technologies, such as the Gryphon home Wi-Fi Router. The Gryphon router has a built-in pornography filter that works on any device connected to the Wi-Fi and thus does not depend on any external VPN filter.⁴⁰ A protective Wi-Fi router gives parents a high-level solution to protect many devices at once, but it only works when those devices are at home and logged into the Wi-Fi.

But just as a device cannot use two VPNs at the same time, the Gryphon router can conflict with VPN-based parental control software. Content-filtering services have acknowledged this issue. For example, Covenant Eyes warns that “[i]f you use another filtering service of parental control software, the other service may ‘fight’ with our filter. This may result in no internet access or otherwise ‘safe’ sites being blocked.”⁴¹ Covenant Eyes’ only advice is to “remove

³⁹ Beatrix Manuel, *VPN vs Parental Control: Does a VPN Bypass Parental Controls?*, PrivacyJournal.net (last updated Nov. 20, 2024), <https://www.privacyjournal.net/vpn-vs-parental-control/>.

⁴⁰ Chris McKenna, *The Ultimate Guide to Understanding Routers*, Protect Young Eyes, Sept. 28, 2023, <https://protectyouneyes.com/the-ultimate-guide-to-understanding-routers/>.

⁴¹ Covenant Eyes Service Center (Sydney), *How does filtering work with other filters or parental controls?* (last updated Oct. 2024), <https://support.covenanteyes.com/hc/en-us/articles/12691064666523-How-does-filtering-work-with-other-filters-or-parental-controls>.

the conflicting service from your device, router, or network” and “[r]estart the device.”⁴²

If a child’s device only reaches the internet through home Wi-Fi (for example, an iPad without its own data plan), the Gryphon router is adequate, and the setup is straightforward. But for devices with a data plan, like a mobile phone, things get complicated quickly. This technical complexity can force parents to choose whether to use a filter that will protect *every device connected to the home Wi-Fi*, or software that will protect a *given device wherever it goes*, or a combination of both, which adds additional options and potential failures.

These complexities underscore the demands that even tech-savvy parents must undertake to set up and maintain a robust content filtering system.

D. Content filters, even if effective in theory, are too complicated for parents in practice.

Respondents claim content filters work fine so long as they are used properly; the problem is just that Texas has not done enough to encourage their use. Pet. at 41. But practically, even with education, establishing and maintaining a filtering regime (including keeping up with neverending updates) is complicated. Filtering sounds good in theory, but parents consistently find it too hard to maintain and too hard to trust. Unsurprisingly, 71% of parents are

⁴² *Ibid.*

dissatisfied with the tools they have used to keep their kids safe online.⁴³

While device manufacturers like Google⁴⁴ and Apple⁴⁵ offer parental control settings on smartphones, these filters are not enabled by default. Neither do these devices prompt parents to set them up, even when the user is a minor. Even if a parent knows these controls exist, they are hard to find and use. One guide developed by Protect Young Eyes, a leading parental advising organization, outlines seventeen different steps required to set up Screen Time on an iPhone or iPad.⁴⁶

Some parents dissatisfied with pre-loaded and off-the-shelf content filters try to create their own “clean” DNS server. The Domain Name System (DNS) is the phonebook for the internet. Web browsers interact through domain names (like [supremecourt.gov](https://www.supremecourt.gov)), but behind each such web address is a number-based IP address (like 192.0.2.1). A DNS translates domain names into IP addresses so browsers can load internet resources. A DNS *server* is essentially a database of public IP addresses and their associated hostnames use that information to “resolve” or translate internet

⁴³ Family Online Safety Inst., *Tools for Today’s Digital Parents* (2020), <https://www.fosi.org/policy-research/tools-for-todays-digital-parents>.

⁴⁴ Protect Young Eyes, *Android Parental Controls* (2020), <https://protectyoungeyes.com/devices/android-parental-controls/>.

⁴⁵ See Protect Young Eyes, *supra* note 30.

⁴⁶ *Ibid.*

searches into something understood by computers.⁴⁷ A DNS server's information can be leveraged to categorize and filter certain IP addresses, including blocking websites known to host pornography.

Setting up a clean DNS server takes considerable effort and technological savvy. On a home Wi-Fi router, a parent must figure out how to change its default DNS settings, update a list of approved or unapproved urls or IP addresses, and then make sure all these new settings are properly saved. A parent must then make sure that all devices on the home WiFi have been set up with profiles that ensure correct use of the DNS settings.⁴⁸

For devices that might connect with Wi-Fi outside of the home, a parent has to set up a DNS policy on each device that mirrors the settings on the home Wi-Fi router. To do this, a parent will have to navigate to the device's WiFi settings and then "Configure DNS," delete all the default DNS servers and domain names, and manually add only clean DNS servers.⁴⁹ The parent must then rinse-and-repeat on each device.

Configuring the device WiFi to route traffic through only clean DNS servers still doesn't ensure browsing is clean when the device is using 4G/5G

⁴⁷ Chris McKenna, *How to Block Porn on Any Device. For Free*, ProtectYoungEyes, Sept. 19, 2020, <https://protectyoungeyes.com/how-to-block-porn-on-any-device-for-free/>.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

instead of WiFi. To fill this gap, parents would need to download and install a “clean browsing DNS” app that operates using a VPN. But as noted above, this form of parental control often interferes with the operation of other device-level controls that rely on VPNs.

After all this extremely complex, time-consuming work to set up a filtering regime, a parent needs to then put *additional* time into covering all the possible bypasses on each separate device, such as changing the DNS settings (which are generally not password-protected) or downloading VPNs and proxy servers.

A parent must also disable the home router’s wireless remote administrator feature so children cannot access router settings from outside the home network, prevent the installation of unapproved browser plugins, prevent options on computers or web browsers to switch to guest mode or create a new account or profile, and manually add sites that filters don’t catch (like archive.org) to the blocklist.⁵⁰

For parents who are acutely aware of the limitations of content filters and who are highly motivated to protect their children from pornography,

⁵⁰ CleanBrowsing, *How to Block VPN Access at Home*, <https://cleanbrowsing.org/help/docs/how-to-block-vpn-access-at-home/>; Qustodio, *How to prevent your child from using guest accounts on Android devices*, <https://help.qustodio.com/hc/en-us/articles/360005217277-How-to-prevent-your-child-from-using-guest-accounts-on-Android-devices>; Sofia Kaufman, *How to Control Internet Access at Home (and Block Content)*, Aura, July 13, 2023, <https://www.aura.com/learn/how-to-control-internet-access-at-home>.

doing all that is required to oversee their children's devices and internet usage is a demanding, if not impossible, task. The initial set up is just the beginning. Because of all the layers and possible loopholes, maintaining an effective filtering and monitoring regime is simply too time-consuming for the vast majority of working parents, especially in single-parent homes.⁵¹

The status quo leaves parents overwhelmed and unequipped and children unprotected. Texas' expert Tony Allen noted that while federal buildings rely on filtering software, that system is maintained by a professional IT team "checking that that's working and working properly, set up properly, operating properly, got all the correct fills, it's got all the correct updates. That's their job and that's what they do, that's how they keep you protected in this building." JA274.

Even then, that's often not enough. School districts with well-funded IT departments have confessed themselves unable to maintain effective content-filtering regimes on school-issued devices.⁵²

⁵¹ Common Sense Media, *The Common Sense Consensus: Media Use by Tweens and Teens* (2021), https://www.commonsensemedia.org/sites/default/files/research/report/8-18-census-integrated-report-final-web_0.pdf.

⁵² Cameron Probert, *West Richland parents say school computer porn filter not good enough*, *Tri-City Herald*, Sept. 25, 2017, <https://www.tricityherald.com/news/local/education/article175374506.html>.

Allen stresses that parents don't have the benefits of professional IT support:

[S]o you do rely to a certain extent on, first of all, parents knowing they're available and then understanding how to implement them and how to put them into place. And then even thereafter, how to keep them updated, how to deal with the fact that children get older and so, therefore, what they might want to experience changes over a period of time. So the studies and research there has been on filtering that they work, as a tool they work, but they rely on parental knowledge and information and education, and they rely on them keeping them up to date. And it's those two latter things that generally are lacking.

JA274.

E. Content filters have not, in fact, protected minors from internet pornography.

Even if Petitioners might quibble at the edges about how effective content filters are on an *individual device*, the bottom line is beyond dispute: the status quo—which relies on parents to select, install, update, and monitor content filters—has not been enough to protect children in our society from internet porn and its harms.

As Justice Breyer, joined by Chief Justice Rehnquist and Justice O'Connor, noted in *Ashcroft*, if a law like H.B. 1181 is subject to strict scrutiny, the least restrictive alternative analysis must note that

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.” 542 U.S. at 684 (Breyer, J., dissenting). Justice Breyer judged that a legislature could reasonably conclude that layering an age-verification requirement on top of the content-filtering status quo would better advance the public’s interest in protecting children from internet pornography. *Id.* at 686.

Twenty years of data confirms Justice Breyer’s conclusion. “The last two decades have [] seen a dramatic increase in the number of children under 13 exposed to pornography—despite content filtering.” Resp. at 8. Even where parents competently install a filter and dedicate the time and attention necessary to monitor it, their children will often still be exposed to online pornography.

Consider the testimony of one young porn addict, Madi. Even though Madi’s parents had installed filters on her devices and made her hand in her phone at night, she still easily came across pornography on social media when she was thirteen years old.⁵³ This prompted her, out of natural curiosity, to seek out pornography more actively, which sent her into a

⁵³ Fight the New Drug, 100 Consider Before Consuming, *Do Women Struggle with Porn?* (2023), <https://considerbeforeconsumingpodcast.com/do-women-struggle-with-porn/>.

downward spiral of addiction for five years.⁵⁴ Madi now warns other parents, “Kids are seeing [porn] if they’re on social media or have any internet access; there is almost no way that they are not seeing pornography at least once a week, [even] once a day.”⁵⁵

The status quo leaves children of lower-income families especially vulnerable. First, such children have, on average, almost twice as much screentime as their higher-income peers.⁵⁶ Second, lower-income households are less likely to monitor their children’s devices. A non-profit focused on protecting children from commercial sexual exploitation testified at hearings for H.B. 1181 that there is “a strong correlation between wealth and privilege and using filtering technologies. That is, well-heeled parents generally have the time and resources to use filters while low-income parents do not.”⁵⁷

As Texas’ expert Tony Allen stated in his declaration below, “Internet filtering tools are ineffective and in most cases, were an insignificant factor in whether young people had seen explicit sexual content.” JA207. Though experts on either side

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ See Common Sense Media, *supra* note 51 (kids in homes with annual income less than \$35,000 spend on average 7:32 hours each a day on screens; kids in homes with annual income over \$100,000 spend on average 4:21 hours a day on screens).

⁵⁷ Testimony of Jamie Carruthers on S.B. 417, Tex. Sen. Comm. State Affs., at 2:18:20 (Apr. 3, 2023), <https://senate.texas.gov/videoplayer.php?vid=19131&lang=en>.

of this litigation might quibble about the reasons why, the plain fact is that content filters have not done enough to protect children from internet pornography and its harms.

III. Parents cannot protect their children from internet pornography without government help, like H.B. 1181.

Petitioners' arguments about the sufficiency of content filters, whatever their merits, do not account for the *scope* of the state interest at issue. Texas' interest is not simply *enabling parents* who want to protect their children from internet pornography. Rather, Texas passed H.B. 1181 "to protect kids from some of the most prurient sexual content imaginable." Resp. at 2; see also JA250 ("This legislation would ban minors under 18 years old from viewing explicit content online."); Pet. at 3 ("Petitioners agree that protecting minors is a compelling government interest."). Texas has correctly judged that minors are harmed by internet pornography regardless of whether their parents are motivated to install, monitor, and maintain internet filters. And the state has an interest in protecting all children from pornography's harms.

Parents know today more than ever that monitoring their children's devices or even any device that enters their home is not enough to protect their children from internet pornography. This approach is dramatically underinclusive. This was true even

twenty years ago, as Justice Breyer noted in his *Ashcroft* dissent:

[F]iltering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents.

542 U.S. at 685 (Breyer, J., dissenting). These numbers have only grown in the decades since.

Justice Breyer flagged this problem though he only envisioned children viewing the unfiltered internet at another family's *home*. Since the advent of the smartphone, however, children might spend not only afternoons and evenings with friends who have unprotected devices, but the entire school day as well. Of children accidentally exposed to online pornography, 29% reported that they were exposed through a friend or classmate.⁵⁸ Indeed, schools themselves have become part of the problem, with many mandating school-issued iPads, laptops, or Chromebooks with internet access and inadequate protective software. Of the 30% of teens who say they

⁵⁸ Robb & Mann, *supra* note 13, at 14.

have viewed porn during the school day, 44% viewed it on a *school-issued device*.⁵⁹

Such was the case of Luke Montgomery who shared his testimony with the Texas Senate:

When I was in third grade, I was exposed to pornography for the first time. A classmate of mine who had an iPhone showed me an image in the bathroom after class. That day opened a world to harmful online content for me that would plague me for multiple years to come. Early on in fourth grade, I remember staying in from recess and sneaking into empty classrooms to access images online on the back computers.⁶⁰

Even if parents could effectively filter their children's devices, they still couldn't protect their children from seeing porn on another child's or school device. Asking parents or Texas to rely solely on filters means that the lowest common denominator will prevail, with the least-regulated households and inadequately protected schools setting the tone for the community as a whole.

Filters are thus insufficient to meet the government's interest in protecting minors from internet pornography. An Oxford Internet Institute

⁵⁹ *Id.* at 16.

⁶⁰ Testimony of Luke Montgomery on S.B. 417, Tex. Sen. Comm. State Affs., at 1:57:46 (Apr. 3, 2023), <https://senate.texas.gov/videoplayer.php?vid=19131&lang=en>.

study calculated that, depending on the form of content, “between 17 and 77 households would need to be filtered to prevent a single young person from encountering online sexual material” in any given year.⁶¹ Indeed, filters are so inadequate that one study estimated that caregiver’s use of content filters only reduced by 0.5%—one in 200—the chance that a child would encounter online sexual material.⁶²

Petitioners call H.B. 1181 a “blunt governmental mandate” and call instead for more “content-filtering software [that] empowers parents to control the kinds of material their children are able to view.” Pet. at 40. But that misstates the record as to the scope of the government interest at issue. As Petitioners acknowledge elsewhere, the “compelling government interest” is “protecting minors,” not just empowering motivated parents. *Id.* at 3.

An age-verification law like H.B. 1181 is a proper response to this public health crisis. Requiring porn sites to verify a user’s age before granting access to content that harms minors would undoubtedly improve the status quo, eliminating many of the loopholes and limitations described above. Such a source-based approach gets to the root of the problem: the point of exposure, the pornography websites

⁶¹Andrew K. Przybylski & Victoria Nash, *Internet Filtering and Adolescent Exposure to Online Sexual Material*, 21 *Cyberpsych. Behav. Soc. Networking* 405 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6101267/>.

⁶² *Ibid.*

themselves. In short, age-verification laws better advance the state's compelling interest in protecting children from pornography. And, of course, they would be a great help to concerned parents.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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