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HOUSE JOINT RESOLUTION 133

By DeBerry

A RESOLUTION relative to safer internet for children.

WHEREAS, since 2016, eight states, including Tennessee, have passed resolutions declaring pornography a public health crisis, acknowledging the need for education, prevention, research, and policy change at the community and societal level, and other states have declared pornography a public health risk or hazard; and

WHEREAS, pornography presents youth with a distorted and often debased and violent image of human sexuality, devoid of sensitivity, mutuality, interpersonal connection, and responsibility; and pornography-fueled compulsive sexual behaviors, which often begin in childhood and adolescence, prevent, damage, and destroy relationships; and

WHEREAS, the U.S. Supreme Court in Miller v. California, 413 U.S. 15 (1973) held that obscene material is "unprotected by the First Amendment" (413 U.S. at 23) and that obscenity laws can be enforced against "'hardcore' pornography" (413 U.S. at 28); and

WHEREAS, the Supreme Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) recognized that there are "legitimate governmental interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles" (413 U.S. at 57). [These "governmental interests" include maintaining "a decent society" (413 U.S. 59) and protecting the "social interest in order and morality" (413 U.S. at 61), "public safety" (413 U.S. at 58), and "family life" (413 U.S. at 63)]; and

WHEREAS, in Ginsberg v. New York, 390 U.S. 629, 639-40 (1968), the Supreme Court stated that not one but "two interests" justify legal limitations upon the availability of pornography to minors. Government may not only enact laws [for example, 47 U.S.C. 230(d)] to aid parents in the discharge of their "primary responsibility for children's well-being."

Government may also enact laws because it has an "independent" and "transcendent" interest in protecting the welfare of children and because "parental control or guidance cannot always be provided"; and

WHEREAS, to protect the American people, including children, Congress enacted legislation in 1988 to strengthen federal obscenity laws and in 1996 to amend 18 U.S.C. 1462 & 1465 to clarify that use of an interactive computer service to transport obscene matter is prohibited; and

WHEREAS, by focusing its obscenity law enforcement efforts on major internet distributors of commercialized obscenity, the U.S. Justice Department could help protect the nation and substantially reduce children's exposure and access to hardcore internet pornography; and

WHEREAS, in 1998, Congress enacted the Child Online Protection Act (COPA) to require websites that commercially distribute sex material to restrict minors' access to material deemed "harmful to minors"; and had this reasonable and needed law been upheld, as it should have been, countless children would have been shielded from exposure to internet pornography; and

WHEREAS, in Ashcroft v. ACLU, 542 U.S. 656 (2004), the Supreme Court, applying "strict scrutiny," failed to uphold COPA, reasoning that there was a "plausible, less restrictive alternative to COPA"—namely, "blocking and filtering software"; and

WHEREAS, in Ashcroft v. ACLU (2004), Justice Antonin Scalia dissented, saying the Court "err[ed]…in subjecting COPA to strict scrutiny. Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review." Ashcroft v. ACLU, 542 U.S. at 676 (Scalia, J., dissenting); but cf., American Booksellers v. Webb, 919 F.2d 1493, 1500-02 (11th Cir. 1990), cert. den., 500 U.S. 942 (1991) (applying intermediate scrutiny to a "harmful to minors" display law); and

WHEREAS, the "less restrictive" means test would make sense if there were two alternatives, either of which could effectively address the problem but one of which placed a greater burden on protected speech. Some societal problems, however, do not permit an

either-or choice between effective means; and protecting children from internet pornography is one such problem. Ashcroft v. ACLU, 542 U.S. 656 (2004) (Breyer, J., dissenting); and

WHEREAS, the news media, government agencies and nonprofits, public officials, schools, internet service providers, software companies, and even the "adult entertainment industry" all vigorously promoted parental use of blocking/filtering software. But reliance on parental use of blocking/filtering software alone has failed to protect children; and

WHEREAS, if a child walked into an "adult bookstore," he or she would be told to leave because it is against the law to sell pornography to children in real space. But if that same child "clicked" to most commercial websites that distribute pornography, he or she could view hardcore pornography, without restriction, that depicts, among other things, "barely legal" teens, bestiality, bondage, child pornography (i.e., child sex abuse images), choking, flogging, gangbangs, "golden showers" (urine), "scat" (feces), group sex, incest, prostitution, pseudo child porn, rape, torture, and paraphilias; and

WHEREAS, technology is available for internet service providers to protect children and families from the instant access to internet pornography on fixed and mobile devices through various proprietary and cloud-based solutions, without the use of additional hardware and software, and that is reasonably and commercially unburdensome; and

WHEREAS, internet service providers could help significantly reduce children's exposure and access to internet pornography were they to voluntarily block access to internet pornography by default but allow adult customers to opt-out of protections; now, therefore,

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDRED ELEVENTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE SENATE CONCURRING, that we call upon the U.S. Justice Department to vigorously enforce federal obscenity laws against internet purveyors of commercialized obscenity and Congress to readdress the crisis problem of children being exposed to and purposefully accessing internet pornography.

BE IT FURTHER RESOLVED, that we call upon internet service providers to voluntarily utilize the most effective and affordable technology now available to block access to internet

pornography by default but allowing adult customers to opt-out of protections that block access to content that is protected by the Constitution.

BE IT FURTHER RESOLVED, that an enrolled copy of this resolution be transmitted to the U.S. Attorney General, the Speaker of the U.S. House of Representatives, the Majority Leader of the U.S. Senate, and each member of the Tennessee congressional delegation.