

No. 23-1122

IN THE
Supreme Court of the United States

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

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

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

**AMICUS CURIAE BRIEF OF
JUSTICE DEFENSE FUND
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE¹

Justice Defense Fund (hereinafter “JDF”) engages in public pressure campaigns and litigation support in favor of victims of sex trafficking, child sexual abuse, and other forms of criminal image-based sexual abuse. JDF’s primary area of concern is the multibillion-dollar free, user-generated online pornography industry, which profits from the distribution of videos and photographs of real sexual crime, including countless women and children who are raped, trafficked, and criminally exploited for profit.

While the law at issue seeks to protect minors from viewing such material, JDF’s primary effort has been to protect those exploited from being viewed. The instant law will have the effect of providing more protections for abused and trafficked minors and adults.

INTRODUCTION AND SUMMARY OF ARGUMENT

The underlying action concerns a Texas House Bill 1181 (hereinafter “H.B. 1181”) which requires age verification for persons seeking to access “adult” content websites. The Fifth Circuit reviewed the law under the rational basis test and determined the law to be constitutional. (*Free Speech Coal. v. Paxton* 95 F.4th 263, 267 (5th Cir. 2024)) Other courts which have considered

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

similar statutes have reviewed the statute under the strict scrutiny standard as a restriction on protected speech.²

Amicus herein contends (1) the material at issue is not protected speech but largely concerns evidence of criminal activity and contraband; accordingly, (2) the restriction should be viewed under the deferential rational basis test.

ARGUMENT

I. UNDERSTANDING THE MODERN ONLINE PORNOGRAPHY INDUSTRY

Based upon the way in which lower courts have addressed the laws requiring age verification, it appears that there is a fundamental lack of understanding about the recent changes to the nature of the pornography industry. The “Free Speech Coalition” (hereinafter “FSC”) seeks to exploit this ignorance by dressing itself as merely protectors of the Constitution, when it is in fact equivocating on the term “free speech” and thereby, cloaking unprotected criminal activity.

2. For instance, the court in *Free Speech Coal. v. Rokita* (S.D. Ind., June 28, 2024, 1:24-cv-00980-RLY-MG) [pp. 29] stated that the Indiana law restricted access to protected speech, “Having concluded the Act impinges on an adult’s ability to transmit and receive constitutionally protected speech, the next question is the level of scrutiny demanded by the First Amendment.” Amicus herein seeks to rebut such a misguided conclusion. While legal speech is intermingled with the criminal content, this law does not deprive adults’ access to such protected speech. If the purveyor wishes to provide protected speech, it has more than enough ability to grant access to such material without commingling it with rape videos.

There are two distinct elements to the pornography industry. The first phase entails studio-produced material involving adult, paid actors sold primarily through age-verified channels. The cases which have found First Amendment protection for pornography, e.g., *United States v. Playboy Entertainment Group, Inc.* 529 U.S. 803 (2000), concern adult, verified, studio-produced material. JDF does not take a position on material made by consenting adults for consenting adults.

Studio-produced pornographic material is sold online via paid website subscriptions.³ The process of selling such material already entails age verification. The very same companies which are protesting age verification already require age verification when they are selling studio-produced material and subscriptions (via a credit card)⁴.

The second, and by far the most voluminous corpus of adult material involves free, user-generated pornographic content. This material will be discussed at length below. Key to understanding this issue requires the Court to understand the nature of the criminal activity. FSC cannot be honest about what is at stake because the user-generated content that sites like Pornhub offer for “free” contain a significant amount of material that is not protected by the First Amendment.

3. Except where samples of the material are offered for free on the free user-generated pornography sites like Pornhub.

4. It should be noted that the same pornography companies that sell the material also own the credit card processors such as ProBiller owned by MindGeek/Aylo, the same parent company that owns both the free site Pornhub and the paid subscription sites like Brazzers, Reality Kings and numerous others.

The primary mode of pornography distribution in 2024 fundamentally differs from pre-internet distribution. Pornography today is primarily distributed by the free “YouTubes of porn.” The ubiquity of internet-connected devices, such as smartphones, that can both record and easily upload images and videos to “user-generated” free pornography “tube sites” dominates the pool of widely available “adult” content. Today, anyone with an iPhone, anywhere in the world, can instantly become a pornographer and upload user-generated sex videos to the world’s most popular and most visited free pornography websites without ever having to reliably verify the age or consent of the individuals depicted in the videos and images. In fact, in 2020, when Pornhub had over 56 million pieces of content live on the site, all that was required to upload was an e-mail address. Anyone in the world, in under 10 minutes, could anonymously upload sex videos without any verification of the uploader or any verification of the age or consent of the individuals in the explicit videos and images. This reckless disregard for human safety has been the standard across the free, user-generated pornography industry, and has created an environment where free, user-generated pornography sites like Pornhub, Redtube, YouPorn, Xvideos, Xnxx, Xhamster, and many others that operate like them, have become infested with real, filmed sexual crime. These videos and images of the real criminal abuse of victims are made widely available to the global public, for free, with no meaningful or effective restriction, even to vulnerable and impressionable children across the United States.

Unlike in years past, when pornography was primarily created by “brick and mortar” studios in “Porn Valley” California, where rules and regulations such as the Child Protection and Obscenity Enforcement Act and related

regulations governed the production and distribution of pornographic content. Today, the international “Big Porn” conglomerates like Pornhub⁵ and its parent company MindGeek/Aylo that dominate the global pornography industry have operated without regard to the law of the United States or compliance with it.

There is no question that no one has the “right” to commit, record, distribute, monetize, advertise or view crimes against children or raped and trafficked adults. The wrong is only compounded by seeking to traumatize and abuse children through exposure to material no adult should see. This Court has no duty to protect those who profit from victims being raped, drugged, trafficked, and criminally abused. To merely look upon the anguish of a child being assaulted on Pornhub or an adult being raped, where advertisements surround the abuse to monetize it for Pornhub’s profit, revolts the sane. JDF appeals to this Court to exercise its wisdom and power, not to shield the criminal but to protect the illegally exploited and to protect children from having to witness such crimes.

5. Pornhub is a private company, much like its competitors (e.g., XVideos, xHamster, and XNXX). Based in Canada, Pornhub is the flagship website of MindGeek/Aylo, the largest global porn conglomerate. MindGeek is registered in Luxembourg but mainly operates out of Montreal headquarters and has satellites in Dublin, London, Nicosia, Los Angeles, Austin, and Bucharest. The MindGeek empire encompasses dozens of porn sites such as YouPorn, RedTube, Tube8, Gaytube, Mofos, Twistys, Sean Cody, Digital Playground, Reality Kings, Wicked Pictures, PornMD, MILF Hunter, My Dirty Hobby, and Fakehub. MindGeek also operates an advertising company (TrafficJunky) and an online payment platform (ProBiller). The annual revenues are estimated to be around \$450 million (Financial Times, 2022).

II. SUMMARY OF ARGUMENT

Amicus JDF contends the Fifth Circuit correctly measured the statute by the deferential reasonable basis standard rather than the strict scrutiny required when reviewing a statute which restricts speech. As this Court knows, not all communication is protected speech, nor is there a constitutional right to convey pornography to minors. The irony of those fighting this statute would be comical had not the irony proved sickening.

For instance, the multi-billion dollar pornography conglomerates, the real parties behind FSC, already use age verification technology for the paid subscription-based pornography sites that they own in the form of paid access via credit card payment. They simply do not want to implement age verification for the free sites that they also own because those sites depend on unrestricted website traffic, so they can sell billions of daily advertising impressions to advertisers.

When the FSC claims age verification will chill speech because people want to remain anonymous, they play on this Court's supposed ignorance. The argument is simple: Illegal abuse of children and women for sexual purposes is illegal; communicating that illegal abuse does not decriminalize the activity because it involves speech. It is a felony crime to distribute or possess child sexual abuse material in the United States. The recording of the child sexual abuse in image and video format is contraband. Additionally, the recorded real rape of adults is not protected speech. Examples abound to demonstrate this simple point: It is one thing to make a movie that depicts slavery and trafficking. It is another to traffic and enslave

a victim, record the criminal exploitation, and then claim protection because the trafficker recorded his evil. It is one thing to make a movie about robbing a bank; it is different to claim first amendment protection because the bank robbery was recorded. It is one thing to speak about piracy of copyrighted material. It is another to actually become a pirate and then claim constitutional protection because the piracy is rebroadcast.

III. THIS CASE IS NOT ABOUT THE FIRST AMENDMENT

This case is not about [1] adults seeking⁶ to [2] anonymously view [3] legal pornography. [1] The statute seeks to protect minors; adults are not at issue. [2] The “free websites” are not anonymous. They collect *and sell* the data of everyone who uses their sites. [3] The material at issue is not all legal, verified, studio-produced pornography:

the “free” user-generated material includes:
(1) videos of criminal child sexual abuse (such as the 12 year old boy in Alabama “CV1” who was drugged, overpowered and raped by Rocky Shay Franklin, who filmed the assaults and uploaded 23 of the child rape videos to Pornhub⁷, or the 15-year-old girl from Broward

6. Thus, a decision such as *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) has no applicability.

7. <https://www.justice.gov/usao-mdal/pr/man-sentenced-40-years-sexual-exploitation-child-advertising-child-porn-and> and <https://www.greenvilleadvocate.com/2022/11/21/greenville-mother-sues-rocky-franklin-pornhub-parent-company-over-video-of-minor-being-sexually-assaulted/>

County Florida who was missing for a year and finally found when her distraught mother was tipped off by a Pornhub user that he recognized her daughter on the site. She was found being assaulted by Christopher Johnson in 58 videos under an account named “Daddy’s Slut”⁸ (2) adult rape and trafficking videos and images (as if the lack of consent were the only wrong at issue; this rape and trafficking is monetized by those hiding behind “Free Speech”; for instance, the over 100 adult trafficking victims exploited on Pornhub by the FBI’s Most Wanted criminal Michael Pratt.⁹ whose sex trafficking was distributed as commerce by Pornhub. Or the violent rape of drugged, completely unconscious women on Pornhub documented by the *New York Times*.¹⁰ That is the type of “adult” content FSC seeks to make available to even children), and (3) pirated material (studio-produced, copyrighted material displayed without a license).

The First Amendment has nothing to do with this case. The Fifth Circuit rightly reviewed the statute under the deferential rational basis standard.

8. <https://www.businessinsider.com/pornhub-is-awash-in-lawsuits-unverified-videos-2024-7>

9. In 2023, Pornhub and its parent company MindGeek/Aylo were criminally charged by the U.S. Government for intentionally and knowingly profiting from the sex trafficking of over 100 victims who were exploited by Michael Pratt et al.

10. <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html>

A. THE LAW PERTAINS TO MINORS NOT ADULTS

The contention that the regulation infringes upon adult speech is misplaced, because the statute by its own terms pertains to minors. Adults can easily verify their own age. Adults do not have a right to view, produce or distribute child sexual abuse material under the First Amendment. (*U.S. v. Hotaling*, 634 F.3d 725, 726 (2d Cir. 2011) [“We conclude that the district court was correct in holding that child pornography created by digitally altering sexually explicit photographs of adults to display the face of a child is not protected expressive speech under the First Amendment.”]; *United States v. Heatherly*, 985 F.3d 254 (3d Cir. 2021); *United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014) [“The Supreme Court has upheld laws that criminalize the production and distribution of child pornography.”]; *New York v. Ferber*, 458 U.S. 747, 757 (1982) [“The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”])

Protecting children from the well-documented injury resulting from exposure to pornography is a wholly appropriate task for our society. (*Book People, Inc. v. Martha Wong*, 98 F.4th 657, 659 (5th Cir. 2024) [and the cases cited therein, “Nothing in the First Amendment prevents states from taking steps to shield children from such content”]) As UNICEF plainly stated, “Pornographic content can harm children.” (UNICEF. “Protection of Children from the Harmful Impacts of Pornography.” *Www.unicef.org*, 2021, www.unicef.org/harmful-content-online.)

In the face of massive evidence that pornography harms children, seeking to regulate access to pornography is little different than regulating their access to cigarettes, guns, or alcohol. Websites which provide information about legal products such as alcohol or guns also require age verification as a matter of course.

Adults are free to access and consume legal pornography, but adults' consumption of legal pornography is not the target of this law. The abundant evidence of the State of Texas and the cooperating amici are noted herein by reference. JDF's mandate is the protection of children and adult victims from being exploited as *content*—the very content the porn conglomerates like MindGeek/Aylo distribute and commercialize. As one victim whose criminal abuse was distributed for profit and pleasure on Pornhub explained, "I'm still getting sold." (Kristof, Nicholas. 2020. "The Children of Pornhub." *The New York Times*, December 4, 2020, sec. Opinion. <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html>; see, e.g., *Doe v. MG Freesites, Ltd.* (N.D. Ala., Aug. 17, 2023, 7:21-cv-00220-LSC)) Shattering the lives of rape and trafficking victims around the world for profit is one cog in an international ring hiding behind the mantle of "Speech." This Court must resist the urge to have illegality turn on whether pictures were involved¹¹. That question was laid to rest long ago. As one court wrote:

In this case, the performance was real; the acts
and conduct recorded on film were actually

11. The news is filled allegations that a famous musician oversaw drugging and rape of children and adults and recorded the whole. He cannot defend against allegations of wrongdoing on the ground that there is video evidence of the (alleged) crime.

committed, and the film is photographic evidence of them. The claim that the First Amendment shields the participants from prosecution for what they did, is grotesque.”

(*Sole v. Grand Jurors* (D.N.J. 1975) 393 F. Supp. 1322, 1332-33)

A piece by New York Times columnist, Nicholas Kristof, about the widespread distribution of real child sexual abuse and rape videos on the major free user-generated pornography websites Xvideos and Xnxx asks the telling question, “Why Do We Let Corporations Profit from Rape Videos?” (Kristof, Nicholas. 2021. “Opinion | Why Do We Let Corporations Profit from Rape Videos?” *The New York Times*, April 16, 2021, sec. Opinion. <https://www.nytimes.com/2021/04/16/opinion/sunday/companies-online-rape-videos.html>) The essay provides numerous details on non-speech criminality, which is distributed by the major, most visited, mainstream free porn sites.

B. THE MATERIAL IS NOT ACCESSED ANONYMOUSLY

The Fifth Circuit considered the district court’s conclusion that the age verification procedure would “chill” adults from accessing the internet material. (*Free Speech Coal. v. Paxton*, 95 F.4th 263, 301 (5th Cir. 2024)) “Ultimately, the Act places burdens on and chills an adult’s ability to engage with, view, transmit, and receive a significant amount of constitutionally protected speech;” *Free Speech Coal. v. Rokita* (S.D. Ind., June 28, 2024, 1:24-cv-00980-RLY-MG) [pp. 28-29]

Such an argument is absurd on its face. The denizens of FSC are not benefactors providing material at no-cost. They seek traffic to scrape data:

MindGeek operates several free pornographic websites, including Pornhub, as well as other paid porn sites. (*Id.* ¶ 60.) MindGeek makes money from its free sites in multiple ways: by advertising its paid sites or its products on the free sites, by selling ad space on the free sites for the services or products of third parties, and by harvesting and selling the data of persons who use the free sites. (*Id.*) MindGeek sells ad space through “TrafficJunky,” its advertising platform. (*Id.* ¶ 62.) Ad revenue earned through TrafficJunky accounts for over 50% of MindGeek’s revenue. (*Id.*) To reach their intended audience, advertisers can build campaigns around keywords like “13yearoldteen” and “not18”; indeed, they can even target ads to people searching the term “child rape” in Japanese. (*Id.* ¶¶ 121-123.) Like a billboard on Interstate 5 is more expensive in Los Angeles than the Grapevine, the price to advertise on MindGeek’s sites corresponds with the traffic on those sites: the higher the traffic, the pricier the ad space. (*Id.* ¶ 62.) Thus, MindGeek is incentivized to drive traffic. (*Id.*)

(*Fleites v. MindGeek S.A.R.L.*, 617 F. Supp. 3d 1146, 1151 (C.D. Cal. 2022)) No one is anonymous, let alone truly anonymous on the internet.

When something is ostensibly free, the commodity is the customer. If speech is chilled, it is because the

free porn sites in question deceive their customers. The computer and/or the cellphone, whichever accesses the website, declares its identity. Moreover, the very parties balking at the supposed “chill” caused by age verification, are parties who already engage in age verification for the consumers of their studio produced, pay-to view pornography websites where credit card payments do the verification.

Pornhub-funded “Free Speech Coalition” argued against preventing children from freely accessing Pornhub and its sister sites, (that as a matter of fact, have been infested with real sexual crime including child sexual abuse, rape, and sex trafficking since 2007), under a guise of concern for “free speech.” Yet, Pornhub’s own management is on the record confessing otherwise.

Pornhub’s Senior Community Manager is documented as admitting that the *real* reason the site does not want to implement age verification for users is that “MindGeek loses money,” “it costs us money,” and because Pornhub stands to lose “traffic.”¹² Indeed, the loss of traffic, whether that traffic is from children or adults, impacts the bottom line for Pornhub, as their business model relies entirely on millions of website visits that enable them to harvest user data and sell 4.6 billion advertising impressions *daily* on Pornhub.

Just a review of the Terms of Service and Privacy Notice disclosures demonstrate that everything which can be extracted from a visitor is extracted to be commercially exploited to the greatest possible value. Pornhub has

12. <https://x.com/LailaMickelwait/status/1760516532499562602>

engaged in collecting, using, storing, transferring and monetizing various kinds of personal data, including a user's IP address, country, city, neighborhood, zip code, payment details, what browser they use, what language they speak, their income, email addresses, and login data. They even assign sex and sexual preferences based on the videos user's watch. As of December 2020, all this data was being harvested for 62 billion annual site visits to Pornhub alone, not to mention the billions of visits to MindGeek's other major free porn tube sites. In Pornhub's Privacy Policy, it states, "As you navigate through and interact with Pornhub, we use automatic data collection technologies to collect website activity data." The "Data We Process About You," reads in part, "We process information about how you use Pornhub, products and services and interact with content and advertisements, including the pages you visit and search history on Pornhub, and the referring web page from which you arrived on Pornhub from. We process browser and operating system information, devices you use to access Pornhub and your time zone setting. We also process online identifiers. Specifically, we process internet protocol (IP) address information and we set cookies as explained below. . . ."

In short, a visit is not private. To pretend otherwise is to deny the nature of the industry. (At the very least, trial on the lack of privacy afforded by such sites could easily disprove the apparent anonymity contended for by FSC.)

V. "FREE" PORNOGRAPHY IS NOT FREE

It is an unquestionable truth that nothing is free. The cost may not be found where one is looking, but nothing is free. Free pornography comes at an extraordinary cost. MindGeek/Aylo is not a public benefactor. FSC is not

protecting our civil liberties. The videos and images on Pornhub and “free sites” like it are heavily monetized with advertisements. In fact, Pornhub alone sells 4.6 billion advertising impressions daily. These free, user-generated pornography sites earn hundreds of millions of dollars per year by utilizing a business model of unrestricted, frictionless content uploading, coupled with unrestricted, frictionless viewing. But make no mistake, the material distributed by Pornhub and others like them comes by extracting immeasurable costs from victims whose abuse is distributed and commercialized on these sites. Victims describe the uploading, downloading and reuploading of their abuse as the “immortalization” of their trauma, where they understand that the worst moments of their lives will live on in perpetuity for both profit and pleasure.

As explained above, JDF advocates protecting the interests of those whose lives are ruined daily by the callous and criminal exploitation of the vulnerable by corporations like Pornhub and its parent company MindGeek/Aylo. Since the fact and content of such horrors have not been adequately considered by the many courts who have ruled *to protect traffickers*, JDF hopes this Court will give due weight to the vulnerable and criminally exploited.

JDF too makes use of its First Amendment right to speak. JDF does not seek to restrict the First Amendment rights of others. But the material which makes up the bulk of the “free” material on pornographic websites has been demonstrated to be material where the age and consent of the individuals depicted was not verified and is thus awash with criminal material involving victims who did not and could not consent.

VI. THIS CASE DOES NOT CONCERN PROTECTED SPEECH

The First Amendment does protect sexually explicit material. (*United States v. Alvarez*, 567 U.S. 709, 716-17 (2012)) This court has extended protection to “vulgar “girlie” periodicals” (*Ginsberg v. New York*, 390 U.S. 629, 672 (1968)) and “Playboy’s programming [which] consists of sexually explicit material.” (*United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 807 (2000)) This Amicus agrees that, “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” (*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)) Such protection does not extend to material merely because it is sexually explicit. But unprotected content is not merely the complaint of the caricature prude sniffing at disapproved material.

There are categories of data which involve crime in and of themselves:

Among these categories are advocacy intended, and likely, to incite imminent lawless action, see *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)(*per curiam*); obscenity, see, *e.g.*, *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) ; defamation, see, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (providing substantial protection for speech about public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (imposing

some limits on liability for defaming a private figure); speech integral to criminal conduct, see, e.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949) ; so-called “fighting words,” see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) ; child pornography, see *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) ; fraud, see *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) ; true threats, see *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)(*per curiam*); and speech presenting some grave and imminent threat the government has the power to prevent, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), although a restriction under the last category is most difficult to sustain, see *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)(*per curiam*) .

(*United States v. Alvarez*, 567 U.S. 709, 717-18 (2012)) As dear a right as all parties hold the First Amendment, excluding a subset of material from this august protection is necessary to protect that which we do protect:

These categories have a historical foundation in the Court’s free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

(*United States v. Alvarez*, 567 U.S. 709, 718 (2012)) Permitting speech to further actions which are criminal in and of itself is not “speech” to be protected. Speech about crime is different than speech which is a crime. The movie *Ocean’s 11* is protected speech about a crime. But speech used to actually burglarize a casino is not protected. The novel *Lolita* is protected, however, the actual crime discussed in the novel is not.

It is undeniably true that criminals use communication to conduct their wrongful conduct. (*U.S. v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) [“a computer program under other circumstances might warrant first amendment protection, SOAP does not. SOAP is too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection.”]). In *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), the court found a book entitled *Hitman* which gave instructions on how to commit murder was not protected by the First Amendment. The court helpfully distinguished speech to “advocate lawlessness” (*Id.* at 243) from speech which is itself lawlessness. Quoting then Judge Kennedy, the court explained:

[T]he First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone. [*United States v. Freeman*, 761 F.2d 549, 552-53 (9th Cir. 1985), cert. denied, 476 U.S. 1120 (1986)]

(*Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 245 (4th Cir. 1997)) It is not the State being an overactive parent which lies beyond the bounds of the First Amendment, but the evils which seek to a shield behind the First Amendment:

The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

(*Osborne v. Ohio*, 495 U.S. 103, 109 (1990))

Here, the harmful communication is pervasive: Step one, a bad actor records vicious criminal activity, such as trafficked women, drugged children, unconscious victims being raped. Step two, seeking the protection of the First Amendment by broadcasting the depravity. The first two steps continue because the free, user-generated pornography tube sites that are flooded with unverified content, market their material and reap the profits.

When a building becomes infested, it is hard to keep cockroaches out of one's kitchen. The instant law from Texas cannot raise an impermeable barrier to protect children from viewing criminal material. But the State can use reasonable efforts to protect children from consuming this material. Aside from the immediate psychological damage from viewing such content, the negative effects upon the children are well documented and fall into two primary categories: (1) the child then becomes a perpetrator of sexual violence on other children; and (2)

the child then becomes more vulnerable to being exploited by others. Such things are the costs of protecting Pornhub from age verification because one lumps the exploitation in with true speech.

A crime does not transmogrify into protected speech because the crime is broadcast. Photographic production and distribution of a crime is no less a crime. (See, e.g., *U.S. v. Schmeltzer*, 960 F.2d 405, 406 (5th Cir. 1992) [“Schmeltzer showed the confidential witness a video tape which he described as a “snuff film.” This film depicted the kidnapping, mutilation, and murder of an oriental female. Schmeltzer told the witness that many snuff films could be obtained in Mexico, and that girls were available in Mexico for the production of such films.”]; *U.S. v. Depew*, 932 F.2d 324, 326 (4th Cir. 1991) [“This describes the action of two individuals, Daniel DePew and Dean Lambey, who conspired to kidnap a young male about 12 years of age for the purpose of producing a “sex-snuff” film. In this film the boy would be sexually abused, tortured and finally murdered. The plot was uncovered by two California detectives who were investigating the production of child pornography films.”])

Advocates contend these sites “merely” contain “pornography” entitled to First Amendment protection. This is untrue, as much of it was illegally created and illegally distributed. For example, multiple class action lawsuits against Pornhub and its parent company MindGeek/Aylo have been certified on behalf of “tens of thousands” of child trafficking victims. Advocates contend that if parents want to protect their children, it is up to the parents to control what their children are watching because the adult consumer may consume without being

chilled. This is untrue for the same reason. Advocates will claim it is Texas which must meet a “strict scrutiny” burden, as has been the successful argument in several districts involving other states. And this argument fails as a matter of law because of the perpetration of crime that happens when the trafficking occurs.

To be sure, Amicus does not pray this Court squelched the broad range of protected speech. But the law will not have the effect of targeting protected speech. It is not aimed at chilling consumption of “speech.” This law has the desired effect of squelching crime. (*Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990) [“It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.”]) Those who seek to profit from such evil should not be protected because the wrong is recorded. If it is wrong in the first instance, multiplying the wrong does not make it less so, it makes it more so. A child such as fourteen-year-old Serena Fleites from California was wronged when she was abused. She was wronged again and again when the videos of her sexual abuse were uploaded to Pornhub and then globally distributed and monetized.¹³ Such things are not protected by the First Amendment. (See, e.g., *Doe v. Mindgeek USA Inc.*, 574 F. Supp. 3d 760, (C.D. Cal. 2021))

As such, the proper measure is rational basis, not strict scrutiny.

13. <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> ; <https://mindgeeklitigation.com/asset/2021.06.17%20-%20Dkt.%20001%20-%20Complaint.pdf> ; <https://www.ourcommons.ca/DocumentViewer/en/43-2/ETHI/meeting-18/evidence>

VII. THE USER PRODUCED CONTENT EVIDENCE CRIMINAL ACTIVITY.

Unlike studio-produced material (which is heavily regulated by the state), the user-produced content does not involve paid actors. User-generated material is routinely recorded using inexpensive, readily available devices (such a cellphone). The ease of recording coupled with the prurient interest of a subset of “consumers” has resulted in a substantial volume of recordings that are not of vetted and verified paid performers, like those involved in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). Rather, the content distributed through “free” user-generated pornography sites is largely unverified content, meaning the age and consent of the individuals in the videos and images, along with the uploaders of the content are not checked to ensure the individuals are over eighteen or that they consented to the sexual acts or consented to the uploading of the sexual acts. Because of this, free user-generated pornography often involves recording of illegal activity: sexually abused minors; drugged victims who are raped and abused; trafficking; so-called “revenge” material which was recorded with consent, but then distributed without consent and other forms of illegal image-based sexual abuse. Not mentioned are material which was originally professionally produced but then pirated and distributed through “free” pornography websites. In short, a significant portion of the volume of material available to those who seek to consume material through free pornography sites are evidence of criminal activities, ranging from the rape of children to criminal copyright violations.

JDF does not contend that all material distributed through free sites is a record of criminal activity. That

would be to overstate the case. But the evidence obtained through investigative journalism, litigation, government investigations and victim testimony, demonstrates that such sites are littered with a continually renewed source of criminal material. Indeed, since the sites do not charge for access to the material, and since the sites permit effectively anyone on the planet to upload content, the platforms act like carrion for blowflies (*Calliphoridae*) where the stench attracts favorable attention.

VIII. PORNHUB AND ITS PARENT COMPANY MINDGEEK/AYLO THAT IS BEHIND THE “FSC” HAS KNOWINGLY EXPLOITED VICTIMS SINCE 2007

JDF exists to end impunity for abusers and empower victims of online sexual crime to pursue justice in the courts of law. Ending impunity includes bringing to light the criminal and abusive practices of bad actors and pressuring those in power to hold them accountable.

In the context of nearly two decades in the fight against sex trafficking, Laila Mickelwait has been leading the Traffickinghub¹⁴ global movement for the past five years to hold Pornhub (“Pornhub” means “Pornhub, its parent company MindGeek/Aylo, and its sister sites and subsidiaries”) accountable for enabling and profiting from child abuse, rape, and sex trafficking. For context, by the end of 2020, after capitalizing on the Coronavirus pandemic to increase its site users that included many

14. Traffickinghub is a play on words. It is not a separate organization, but is a movement to create public pressure against the criminal conduct by Pornhub and others who traffic in exploitation.

children stuck at home, Pornhub became the 5th most visited website across the entire internet with over 170 million daily site visitors¹⁵ who were accessing the site's 56 million free, user-generated sex videos and images. Researchers at the time named Pornhub as the third most influential “tech” company in society just behind Facebook and Google. But Pornhub was also an unchallenged crime scene. As two-time Pulitzer Prize-winning journalist, Nicholas Kristof of the *New York Times* reported,

Pornhub prides itself on being the cheery, winking face of naughty, the website that buys a billboard in Times Square and provides snow plows to clear Boston streets. It donates to organizations fighting for racial equality and offers steamy content free to get people through Covid-19 shutdowns . . . Yet there's another side of the company: Its site is infested with rape videos. It monetizes child rapes, revenge pornography, spy cam videos of women showering, racist and misogynist content, and footage of women being asphyxiated in plastic bags. A search for “girls under18” (no space) or “14yo” leads in each case to more than 100,000 videos . . .¹⁶

The Traffickinghub movement to hold Pornhub, its owners, and parent company accountable was launched

15. Testimony of Pornhub/MindGeek CEO Feras Antoon, February 5, 2021 <https://www.ourcommons.ca/DocumentViewer/en/43-2/ETHI/meeting-19/evidence>

16. <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html>

in 2020. Today, the Traffickinghub petition¹⁷ to shut down Pornhub for enabling and profiting from sex trafficking has been signed by over 2.3 million people from every country in the world. Thousands of media pieces have been written exposing the monetized crime on the site. The secret majority shareholder of the company was located and exposed¹⁸ and has been sued in U.S. federal court by dozens of child and adult Pornhub victims.¹⁹ After confirming the ubiquity of commercialized illegal content on the site, Visa, Mastercard, and Discover joined PayPal in cutting off all transactions in July 2022.²⁰

From 2020-2024, Pornhub has been forced to take down 91% of the entire website because it was unverified content infested with child abuse, rape, and sex trafficking in what the *Financial Times* called “probably the biggest takedown of content in Internet history.” In 2023, Pornhub and its parent company MindGeek/Aylo were criminally charged by the U.S. Federal Government for knowingly and intentionally profiting from the proceeds of over 100 adult sex trafficking victims who were abused by the Girls Do Porn sex trafficking operation out of

17. [Traffickinghubpetition.com](https://traffickinghubpetition.com)

18. <https://www.tortoisemedia.com/audio/hunt-for-the-pornking/>

19. <https://www.cbsnews.com/video/lawsuit-accuses-pornhub-of-operating-like-a-criminal-enterprise/> and https://drive.google.com/drive/folders/1ivabGpO3U25YzM_PhV9a6n84fzqhHr5?usp=share_link

20. <https://www.cnbc.com/2022/08/04/visa-suspends-card-payments-for-ad-purchases-on-pornhub-and-mindgeek-amid-controversy.html>

California.²¹ To date, nearly 300 victims have brought claims in 25 lawsuits, including multiple certified class actions that represent tens of thousands of child sexual abuse victims. In 2023, Pornhub and its parent company were sold as a distressed asset to a hastily concocted private equity firm that deceptively named itself “Ethical Capital Partners.” As reported by TIME Magazine, the new ownership group consists of criminal defense attorneys with a history of defending pedo-criminals along with cannabis entrepreneurs. In an effort to distance from Pornhub’s toxic reputation as a peddler of crime, the new ownership group renamed Pornhub’s parent company from MindGeek to Aylo. However, no amount of rebranding or whitewashing will make the truth about the site go away, and it certainly will never erase the trauma caused to the countless victims of the site whose lives have been permanently shattered by this predatory pornography conglomerate.

It is in JDF’s interest as an organization and the interest of the victims of these sites to allow the Court to consider the truth of the type of content being distributed on Pornhub, its many sister sites, and the other free user-generated pornography websites around the world that operate like them.

It must be noted that because Pornhub has set a global standard by executing a “profit at any cost” business model since its inception in 2007, it has created a business model utilized by ostensible competitors. This is the way business

21. <https://www.justice.gov/usao-edny/pr/pornhub-parent-company-admits-receiving-proceeds-sex-trafficking-and-agrees-three-year>

(in the online user-generated pornography industry) is now done.

IX. THE FIFTH CIRCUIT RIGHTFULLY MEASURED THE LAW BY A RATIONAL BASIS TEST

As this court is aware, the government reviewed the decision under a rational basis test:

First, we vacate the injunction against the age-verification requirement based on *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), which remains binding law, even after *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). The proper standard of review is rational-basis, not strict scrutiny. Applying rational-basis review, the age-verification requirement is rationally related to the government's legitimate interest in preventing minors' access to pornography. Therefore, the age-verification requirement does not violate the First Amendment. Further, Section 230 does not preempt H.B. 1181. So, the district court erred by enjoining the age-verification requirement.

(*Free Speech Coal. v. Paxton*, 95 F.4th 263, 267 (5th Cir. 2024)) It is incontestable (as a practical matter) that the law passes constitutional muster should the Court examine the statute under a rational basis test:

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

(*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); see *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) [“On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity”])

Amicus does not contest the proposition that if the statute were to prohibit adults from accessing *legal* pornography, that such a statute could withstand strict scrutiny review. (*United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) [“Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny]; see also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 312 (2010) [“Laws burdening such speech are subject to strict scrutiny,”]) But that is not what is at issue in this case. The rational basis review applies when crime is involved or furthered by the speech act.

X. PROTECTING CHILDREN IS APPROPRIATE

The Fifth Circuit writing on a similar issue recently provided ample argument in favor of the public policy to protect minors from pornography:

Even if strict scrutiny were to apply, states have a profound interest in protecting the innocence of children from various adult activities. We don't let children buy alcohol. We don't let them gamble. They're not supposed to smoke. *See, e.g.*, 21 U.S.C. § 387f(d)(5) (tobacco); 23 U.S.C. § 158 (alcohol); CONN. GEN. STAT. § 12-576 (gambling). We also shield them from sexually explicit materials. Nothing in the First Amendment prevents states from taking steps to shield children from such content. (*See, e.g., Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (“The well-being of its children is of course a subject within the State’s constitutional power to regulate,” “justify[ing] . . . limitations . . . upon the availability of sex material to minors”); *FCC v. Pacifica Found.*, 438 U.S. 726, 749, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (“Bookstores and motion picture theaters . . . may be prohibited from making indecent material available to children.”); *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (“we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights”); *Thompson v. Oklahoma*, 487 U.S.

815, 824, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (in all “50 States,” “no one under age 16 may purchase pornographic materials”); *see also Pope v. Illinois*, 481 U.S. 497, 516 n.11, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) (Stevens, J., dissenting) (“As for prohibiting sale or exhibition of sexually explicit material to minors . . . it has long been established that the State may go beyond the constitutional definition of obscenity.”).

(*Book People, Inc. v. Martha Wong*, 98 F.4th 657, 659 (5th Cir. 2024)) This Court has explained that protecting children is an appropriate goal of a government:

The protection of children clearly constitutes a “public welfare” interest justifying regulation of speech in certain circumstances. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (addressing constitutionality of two provisions of Communications Decency Act of 1996 intended to protect children from “indecent” and “patently offensive” material on Internet, but finding statutory provisions overbroad); *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (upholding FCC restrictions on broadcast in part because of broadcast’s “unique accessib[ility] to children”); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (upholding statute prohibiting sale of obscene materials to minors); *see also Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (stating that “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of

young people into full maturity as citizens”). Of particular importance here, the Supreme Court has consistently upheld restrictions on First Amendment freedoms to combat the “extraordinary problem” of child pornography. See *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

(*U.S. v. Matthews*, 209 F.3d 338, 342 (4th Cir. 2000))
Protecting children is good. Exploiting children is bad. Rape is bad. Recording the rape is worse. Turning a profit off of the rape compounds the wrong. This is not a matter to dispute.

It is true that one could circumvent the barrier, but that does not make the barrier wrong. The perfect should not crowd out the good.

CONCLUSION

Speech is protected. This is a good universally agreed. But not everything recorded and broadcast is protected by the First Amendment. This Court has granted protection for studio-produced, legal pornography. But the Courts will not give First Amendment protection to everything merely because it was recorded. A conman uses the telephone to commit a fraud. He cannot raise the First Amendment as a defense on the ground he talked when committing the fraud. A murderer “livestreams” a murder. He cannot raise the First Amendment as a defense to the murder because it was broadcast. “Free” user-generated internet pornography is littered with countless videos of child sexual abuse, rape, trafficking and criminal image-based sexual abuse. Surely this Court will not

grant rapists protection because the rapist recorded and Pornhub distributes and profits from it.

Texas did not restrict speech. It restricted crime from being accessible to minors. The rationale basis standard is the appropriate basis for evaluating the law.

Respectfully submitted,

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