

No. 23-1122

In the Supreme Court of the United States

FREE SPEECH COALITION, INC., ET AL,

Petitioner,

v.

KEN PAXTON, Attorney General of Texas,

Respondent.

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

**BRIEF OF AMICUS CURIAE
THEM BEFORE US
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE**

Them Before Us is a nonprofit, children’s rights organization committed to putting the rights, needs, and well-being of children ahead of the desires and agendas of adults. *See About, Them Before Us*, <https://thembeforeus.com/whoweare/> (last visited November 21, 2024).

Texas’s age-verification law directly implicates this mission. The challenged law requires that pornography peddlers take commercially reasonable steps to keep children from accessing sexual content online. That requirement protects the rights, needs, and well-being of children. Pornography “can contribute to the sexual abuse of children and the sex trafficking of children and women.” American College of Pediatricians, *The Impact of Pornography on Children* at 5 (August 2024 update), <https://perma.cc/86FJ-M9GH>. It “is used to groom children for sexual abuse,” *id.*, and “can lead to the physical exploitation of children,” *id.* at 4. Even for kids who avoid exploitation, early exposure to pornography robs them of their God-given right to innocence.

The petitioners do not dispute any of this. Still, they oppose the age-verification law. That law, they argue, will chill speech by making *adults* feel less comfortable viewing online pornography. This is precisely the sort of adults-first logic that Them

* No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 37.6.

Before Us exists to oppose. For that reason, Them Before Us files this brief urging the Court to reject the petitioners' arguments.

SUMMARY OF ARGUMENT

The petitioners rely on abstract legal principles to obscure the reality of the “speech” at issue. For example, while the petitioners claim that Texas’s age-verification law risks “chilling access to protected sexual expression,” Br. for Petitioners (“Petr. Br.”) at 11, they avoid providing any detail regarding what the supposed “expression” consists of.

Those details are no doubt disturbing. But this Court must resist the urge to “recast the facts in sterile abstraction.” *O’Bryan v. Estelle*, 714 F.2d 365, 389 (5th Cir.1983) (Higginbotham, J, special concurrence). Here, as in other contexts, “abstract analysis can only go so far; indeed, it may obscure what matters most.” *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2296 (2024) (Kagan, J., dissenting).

The Court should resolve this case with a full understanding of the products Texas’s age-verification law regulates. Texas’s brief provides some insight. It describes, for example, a video in which “five men tie a young woman down with electrical tape and take turns penetrating her orally, vaginally, and anally—sometimes simultaneously.” Br. for Respondent (“Texas Br.”) at 4. It notes the prevalence of videos involving “sexual activity between people and animals,” plus those “involving urine or feces.” *Id.* at 8 (alteration accepted). And it discusses “hentai, a cartoon introduction to violent

pornography which commonly features a grotesque creature penetrating a girl with an enormous phallus or tentacle—acts which, if performed in real life, would result in severe injury or death.” *Id.* at 5 (quotation marks omitted).

This short brief builds on Texas’s efforts. *Them Before Us* shares concrete examples of what a minor would encounter on just one mainstream website—examples it collected with assistance from a former state and federal law-enforcement officer with experience investigating child exploitation and sexual abuse material. The brief additionally directs the Court to data regarding the awful effects of children’s accessing this material. The Court must not turn a blind eye to the reality of the “speech” the petitioners seek to protect. It should decide this case with its eyes wide open.

ARGUMENT

The petitioners portray “sexual content online” as, at least arguably, “artistic, informative, or even essential to important parts of career and life.” *Petr. Br.*1. And they launder their product by placing it in the same categories as sexually themed works by Shakespeare or “*Aristotle’s Masterpiece*.” *Id.* at 18 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246–48 (2002)). From their brief, one would get the impression that Texas’s law regulates high art—Michelangelo’s *David*, perhaps, or the reclining nudes that Justice Kagan discussed in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 587–88 (2023) (Kagan, J., dissenting).

The Court must not be misled. Texas’s law is directed at obscene, often violent sexual displays of no artistic or informational value. Indeed, very little of it “expresses” anything at all, and much of it simply records sadistic, real-life behavior.

“An old proverb warns us to take heed lest we ‘walk into a well from looking at the stars.’” *Terminiello v. City of Chicago*, 337 U.S. 1, 14 (1949) (Jackson, J., dissenting). This “Court is in some danger of doing just that” if it relies exclusively on formulaic abstractions regarding the (undoubted) importance of free expression. *Id.* *Them Before Us* aims to “bring these deliberations down to earth.” *Id.* It does so by focusing on the supposed “expression” about which the petitioners fret. We are not dealing here with Shakespeare or even *Aristotle’s Masterpiece*.

Indeed, an earlier work has more relevance to this case. “Unless” the Court is “to reach judgments as did Plato’s men who were chained in a cave so that they saw nothing but shadows,” it must “consider the facts” on the ground. *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (Jackson, J., concurring in result). Those facts leave no doubt regarding the nature of the petitioners’ speech and the need for a law like Texas’s.

I. Pornography is widely available and easily accessible online.

“Sex ... has indisputably been a subject of absorbing interest to mankind through the ages.” *Roth v. United States*, 354 U.S. 476, 487 (1957). Today, people have easy access to sexual material through the internet. And easy access begets

frequent use. Pornhub, the most popular pornographic site, attracted 5.49 *billion* monthly website views as of May 2024, according to Statista. *See Most popular pornographic websites worldwide as of May 2024, by total visits*, Statista (Sept. 2, 2024), <https://perma.cc/DQ8M-B7TU>.

Pornographic “content triggers neurological effects akin to gambling.” Tex. Br.3 (citing Todd Love, *et al.*, *Neuroscience of Internet Pornography Addiction: A Review and Update*, 5(3) Behavioral Sciences 388 (2015)). Pornhub and other sites take full advantage of this, coupling an addictive product and easy access with sophisticated algorithms that cater to user preferences. The algorithms work much like those on social-media websites, identifying videos likely to appeal to the tastes of individual users. *Cf. Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2404 n.5 (2024). Pornhub, for example, features a “Recommended” tab, in which “videos are [recommended] based on your browsing history and/or popular videos from your location.”

Many of these sites host third-party content—videos uploaded by users rather than by the website operator itself. As a result, websites often do not know who is posting the video, whether the participants consented, whether they are adults, and so on. Even when websites *try* to gatekeep these matters, those gates are easily jumped. Just last year, twenty-six state attorneys general wrote Pornhub’s parent company to warn of a “loophole” in Pornhub’s moderation practices.” *See Letter from 26 Attorneys General to Matt Kilicci and Solomon Friedman* (Sept. 29, 2023), <https://perma.cc/V434-Q9GV>. This loophole existed because

Pornhub required performers to “produce a photo ID to open an account” but did “*not* require[]” that performers “show their faces in the content they upload to the site.” *Id.* at 2. That made it impossible “to confirm that the content actually features the performer/content creator that upload[ed] the content.” *Id.*

Truth be told, there is no way to *ensure* that videos uploaded by third parties feature only consensual acts, do not involve sex-trafficking victims, or do not include minors. Websites can do their best. But, given the volume of uploads, their best will never approach perfection.

This hard-to-monitor material is readily accessible to kids. Even a decade ago, studies found that kids were, on average, accessing pornography for the first time between 12 and 13 years old. See Shane Kraus & Harold Rosenberg, *The Pornography Craving Questionnaire: Psychometric Properties*, Archives of Sexual Behavior 43(3), table 2 (2014) (available for download at <https://tinyurl.com/CravingQ>). Today, 12 is the average age at which a child obtains a cell phone, on which pornography can be easily and secretively accessed. See Aliah Richter, *et al.*, *Youth Perspectives on the Recommended Age of Mobile Phone Adoption: Survey Study*, 5(4) JMIR Pediatrics & Parenting at 4 (2022) (archived at <https://perma.cc/BU7L-8B9E>). It is thus to be expected that many children today can and do access pornography even before turning 12.

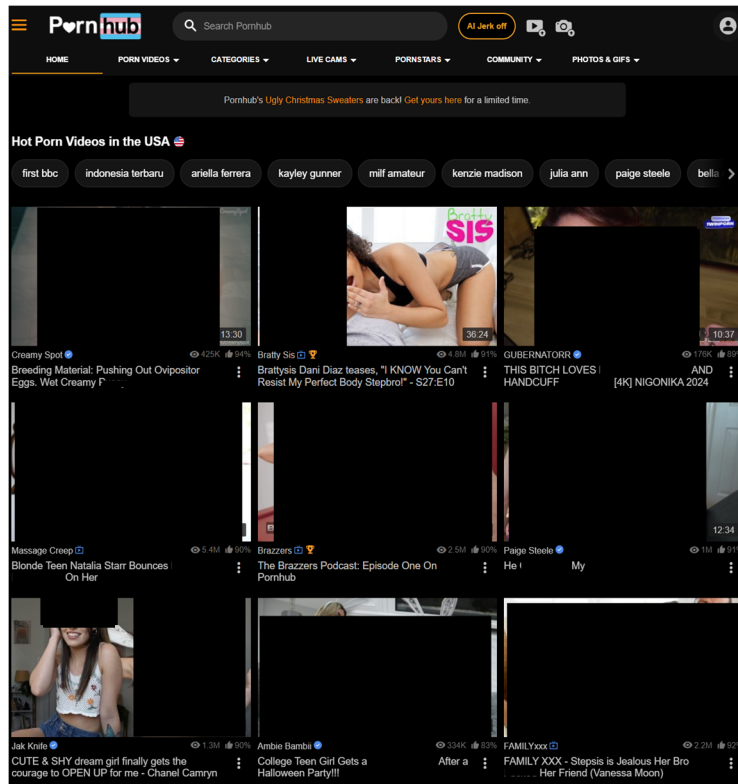
Research confirms what common sense suggests: early access to pornography harms minors.

For example, “children less than 12 years of age who disclosed engaging in pornography viewing were at significantly higher odds of engaging in” what are called “problem sexualized behaviors”—behaviors involving “sexual knowledge beyond what would be expected for the child’s age and developmental levels.” Gail Hornor, *Child and Adolescent Pornography Exposure*, 34(2) *J. of Pediatric Health Care* 191, 194 (March/April 2020), <https://tinyurl.com/Hornor2020>.

II. Pornhub and other websites host conscience-shocking content.

“It is a mistake to think of Playboy, Penthouse, or even Hustler when discussing the contemporary ... online porn industry.” JA.158. “Rather than the images of yesterday, which showcased pinup pornography, today’s mainstream pornography is violent, body-punishing, and cruel.” *Id.* Given Pornhub’s success in the industry, its content provides a helpful example of the sort of material Texas enacted its law to address.

The Pornhub homepage is easily accessed via its uniform resource locator (URL): “pornhub.com.” A child logging into the page would immediately see a variety of free videos available for access. Here is a (heavily redacted) screenshot of the website’s homepage.



To repeat, this is the home page—the first thing a user sees. Indeed, it is a *cropped* version of the home page, showing the redacted thumbnails for just nine videos. Those thumbnails required redaction, as they depicted sexual acts, nudity, ejaculate, and other images too vile for inclusion in a brief. But a child accessing the page would see all that immediately.

In the screenshot above, Them Before Us also redacted portions of the videos' titles. But even the unredacted portions include allusions to incest (“Brattysis Dani Diaz teases, ‘I KNOW You Can’t Resist My Perfect Body Stepbro!’”) and violence

(“THIS B**** LOVES [REDACTED] AND [REDACTED] HANDCUFF [REDACTED] ...”).

Note that a child accessing this page need not even conduct a search or log in to start watching pornography. He can simply click on a thumbnail. This means that anyone with elementary proficiency on the internet—including the vast majority of school-age children—can access this material with ease.

Note also the “categories” link at the top. There, with one click, a child (or anyone else) can gain access to collections of videos categorized under headings like “Babysitter,” “Bondage,” “Cartoon,” “Gangbang,” “Hentai,” “Old/Young,” “Rough Sex,” “School,” and “Step Fantasy.” (No screenshot could be included, as the category names appear over pictures that would need to be redacted.)

The last of those categories—“Step Fantasy”—features videos from the “step-incest” genre. That immensely popular category features “sex between family members who are not biologically related, such as stepbrothers and stepsisters; stepsisters; stepsons and stepmothers; and stepfathers and stepdaughters (stepbrothers is also a popular genre on Pornhub’s gay videos).” Alexandre Lefebvre, *Why Is Step-Incest Porn So Insanely Popular Right Now?*, *The Daily Beast* (May 31, 2024) (archived version available at <https://perma.cc/W9Y5-BHUD>). On November 11, Pornhub featured at least one such video on its homepage—a twelve-minute video entitled “I gave my stepmom a massage and then f***** her roughly with a c*****t on her face.” The video—which has been

viewed over a million times—purports to capture vaginal and oral sex between a stepmother and stepson. Even a child who declined to watch the video would have seen a thumbnail in which a woman is seen manually stimulating the genitals a man held out as her stepson.

Videos like this are not *Casablanca*. They are not even “the latest *Zoolander*.” *Lockhart v. United States*, 577 U.S. 347, 362 (2016) (Kagan, J., dissenting). They are pure obscenity, often expressing no substance whatever. And they expose any child who encounters them to degrading messages about sex, men, women, and even family.

If the promotion of fantasies about incest were not bad enough, the “industry has seen a dramatic increase in what is commonly called ‘choking’ but is in reality defined by medical science as ‘nonfatal strangulation.’” JA.158. This “poses grave neurological harms to victims, including unconsciousness, brain injury, seizure, motor and speech disorders, memory loss, and post-traumatic stress disorder.” *Id.* Choking videos are abundant on Pornhub. Consider “Spit in My Mouth and Steal My Soul,” in which a woman is strangled during sex. She visibly and audibly gasps for air, her face turning red from lack of blood flow. That video has over 2 million views.

Such images have potentially deadly real-world effects. “Pornography has now become *the* major form of sex education for children.” JA.157 (emphasis added). And young people are absorbing its lessons. With respect to choking, “a recent undergraduate probability survey study” found that “*nearly*

one-third of undergraduate women reported being choked by a partner during their most recent sexual event.” Megan E. Huibregtse, *et al.*, *Frequent and Recent Non-fatal Strangulation/Choking During Sex and Its Association with fMRI Activation During Working Memory Tasks*, 16 *Frontiers in Behavioral Neuroscience* 2 (June 2022) (emphasis added), <https://perma.cc/8FEL-2JT2>. To be clear, that does not mean that one-third of undergraduate women have been choked during sex *at some point*—though that would be bad enough. It means that one-third of undergraduate women claim to have been choked the last time they engaged in sexual activity.

That is immensely concerning. For one thing, being choked can obviously lead to serious injury or death. And it can lead to other, less-visible injuries too. For example, “being choked frequently during sex could result in changes in neural structure and function, and this effect could be compounded when this behavior is experienced during late adolescence and early adulthood.” *Id.* at 11. Then there are the mental-health risks. “Undergraduate women with a history of being choked more than five times during sex within the past 30 days were 2.19 times” more likely than women who had never been choked “to endorse experiencing overwhelming anxiety, 2.16 times more likely to report feeling very sad, 1.59 times more likely to report being very lonely, and 1.77 times more likely to feel ‘so depressed that it was difficult to function.’” *Id.* at 8.

Choking is not the only form of violence a child might stumble upon. One study found “that sexual

violence in pornography is mainstream, comprising one in eight titles shown on the home pages of the United Kingdom’s most popular sites.” Fiona Vera-Gray, *et al.*, *Sexual violence as a sexual script in mainstream online pornography*, 61 *The British Journal of Criminology* 1243, 1244 (2021) (available for download at <https://tinyurl.com/VeraGray>). Pornhub is among the sites the study reviewed. *Id.* at 1246. The same study “found that far from being represented as aberrant, sexual practices involving coercion, deception, non-consent and criminal activity are described in mainstream online pornography in ways that position them as permissible.” *Id.* at 1244.

All this has predictable effects. “Boys exposed to violent pornography were 2–3 times more likely to report [teen dating violence] perpetration and victimization,” according to one study. Whitney L. Rostad, *et al.*, *The Association Between Exposure to Violent Pornography and Teen Dating Violence in Grade 10 High School Students*, HHS Public Access, Author Manuscript at 1 (2019), <https://perma.cc/ZU9N-59A8>. Other research shows that “[y]outh reporting exposure to sexually violent pornography were 24 times more likely to perpetrate sexually aggressive behaviors in comparison with their non-pornography viewing peers.” Hornor, *Child and Adolescent Pornography Exposure*, 34 *J. of Pediatric Health Care* at 195. “This increased likelihood of engaging in sexually aggressive behaviors was not gender-specific; both boys and girls viewing pornography, especially sexually violent pornography, were much more likely to engage in sexually aggressive behaviors.” *Id.*

Pornhub’s own data suggests still more reason for concern. “Pornhub Insights” collects data on user preferences and searches. And the “2023 Year in Review” page reveals some alarming trends. *See 2023 Year in Review*, Pornhub Insights (archived version accessible at <https://perma.cc/6QQT-Z7Q8>). For one thing, “hentai” tops the list of most-searched terms. Texas’s brief describes this genre as “commonly featur[ing] a grotesque creature penetrating a girl with an enormous phallus or tentacle—acts which, if performed in real life, would result in severe injury or death.” Texas Br.5. “Pre-pubescent children ... are particularly drawn to hentai.” *Id.* at 41.

The page that loads if one clicks on the “Hentai” category is filled with thumbnails showing animated characters engaged in sex acts. A child who browses this category might stumble upon “Tifa underwater hentai!” In that bit of computer-generated cinema, a sea monster holds a realistic-looking woman underwater while vaginally penetrating her with numerous large tentacles at once. The video thus combines sex, violence, and bestiality, all packaged in video-game-like graphics of the sort one finds in films marketed to minors. It has over 1 million views. There is no way to know how many of those views are attributable to children.

Pornhub’s “2023 Year in Review” additionally reports that, in the United States, “gangbang” saw a “substantial increase of +12 spots this year compared to last.” The term “gangbang” colloquially refers to the successive rape of one person by a group of people.

A child searching this term would encounter dehumanizing content. Entering the search term “gangbang” on November 11, 2024 yielded 41,658 search results. The video entitled, “Lana Rhoades First Gangbang – F*****d Hard in All Holes” has been viewed *63.1 million* times. The seven-minute video features a woman surrounded by numerous men. She performs fellatio on some men before engaging in vaginal and anal sex with members of the group, sometimes simultaneously. The video concludes with men ejaculating onto her face. Other such videos abound. At argument, perhaps the petitioners’ counsel will explain to those lacking the sophistication of a film critic how this work is “artistic, informative, or even essential to important parts of career and life.” Petr. Br.1.

What lessons would a child draw from material like this? Is a boy who regularly views this material more or less likely to view women as objects for sexual satisfaction, as opposed to individuals entitled to respect? Is a girl who views the oeuvres of Ms. Rhoades and her peers more or less likely to view self-degradation as a means of attracting suitors? Will watching these videos make either child more likely to enter adulthood with an improved understanding of what a healthy sexual relationship looks like? The questions answer themselves.

* * *

As the foregoing shows, the Court is not dealing here with a law that regulates “artistic” or “informative” expression. Petr. Br.1. Nor is the content on websites like Pornhub “essential to

important parts of career and life.” Petr. Br.1. Humans survived for millennia—they found work and raised families—without videos of women being violently deprived of oxygen during sexual intercourse. Human flourishing never required footage of purported incest, bestiality, or the sort of degradation one finds on Pornhub and similar websites. This Court’s lofty rhetoric regarding the importance of free expression must not obscure the truth about the product the petitioners peddle.

In any event, Texas’s age-verification law does not bar adults from producing or viewing online pornography. If “Spit in My Mouth and Steal My Soul” is “essential to important parts” of an adult Texan’s life, he may continue to view it online. The law in question requires only that pornographic websites take steps to keep children from accessing such material—material that even the petitioners acknowledge children have no constitutional right to view. If websites cannot provide this material without denying access to kids—if they cannot internalize this small portion of the costs their activities impose on society—the public will benefit from their closure.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

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