APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23-50627

FREE SPEECH COALITION, INCORPORATED;
MG PREMIUM, LIMITED; MG FREESITES,
LIMITED; WEBGROUP CZECH REPUBLIC. A.S.;
NKL ASSOCIATES, S.R.O.; SONESTA TECHNOLOGIES, S.R.O.; SONESTA MEDIA, S.R.O.;
YELLOW PRODUCTION, S.R.O.; PAPER STREET MEDIA, L.L.C.;
NEPTUNE MEDIA, L.L.C.; JANE DOE;
MEDIAME, S.R.L.; MIDUS HOLDINGS, INCORPORATED,

Plaintiffs—Appellees,

versus

KEN PAXTON, *Attorney General, State of Texas*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-917

Before HIGGINBOTHAM, SMITH, and ELROD, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

Texas H.B. 1181[1] was scheduled to go into effect on September 1, 2023. It imposes new standards on commercial pornographic websites, requiring them to verify the age of their visitors and to display health warnings about the effects of the consumption of pornography. Free Speech Coalition, Incorporated, an adult industry trade association; several domestic and foreign corporations that produce, sell, and host pornography; and one individual adult content creator brought a facial challenge against the enforcement of H.B. 1181. The day before the law was scheduled to take effect, the district court granted plaintiffs' motion for a preliminary injunction in an 81-page order. *Free Speech Coal., Inc. v. Colmenero*, No. 1:23-CV-917, 2023 WL 5655712, at *30 (W.D. Tex. Aug. 31, 2023). The court concluded that: (1) both the age-verification requirement and the health warnings of H.B. 1181 likely violate plaintiffs' First Amendment rights, and (2) as to certain plaintiffs, the law likely conflicts with, and thus is preempted by, Section 230 of the Communications Decency Act, 47 U.S.C. § 230. Then the court ruled that plaintiffs had satisfied the other preliminary injunction factors.

Texas filed an emergency appeal, and this court issued an administrative stay, ordered expedited briefing, and heard oral argument two weeks later. A month after argument,

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[1] *See* Publication or Distribution of Sexual Material Harmful to Minors on an Internet Website; Providing a Civil Penalty, 2023 TEX. SESS. LAW SERV. Ch. 676 (H.B. 1181) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 129B.001 *et seq*.).

this panel granted Texas's motion to stay the district court's injunction pending appeal. We now vacate that stay and rule on the merits of the preliminary injunction.

First, we vacate the injunction against the age-verification requirement based on *Ginsberg v. New York*, 390 U.S. 629 (1968), which remains binding law, even after *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656 (2004).[2] 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.

Second, we affirm the injunction in regard to the health warnings. The district court properly applied *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 585 U.S. 755, 766 (2018), and ruled that H.B. 1181 unconstitutionally compelled plaintiffs' speech.

I.

H.B. 1181 regulates only certain entities, specifically, "commercial entit[ies] that knowingly and intentionally publish[] or distribute[] material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors." § 129B.002(a). Those regulated entities must take two actions.

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[2] *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793–94 (2011) (discussing *Ginsberg*'s treatment of "*sexual* material that would be obscene from the perspective of a child").

First, they must "use reasonable age verification methods" to limit their material to adults. *Id.* Second, they must "display notices on the landing page of the website and on all advertisements for that website in 14-point font or larger." § 129B.004(1) (cleaned up).

The newly enacted statute defines sexual material harmful to minors by adding "with respect to minors" or "for minors," where relevant, to the well-established *Miller* test for obscenity. *See Miller v. California*, 413 U.S. 15, 24 (1973).[3] It also mimics the language of 47 U.S.C. § 231, which the Supreme Court reviewed in *Ashcroft II*.[4]

Regulated entities may choose their preferred "reasonable age verification methods," including by outsourcing the process to a third party. §§ 129B.002–129B.003. The options include the use of government-issued identification. *See* § 129B.003(b)(2)(A).

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[3] The law defines "[s]exual material harmful to minors" as material that

> (A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;
>
> (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or primarily consists of descriptions of actual, simulated, or animated displays or depictions of [explicitly described sexual material]; and
>
> (C) taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

§ 129B.001(6).

[4] *See* Omnibus Cons. & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, §§ 1401–06 (1998) (also referred to as the "Child Online Protection Act," hereinafter "COPA").

But the websites may alternatively require digital identification or may use other "commercially reasonable method[s]." § 129B.003(b)(1), (2)(B). Further, whoever performs the verification may not retain any of the individual's identifying information. § 129B.002(b).

The websites must also show three health warnings on their landing pages and advertisements. § 129B.004(1).[5] Additionally, the entities must place a notice at the bottom of every webpage. § 129B.004(2).[6]

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[5] The warnings read,

> TEXAS HEALTH AND HUMAN SERVICES WARNING: Pornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function.
>
> TEXAS HEALTH AND HUMAN SERVICES WARNING: Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses.
>
> TEXAS HEALTH AND HUMAN SERVICES WARNING: Pornography increases the demand for prostitution, child exploitation, and child pornography.

§ 129B.004(1) (internal quotation marks omitted).

[6] That notice reads,

> U.S. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION HELPLINE:
>
> 1-800-662-HELP (4357)
>
> THIS HELPLINE IS A FREE, CONFIDENTIAL INFORMATION SERVICE (IN ENGLISH OR SPANISH) OPEN 24 HOURS PER DAY, FOR INDIVIDUALS AND FAMILY MEMBERS FACING MENTAL HEALTH OR SUBSTANCE USE DISORDERS. THE SERVICE PROVIDES REFERRAL TO LOCAL TREATMENT FACILITIES, SUPPORT GROUPS, AND COMMUNITY-BASED ORGANIZATIONS

§ 129B.004(2).

Should an entity either refuse or fail to comply with H.B. 1181, the Attorney General may seek injunctive relief and civil penalties of up to $10,000 for each day a company lacks age-verification; up to $10,000 for each instance of improper retention of identifying information; and up to $250,000 for a minor's accessing of sexual material harmful to minors. § 129B.006.[7]

Shortly after Texas enacted H.B. 1181 and before it took effect, plaintiffs sued. They claimed, *inter alia*, H.B. 1181 impermissibly encroaches on their First Amendment rights and, for some plaintiffs, conflicts with Section 230.

The district court found that: (1) all plaintiffs have standing and that sovereign immunity does not bar the claims because *Ex parte Young* creates a carveout for suits against state officials where the plaintiffs seek prospective relief for violation of constitutional rights[8]; (2) the age-verification requirement is subject to and fails strict scrutiny under *Ashcroft II* and *Reno*[9]; (3) the health warnings compel speech, so they are subject to, and fail, strict scrutiny; and (4) Section 230 conflicts with and therefore preempts H.B. 1181 as to certain plaintiffs. Thus, the district court believed that

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[7] Those penalties are strictly civil. This law does not criminalize the publication or distribution of obscenity. Another, longstanding Texas law already does so. *See* TEX. PENAL CODE ANN. §§ 43.21–43.23. Texas has not attempted to regulate plaintiffs under those laws, despite its apparent ability to do so.

[8] *See Ex parte Young*, 209 U.S. 123, 159–60 (1908).

[9] *Reno v. ACLU*, 521 U.S. 844, 864–68, 874 (1997).

plaintiffs were likely to succeed on the merits of their claim and to suffer irreparable harm and that the balance of harms and public interest favored a preliminary injunction under *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). So, the court issued a pre-enforcement preliminary injunction. Texas now appeals.

II.

We review preliminary injunctions for abuse of discretion. *Ashcroft II*, 542 U.S. at 664. But such "a decision grounded in erroneous legal principles is reviewed *de novo*." *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)).

Preliminary injunctions are "extraordinary remed[ies] that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[10] The moving party must show

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Mock, 75 F.3d at 577 (quoting *Byrum*, 566 F.3d at 445). And "[t]he government's and the public's interests merge when the government is a party." *Id.* (citing *Nken* v. *Holder*, 556 U.S. 418, 435 (2009)).

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[10] *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 447 (5th Cir.) (quoting *NRDC*, 555 U.S. at 22), *cert. granted*, 144 S. Ct. 275 (2023).

The key issue is whether the district court properly found a substantial likelihood of success on the merits. So, we turn to that first.

III.

A.

H.B. 1181's age-verification requirements are subject to rational-basis review. Applying that standard, we uphold them as constitutional.

1.

"The State has an interest to protect the welfare of children and to see that they are safeguarded from abuses." *Ginsberg*, 390 U.S. at 640 (cleaned up).[11] For that reason, regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review. *See id.* at 641; *see also Ent. Merchs.*, 564 U.S. at 793–94 (quoting *Ginsberg*, 390 U.S. at 641).

Ginsberg dealt with a First Amendment challenge to a New York law criminalizing the sale of so-called "girlie" picture magazines and applied the then-relevant *Memoirs* obscenity standard, modified for children.[12] The Court recognized that the magazines

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[11] Texas is not alone asserting this interest. Seven other states—Arkansas, Louisiana, Mississippi, Montana, North Carolina, Utah, and Virginia—have recently passed similar laws.

[12] *Ginsberg*, 390 U.S. at 632–35 (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Att'y Gen. of Mass.* (*Memoirs*), 383 U.S. 413, 418 (1966) (plurality opinion) (test altered by *Miller*, 413 U.S. at 23–24)).

at issue "are not obscene for adults" but ruled that, because the seller could still stock and sell them to adults, *Butler v. Michigan* did not apply. *Ginsberg*, 390 U.S. at 634–35 (citing *Butler*, 352 U.S. 380, 382–84 (1957) (holding that the state cannot "reduce the adult population of Michigan to reading only what is fit for children")). Instead, New York could criminalize the selling of those magazines to children because "it was not irrational for the legislature to find that exposure to material condemned by the state is harmful to minors." *Id.* at 641.

The decision in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), reaffirmed a robust reading of *Ginsberg*'s principle: "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Id.* at 212 (citing *Ginsberg*, 390 U.S. 629). Crucially, the material regulated by the ordinance in *Erznoznik* was available to both youths and adults.[13] "Assuming the ordinance [was] aimed at prohibiting youths from

[13] The ordinance in question read,

> 330.313 Drive-In Theaters, Films Visible from Public Streets or Public Places. It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense.

Erznoznik, 422 U.S. at 206–07 (citations and internal quotation marks omitted).

viewing the films," the Court did not take issue with the burdens that enforcing the regulation would have on adults. *Id.* at 213. Instead, the Court questioned the regulation's targeting of material, noting that "it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks . . . ." *Id.*

But that is no issue here; H.B. 1181 is restricted to material obscene *for minors*. *Erznoznik* suggests that if—like H.B. 1181—Jacksonville's ordinance had been tailored to material obscene for minors, the Court stood ready to accept Jacksonville's contention that "the . . . ordinance [was] a reasonable means of protecting minors from this type of visual influence." *See id.* at 212.

Ginsberg's central holding—that regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review—is good law and binds this court today. And not only this court. Years after *Reno* and *Ashcroft II*, the Supreme Court, to avoid rational-basis review, felt required to distinguish *Ginsberg* in *Entertainment Merchants*, 564 U.S. at 794. As that Court described it, *Ginsberg* "approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child" because that proscription "'was not irrational.'" *Id.* at 793–94 (quoting *Ginsberg*, 390 U.S. at 641). But the material at issue in *Entertainment Merchants* was violent, not sexual—and *Ginsberg* set out a lower standard only for regulation of certain kinds of *sexual* content. Further, the Court and

its individual Justices have cited *Ginsberg* multiple other times after *Reno* and *Ashcroft II*, albeit for different propositions.[14]

In an attempt to distinguish *Ginsberg*, Plaintiffs pick at the factual dissimilarities between the world of *Ginsberg* and our world. They note that "the Supreme Court recognized that source-based restrictions on Internet expression raise concerns categorically different from those at issue in cases such as *Ginsberg*, given the nature of cyberspace and the breadth and invasiveness of speech burdens in this context."[15] Also, plaintiffs posit that in-person age-verification creates fewer risks to privacy because "[m]any adults are never even asked for their identification in person; their appearance alone suffices."[16] We disagree with those analyses.

First, as plaintiffs admit, the statute at issue in *Ginsberg* necessarily implicated, and intruded upon, the privacy of those adults seeking to purchase "girlie magazines." But the Court still applied rational-basis scrutiny.

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[14] *See Counterman v. Colorado*, 600 U.S. 66, 111 (2023) (Barrett, J., dissenting); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2307 (2019) (Breyer, J., concurring in part); *Elonis v. United States*, 575 U.S. 723, 741 (2015); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 519 (2009).

[15] Though plaintiffs' example of this supposed recognition is *Reno*, which is readily distinguishable. *See infra*.

[16] Of course, one of the allegedly commercially reasonable methods of age-verification confirms age through algorithmic analysis of the user's appearance.

Second, the age-verification requirements do not impose any sort of "categorically different" burden on adults. H.B. 1181 provides that a purveyor of pornography can use "digital verification," "government-issued identification," or other "commercially reasonable method[s]." § 129B.003(b). That allows for *at least* three concrete means of age-verification: (1) government ID, (2) facial appearance, or (3) some other available information used to infer the user's age. At least one of those options will have no more impact on privacy than will in-person age verification à la *Ginsberg*. Moreover, H.B. 1181 punishes entities $10,000 for each instance of retention of identifying information, possibly yielding heavier penalties than would the failure to age-verify.[17]

Third, even were there a gap in privacy concerns as large as plaintiffs suggest, we decline to adopt their notion that such a gap matters. In short, no binding precedent compels us to depart from *Ginsberg* on privacy grounds, and we decline to do so.

Finally, the Supreme Court itself has declined to adopt such a distinction. If the differences between the contemporary world of the Internet and the 1960's world of in-person interaction were sufficient to distinguish *Ginsberg*, the Court would have noted as much in *Reno*. Yet none of the four "important respects" the Court notes

[17] In that respect, H.B. 1181 is more privacy-protective than was the statute in *Ginsberg*, which provided no analogous provision. *Ginsberg*, 390 U.S. at 645–47.

distinguishing the statute in *Reno* from the statute in *Ginsberg* references the Internet at all. *See Reno*, 521 U.S. at 865–66.[18]

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[18] Plaintiffs also contend that *Ginsberg* was a challenge based on the speech rights of minors rather than the speech rights of adults—and that this distinction matters. They attempt to distinguish *Entertainment Merchants* in the same way. That distinction fails for several reasons.

First, it misrepresents what was before the Court in *Ginsberg*. *Ginsberg*, unlike *Ashcroft II*, dealt not with a narrow challenge under an assumed tier of scrutiny. Instead, the challenger brought an exceedingly broad challenge framing the statute as unconstitutionally "restrain[ing] the distribution of literature." Brief for Appellant, *Ginsberg*, 390 U.S. 629 (No. 47), 1967 WL 113634, at *9–10. And the Court construed the challenge in the broadest way possible: "This case presents the question of the constitutionality on its face of a New York criminal obscenity statute . . . ." *Ginsberg*, 390 U.S. at 631 (first line). But most importantly, the Court in *Ginsberg did* have before it the appropriate level of scrutiny for a law of this sort, and it concluded that rational-basis review sufficed.

The same cannot be said for *Ashcroft II*. We will not retcon *Ginsberg*'s central holding, sixty-five years later, to narrow artificially what the Court held: Regulation of the distribution *to minors* of content obscene *for minors* is subject only to rational-basis review.

Instead of following *Ginsberg*, plaintiffs point to two cases that address laws like H.B. 1181 but that applied strict scrutiny: *Reno* and *Ashcroft II*. The former is readily distinguishable. There, the Court reviewed and enjoined the Communications Decency Act of 1996 ("CDA"). *Reno*, 521 U.S. at 849. In doing so, it recognized four "important respects" in which the CDA and the statute in *Ginsberg* differed. *Id.* at 865. Most of those same differences exist between the CDA and H.B. 1181—but those

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Second, as suggested at various points in this opinion, laws such as the statute in *Ginsberg* necessarily affect, to some degree, adults' access to the regulated material. A law that requires by its nature sale only to adults requires (prudent) venders to verify the age of their customers. Plaintiffs recognize as much when they try to distinguish *Ginsberg*. That H.B. 1181 similarly affects adults' access to regulated material does not place it beyond *Ginsberg*'s shelter.

Finally, *Entertainment Merchants*'s use of *Ginsberg* undercuts plaintiffs' reading. *Entertainment Merchants* held that "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply." 564 U.S. at 804–05. But the Court distinguished *Ginsberg* because the content of the material regulated in *Ginsberg* was sexual in nature. *Id.* at 793. Thus, *Entertainment Merchants* helps confirm our understanding that within "the constitutional limits on governmental action" that apply where "protection of children" is the "object" of a regulation, there is ample room for regulation, subject to rational-basis review, of the distribution of materials obscene *for minors to minors*. *Id.* at 804–05.

are not the only differences between the two laws; they include the following: (1) The CDA included prohibitions on non-sexual material; H.B. 1181 does not. *Id.* at 873.[19] (2) Parental participation or consent could not circumvent the CDA; it can circumvent H.B. 1181. *Id.* at 865. (3) The CDA did not specifically define the proscribed material; H.B. 1181 does. *Id.* at 873. (4) The CDA had no limitation to commercial

[19] The Court specifically referred to the CDA's language on "excretory activities." *Reno*, 521 U.S. at 846. A keen reader will note that H.B. 1181 also refers to excretion, but that reference to "excretory functions" is fairly read to mean something else. H.B. 1181 in part defines "sexual material harmful to minors" as "excretory functions . . . or any other sexual act." § 129B.001(6)(B)(iii). In light of *noscitur a sociis*, "excretory functions" in H.B. 1181 probably refers to excretory functions *as* sexual acts (which are too crude to describe here). By contrast, the CDA set up "excretory activities" *in opposition to* "sexual . . . activities." *See Reno*, 521 U.S. at 860 (The CDA reads "sexual or excretory activities.") Moreover, the term "excretory" in H.B. 1181 appears in a definition of "sexual material harmful to minors," § 129B.001(6), but the term "excretory" in the CDA works to define "offensive" material, *see Reno*, 521 U.S. at 873. Moreover, H.B. 1181 covers only materials "*designed* to appeal to or pander to the *prurient* interest." § 129B.001(6)(A) (emphasis added). *See infra* note 22. This is but one of multiple serious distinctions between the CDA and H.B. 1181.

activity; H.B. 1181 covers only commercial entities. *Id.* at 865.[20] (5) In enjoining the CDA, the Court relied at least in part on "the absence of a viable age verification process," but that process is the central requirement of H.B. 1181. *Id.* at 876. Finally, (6) the Court's decision was fundamentally bound up in the rudimentary "existing" technology of twenty-seven years ago, but technology has dramatically developed. *Id.* at 876–77.

Indeed, only one distinction appears to work against our analysis here. The Court noted that "the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority." *Id.* at 865–66. Given that this is the sole mention of that distinction, and that the rest of the distinctions still align with H.B. 1181, it beggars belief that the Supreme Court meant that to be an essential component in triggering

[20] Notably, the Court emphasized that the statute in *Ginsberg* "applied only to commercial transactions." *Reno*, 521 U.S. at 865. Texas similarly limited H.B. 1181 to "commercial entit[ies]." § 129B.002(a). We recognize that language is not one-to-one, but the distinction is of no import for two reasons. First, we are sufficiently convinced that the activity here is a commercial activity. *See infra* Section III.B.i. Second, the CDA contained no limitation to commerce at all. In that sense, H.B. 1181 tracks the law in *Ginsberg* much more than it does the CDA.

the *Ginsberg* framework. That is especially true where the Court relied principally on the CDA's overbreadth and lack of adherence to the *Miller* standard. *See id.* at 873.[21]

Nor does other seemingly contradictory language in *Reno* impede our analysis. For example, *Reno* says that the interest in protecting children, for which it cites *Ginsberg*, "does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875. As noted above, the reach of the CDA was well beyond *Ginsberg*'s safe harbor and included even non-sexual material.[22] Moreover, *Reno* makes that point, referring to *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989). *See Reno*, 521 U.S. at 875. *Sable* addressed "an outright ban on indecent as well as obscene interstate commercial telephone messages." 492 U.S. at 117. That too is well outside

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[21] We do not suggest that each of the distinctions here is necessary for a law to receive rational-basis review under *Ginsberg* instead of strict scrutiny under *Reno*. We list them in full merely to illustrate how different the CDA is from H.B. 1181.

[22] The dissent complains: "Like the CDA, H.B. 1181 regulates more than just 'sexual conduct.'" That is plainly not so. *Inter alia,* H.B. 1181 applies only to matter "*designed* to appeal to or pander to the *prurient* interest." § 129B.001(6)(A) (emphasis added). In this context, "prurient" plainly limits the statute's applicability to content designed to excite sexual arousal. *See Miller*, 413 U.S. at 24. This contrasts sharply with the CDA's bar on plainly non-sexual activities. *See supra* note 19.

Ginsberg's safe harbor for regulations on distribution *to minors* of material obscene *for minors*.[23]

On the other hand, *Ashcroft II* supplies plaintiffs' best ammunition against H.B. 1181. After all, despite Texas's protestations, H.B. 1181 is very similar to COPA. Sure, COPA was criminal, and H.B. 1181 is civil. And COPA allowed age-verification as an affirmative defense, yet H.B. 1181 requires it upfront. But those changes do not affect our analyses here.[24] *Ashcroft II*, finding that COPA probably failed the narrow tailoring component of strict scrutiny, sent the case back down for trial. 542 U.S. at 673. One

[23] *Sable* is distinct for two reasons. First, like the CDA, the statute in *Sable* swept in a much larger swath of speech than the speech targeted here. *See Sable*, 492 U.S. at 117. Second, *Sable* dealt with an outright ban. Plaintiffs repeatedly emphasize that "content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000). But, read in context, that proposition is not as broad as it seems. Indeed, *Playboy* seems to have cited favorably *Ginsberg*'s narrower approach when it discussed *Sable*. *See id.* at 814 (comparing cases where bans were struck down to cases where restrictions were upheld).

[24] That is not to say that such distinctions could never matter.

might read *Ashcroft II* for the proposition that COPA (and consequently H.B. 1181) fail strict scrutiny. We can even assume that here.[25]

But that assumption does not end our analysis. Though *Ashcroft II* concluded that COPA *would* fail strict scrutiny, it contains startling omissions. Why no discussion of rational-basis review under *Ginsberg*? And why no analysis of intermediate scrutiny under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)? We find those omissions particularly surprising considering that the Court in *Reno* felt the need to distinguish those at length. *See Reno*, 521 U.S. at 865–68.

We see only one answer and therefore only one way to read *Ashcroft II* consistently with *Ginsberg*: *Ashcroft II* did not rule on the appropriate tier of scrutiny for COPA. It merely ruled on the issue the parties presented: whether COPA would survive strict scrutiny. Indeed, the petitioner's brief in *Ashcroft II* made two claims:

> I. COPA is narrowly tailored to further the government's compelling interest in protecting minors from harmful material on the World Wide Web.
>
> . . .
>
> II. The court of appeals erred in holding that COPA is not narrowly tailored.

Brief for Pet'r, *Ashcroft II*, 542 U.S. 656 (2004) (No. 03-218), 2003 WL 22970843, at *iii. In other words, the petitioners did not challenge the applicable standard of review.

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[25] To be clear: Although we comment on the facial similarities between COPA and H.B. 1181, we do not mean to express any opinion on how H.B. 1181 would fare under any other tier of scrutiny.

Because that is not a jurisdictional argument, the Court did not have to correct them *sua sponte*.[26]

It is true that, in passing and without reference to *Ginsberg*, the Court said, "[w]hen plaintiffs challenge a content-based speech restriction, the Government has the burden to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft II*, 542 U.S. at 657. But that is the closest that opinion comes to ruling on the appropriate standard of review.[27] Given our circuit's respect for

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[26] This explains the need for the Third Circuit to clarify, in the follow-on proceedings from *Ashcroft II*, that strict scrutiny "appl[ied] in this case inasmuch as COPA is a content-based restriction on speech." *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)).

[27] Plaintiffs urge us to rely on the Court's observation that "the District Court concluded only that the statute was likely to burden some speech that is protected for adults, which petitioner does not dispute." *Ashcroft II*, 542 U.S. at 665 (citation omitted). But that does not constitute a holding, or even *dictum*, that strict scrutiny is applicable for the same reason as the passage distinguished in the paragraph in which this footnote sits. Instead, it supports our reading that that the appropriate standard of review was not in dispute in *Ashcroft II*. Nor does the Court's later note that it "affirm[s] the District Court's decision to grant the preliminary injunction for the reasons relied on by the District Court," *id*., constitute a wholesale adoption of the district court's reasoning so as to make an opinion from the Eastern District of

the Court's *dicta*, we cannot brush that comment aside as such; yet, it is inapposite for two reasons: First, read in context, it is most readily seen as an explanation of how strict scrutiny works generally and not as a clear articulation of its appropriateness for COPA. Second, and more importantly, it is inconsistent with the proposition that *Ginsberg* remains good law.[28]

Ginsberg undeniably upholds a content-based restriction on speech under a rational-basis framework. But reading that passage from *Ashcroft II* in a vacuum is irreconcilable with that proposition. Because the Court makes clear that *Ginsberg* is good law after *Ashcroft II*, *Ginsberg*'s on-point framework must take pride of place. *See Ent. Merchs.*, 564 U.S. at 793.

In short, the question of the appropriate standard of review in *Ashcroft* is a "[q]uestion[] which merely lurk[s] in the record, neither brought to the attention of

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Pennsylvania—*ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999)—binding on us. In context, that passage is better read to explain the Court's decision to "decline to consider the correctness of the other arguments relied on by the Court of Appeals," and no more. *Ashcroft II*, 542 U.S. at 665.

[28] Or *Erznoznik*, 422 U.S. at 212–14 (indicating that but for overbreadth, a content-based regulation of protected speech would be subject to rational-basis review), or *Renton*, 475 U.S. at 50 (applying a form of intermediate scrutiny to content-based regulations of protected speech), or *FCC v. Pacifica Found.*, 438 U.S. 726, 748–51 (1978) (similar), or *Cent. Hudson*, 447 U.S. at 566 (similar).

the court nor ruled upon" and consequently is not "to be considered as having been so decided as to constitute precedent[]." *Cooper Indus., Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).[29] *Ashcroft II* does not control.

Plaintiffs point to *Playboy* to counter Texas's suggestion that *Reno* and *Ashcroft* do not supply the standard of review here. *Playboy* dealt with a statute that "required

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[29] *Webster*, whence that quotation originates, offers a helpful example. The question there was whether the Court could entertain a suit in which a superior that needed to be joined for relief had not been joined. The Court had previously ignored that question in other cases, assumed it could, and gotten to the merits. But in *Webster*, the Court took issue with it. The Court essentially said: In those previous cases, joining the superior was not the issue at hand, it was just a "question which merely lurks in the record," so those cases are not binding precedent.

The Eighth Circuit recently relied on *Webster* to resolve another contentious issue the Court has assumed but never decided. *Cf. Ark. State Conf. NAACP v. Ark. Bd. Of Apportionment*, 86 F.4th 1204, 1215 n.6 (8th Cir. 2023) (citing *Webster*, 266 U.S. at 511). And our circuit regularly takes it a step further, employing a similar framework to some jurisdictional questions. *See, e.g.*, *United States v. Garcia-Ruiz*, 546 F.3d 716, 718 n.1 (5th Cir. 2008) ("The failure of the earlier panels, . . . to discuss mootness does not yield an implication that those panels decided the cases were not moot, and we are not bound by any *sub silentio* determinations there.").

cable television operators who provide channels primarily dedicated to sexually-oriented programming either to fully scramble or otherwise fully block those channels or to limit their transmission to hours when children are unlikely to be viewing." 529 U.S. at 806 (cleaned up). To plaintiffs' credit, *Playboy* seems to have the clearest language supplying a standard of review: "As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny." *Id.* at 814. Moreover, *Playboy* dealt with a law the purpose of which was to protect children from incidentally consuming pornographic material. *See id.* at 806. Further, even after acknowledging the difference in "degree," the Court held that "content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans." *Id.* at 812.

But *Playboy* cannot surmount the rock that is *Ginsberg*. As we have discussed, *Ginsberg* is good law.[30] So it must have some minimum content.

H.B. 1181 is plainly more like the regulation in *Ginsberg* than like the regulation in *Playboy.* H.B. 1181 allows adults to access as much pornography as they want whenever they want. The law in *Playboy* did not. The burden in *Playboy*, although not a ban, is different in kind from whatever "burden" arises from the same type of age-verification required to enter a strip club, drink a beer, or buy cigarettes. The law in *Ginsberg*, like H.B. 1181, targeted distribution *to minors*; the law in *Playboy* targeted distribution *to all*. That is, once certain an individual is not a minor, H.B. 1181 does

[30] Consider especially that *Entertainment Merchants* cited *Ginsberg* eight years after *Playboy*.

nothing further.[31] The same cannot be said of the law in *Playboy*, which imposed substantial burdens even after an individual established his or her majority.

Moreover, *Playboy* preceded not only *Entertainment Merchants* but also *Reno*. If we should read *Playboy* as broadly as plaintiffs suggest, it renders *Reno*'s distinguishing of *Ginsberg* inexplicable.[32] *See Reno*, 521 U.S. at 864–66. Likewise, broadcast media has always raised medium-specific considerations that meaningfully diminish the guidance that First Amendment cases concerning broadcast media can provide in other technological contexts—such as regulations to combat "signal bleed," *Playboy*, 529 U.S. at 806.[33]

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[31] Insofar as concerns the age-verification requirement at issue.

[32] Let alone *Playboy*'s own treatment of *Ginsberg*. *See supra* note 23.

[33] *Cf. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973) ("[T]he broadcast media pose unique and special problems not present in the traditional free speech case."); *Pacifica*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems." (citation omitted)); *Sable*, 492 U.S. at 127–28. We recognize that in other cases the difference between broadcast media and other forms of media may have led to a lower standard of scrutiny for government regulation of broadcast. But, the uniqueness of broadcast media has the opposite effect here. Because broadcast media has comparatively no ability to discriminate between consumers of broadcast content, broadcast caselaw

Finally, an appeal to H.B. 1181's "content-based" nature is insufficient because the law in *Ginsberg* was content-based.[34] *Ginsberg* carves out an exception to heightened scrutiny of content-based speech restrictions. If *Ginsberg* is no longer good law, we await that instruction, but until that day it must stand for something.

We agree with the dissent's laudable conclusion that "Texas has the right—and . . . the obligation—to protect its minors, and in doing so, it must have the means to frustrate their access to pornographic materials consistent with the First Amendment." But the dissent's read of *Reno*, *Ashcroft*, *Playboy*, *Sable*, and *Ginsberg* would strangle the state's ability to do just that.

Because it is never obvious whether an internet user is an adult or a child, any attempt to identify the user will implicate adults in some way. In the dissent's view, any attempt to protect children will be subject to strict scrutiny, often a death knell in and of itself.[35] To suggest protecting children would be so difficult is inconsistent with *Ginsberg*, where rational basis review was sufficient *even though* adults would

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has little import for a medium that can make—and a regulation that forces it to make—that distinction.

[34] As in at least *Erznoznik*, *Renton*, and *Central Hudson*, *see supra* note 28.

[35] To be fair, the dissent gestures that the states might "requir[e] electronic filters on devices" on the consumer end. *Quaere* whether that is consistent with the rest of the dissent. But the dissent performs only a perfunctory analysis, so we respond in kind.

presumably have to identify themselves to buy girlie magazines. In other words, the dissent's reading implies that the invention of the Internet somehow reduced the scope of the state's ability to protect children. That is a dubious principle without support in existing Supreme Court caselaw.[36]

Plaintiffs proffer a few more reasons why strict scrutiny applies. None convinces. First, they emphasize that the law does not just regulate speech obscene to minors. Instead, because of the "one-third threshold," the act regulates even "content . . . benign for people of any age." Plaintiffs assert that means that "a substantial number of its applications are unconstitutional," so the statute is facially unconstitutional. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks and citation omitted).

That averment fails for two reasons. First, it very well might be appropriate in this context to evaluate plaintiffs' websites as a whole.[37] And second, the magazines at

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[36] Indeed, the opposite is true. The Court has clearly indicated that the principles underpinning *Ginsberg* are not limited by the advance of technology. *Cf. Pacifica*, 438 U.S. at 750 ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.")

[37] The *Ashcroft* litigation left open the question of whether websites should be evaluated as a whole. *See Ashcroft v. ACLU* (*Ashcroft I*), 535 U.S. 564, 592–93 (2002) (Kennedy, J. concurring in the judgment) ("The notion of judging work as a whole is

issue in *Ginsberg* were similarly situated to the websites captured by H.B. 1181. Indeed, the "girlie magazines" of *Ginsberg*'s day had a substantial amount of content that was non-sexual in its entirety.[38] The inclusion of some—or even much—content that is *not* obscene for minors does not end-run *Ginsberg* where the target of the regulation contains a substantial amount of content that *is* obscene for minors.

Second, plaintiffs assert that "the Act's vagueness further chills protected speech." In particular, they contend that the phrase "with respect to minors" has no fixed meaning.[39] That was not a problem for the law in *Ginsberg*, and it is no problem here.

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familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites."). Indeed, Justice Kennedy acknowledged that this question dropped out of that litigation between the district court and the court of appeals. *Id.* at 599 (citation omitted).

[38] *See, e.g.*, Meg Dalton, *Hugh Hefner's* Playboy *did a lot of great journalism. Here are a few highlights.*, COLUM. JOURNALISM REV., tinyurl.com/ynn3yz2d (Sept. 28, 2017).

[39] They also note that the "one-third" requirement itself is vague. Even if that were the case, that strikes us as a consideration were we to evaluate the law under strict scrutiny. But, plaintiffs do not demonstrate why that would be sufficient to trigger strict scrutiny here.

Third, plaintiffs maintain that strict scrutiny applies because "the Act discriminates based on speaker and viewpoint." They point to both what they deem H.B. 1181's "underinclusiveness" and its health-warnings requirement as evidence that Texas is really engaged in speaker discrimination "to stigmatize the 'porn industry' and deter all patronage of such disfavored speech." The under-inclusivity in question is the exemption of "search engines . . . and social-media platforms . . . that display the same content."

On this, there is no issue. First, under-inclusivity (in the speaker/viewpoint discrimination context) only serves as a signal that the state *may* be engaged in viewpoint discrimination. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (under-inclusivity "diminish[es] the credibility of the government's rationale for restricting speech in the first place"). Where, as here, the exemptions are driven by some-thing else, though—such as making a reasonable policy choice to avoid the legal concerns that accompany attempts to regulate the "entire universe of cyberspace," *Reno*, 521 U.S. at 868—the state is not pursuing viewpoint discrimination. Second, underinclusivity is typically not an issue where the state chooses to regulate a specific medium. *See, e.g.*, *Gilleo*, 512 U.S. at 52 (discussing "[e]xemptions from an otherwise legitimate regulation of *a medium* of speech" (emphasis added)).

And plaintiffs' examples fall into line with this reasoning.[40] Plaintiffs suggest that under *R.A.V. v. City of St. Paul*, under-inclusivity "alone [is] enough to render the ordinance presumptively invalid[.]" 505 U.S. 377, 394 (1992). But the sort of "[s]electivity" at issue in *R.A.V.* was between different sorts of *messages*, not different *mediums*. *See id.* In short, where a state chooses to regulate a specific kind of medium, that selection does not necessarily implicate strict scrutiny based on viewpoint discrimination.[41]

Thus, bound by *Ginsberg* and the Supreme Court's application of it in *Entertainment Merchants* and *Erznoznik*, we apply rational-basis review.

2.

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[40] *See, e.g.*, *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983). There the Court enjoined not just "an" ink and paper tax, but one which targeted large but not small newspapers. *See id.* The other major issues raised in that opinion are specific to both the nature of taxation and the nature of the press, neither of which is at issue here. "There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment." *Id.* at 583. Quaere whether raising barriers to distributing pornography to minors would have concerned the Founders in the same way.

[41] *See, e.g.*, *Ginsberg*, 390 U.S. at 647 (singling out print but not broadcast material); *Pacifica*, 438 U.S. at 750 (singling out broadcast and noting the "differences between radio, television, and perhaps close-circuit transmissions").

Under rational-basis review, H.B. 1181 easily surmounts plaintiffs' constitutional challenge. As the Court in *Ginsberg* puts it, we need "only . . . be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." 390 U.S. at 641.

We do that easily. The record is replete with examples of the sort of damage that access to pornography does to children. One study finds that earlier use of adult pornography was correlated with an increased likelihood of engagement "with deviant pornography (bestiality or child)." A review of literature from 2013–2018 finds a correlation between "frequent use of online pornography" and "distorted gender orientations, insecurities and dissatisfaction about one's own body image, depression symptoms, assimilation to aggressive models," and more. Another review of scientific literature finds that "internet pornography addiction fits into the addiction framework and shares similar basic mechanisms with substance addiction." Further, a study finds that "[t]he more boys used sexually explicit internet content, the poorer their school grades were six months later." That is far more than what is necessary to demonstrate that the legislature did not act irrationally.[42]

[42] This might not be enough to move this issue beyond controversy, *see infra* Section III.B.2, but it is more than enough for us to say that the legislature was "not irrational."

Thus, H.B. 1181's age-verification requirement likely passes constitutional muster under the rational-basis standard in *Ginsberg*.[43] We offer no opinion as to how it would fare under any other standard of review.

B.

We turn to plaintiffs' likelihood of success in challenging the health warnings. Concluding that the health warnings unconstitutionally compel speech, we uphold the injunction in that regard only.

H.B. 1181 regulates only commercial entities. It is well established that the First Amendment protects commercial speakers.[44] Further, it protects both the "right to

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[43] We do not foreclose the possibility that the content on plaintiffs' sites might be entirely unprotected by the First Amendment. Texas contends that much of plaintiffs' content fits within *Miller*'s "plain examples" of what a state could regulate as unprotected obscenity. 413 U.S. at 25. That is certainly possible. Yet, although Texas might be able to regulate plaintiffs' websites solely under *Miller*, it might also be that a substantial amount of the material elsewhere on the Internet that H.B. 1181 covers is obscene only for minors and thus outside of *Miller*'s grasp. Because this case resolves more clearly under *Ginsberg*, we decline to rule on Texas's *Miller* defense. *Cf. supra* note 7.

[44] *See Va. State Bd. of Pharmacy*, 425 U.S. at 770 (1976); *303 Creative LLC v. Elenis*, 600 U.S. 570, 593–94 (2023).

speak and the right to refrain from speaking."[45] Yet, it is equally settled that the government may regulate commercial speech more heavily than non-commercial speech.[46] So, the constitutionality of the required warnings turns on both (1) whether the speech is commercial and (2) the applicable level of scrutiny.

As with the age-verification requirements, the parties dispute the standard of review. Plaintiffs claim the warnings are content-based regulations of non-commercial speech—so strict scrutiny applies.[47] Texas responds by asserting that the warnings compel only commercial speech, so we should review deferentially under *Zauderer*.[48] Alternatively, the state suggests that if *Zauderer* does not apply, this court should use *Central Hudson*'s intermediate scrutiny.[49]

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[45] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 796–97 (1988).

[46] *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)); *see also Chamber of Com. v. SEC*, 85 F.4th 760, 768 (5th Cir. 2023).

[47] Particularly, they point to *303 Creative*, 600 U.S. at 588–90, alleging that this is compelled speech that eliminates dissenting ideas and is thus barred by the First Amendment. H.B. 1181, they contend, presents them with an offer they cannot refuse: Speak the government's message or let their websites sleep with the fishes.

[48] *See Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626 (1985).

[49] *See Cent. Hudson*, 447 U.S. at 571–72.

1.

We answer first whether H.B. 1181 regulates commercial or noncommercial speech. The district court offered several reasons that this speech is not commercial. First, it found that plaintiffs' speech goes "beyond proposing a commercial transaction." 2023 WL 5655712, at *21 (cleaned up) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)). Second, it ruled that this speech is not commercial because the "paid access that makes speech commercially viable is 'inextricably intertwined' with the speech itself." *Id.* at *21 (quoting *Riley*, 487 U.S. at 796). But both justifycations misconstrue the nature of these websites.

Though courts have not settled "the precise bounds of the category of expression that may be termed commercial speech, . . . it is clear enough that [some of] the speech at issue in this case—advertising pure and simple—falls within those bounds." *Zauderer*, 471 U.S. at 637.[50] That suffices for the part of the statute that covers advertisements.

[50] *See also Cent. Hudson*, 447 U.S. at 561 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"); *Bolger*, 463 U.S. at 66.

Along with warnings on advertisements, though, H.B. 1181 also requires warnings on the landing page and on each subsequent page of the regulated websites. So, we must resolve whether those webpages also propose commercial transactions.[51]

As always, we begin with the text of the statute. H.B. 1181 regulates "commercial entit[ies]" and defines such as "a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity." § 129B.001(1).[52] The text's focus on business and corporate forms reads most naturally as an indication that the statute reaches only those entities that publish or distribute sexual material harmful to minors *for commercial or business purposes*. Thus, the landing page and other pages of those subscription-based and paid websites are proposing "no more than" a commercial transaction—*e.g.*, "you give us money and we give you porn."[53] Indeed, to the degree that the websites purport to offer educational

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[51] *See Bolger*, 463 U.S. at 66 (defining the "core notion of commercial speech" as "speech which does no more than propose a commercial transaction" (quotation marks and citations omitted)).

[52] *Bolger*, 463 U.S. at 66; *see also* § 129B.005(a) (exempting news or public interest broadcasters).

[53] We disagree with the district court's analysis of subscriptions as past transactions not subject to traditional commercial speech analysis. *See Free Speech Coal.*, 2023 WL 5655712, at *21. After someone has bought a subscription, the use of that subscription is part of the same, ongoing, commercial transaction. *Cf. Dun & Bradstreet, Inc. v.*

speech; they only offer it as an add-on to their primary purpose, exchanging far-from-core First Amendment entertainment for money.[54] Therefore, the webpages communicate commercial speech.[55]

We also conclude that H.B. 1181 regulates commercial speech on free websites because they too propose a commercial transaction: They offer pornography in exchange for data; then, they monetize that data, primarily through advertisements.

Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (applying commercial-speech standards to ongoing subscriptions for credit reports); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29–30 (5th Cir. 1973) (same).

[54] Specifically—unlike most books, newspapers, movies, or other forms of core-protected speech or entertainment—they offer that prurient entertainment without "serious literary, artistic, political, or scientific value for minors." § 129B.001(6)(c).

[55] *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762)). We do not view this as akin to a newspaper's selling information for money because, here, the interests are in the sellers' economic gain, and the buyers' entertainment or pleasure, not the spread of information relevant to the public. In other words, their speech falls far from the core of the First Amendment's protections. *See also supra* note 54.

That series of transactions is explicitly commercial, just as was the case in *NetChoice*. *See* 49 F.4th at 485–88.[56]

Finally, we reject the contention that *Riley*'s inextricably intertwined" analysis controls here. That the websites might offer non-obscene sexual education or expressive obscenity "no more convert[s]" the act of selling pornography and bartering for data into protected speech than does "teaching home economics . . . convert[] [Tupperware parties] into educational speech."[57] Indeed, instead of being closer to a paywall on a newspaper—core, protected speech—the landing pages are more like the entrance to a strip club—commercial activity with a speech element.[58]

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[56] The "Platforms" at issue in *NetChoice* included "Facebook, Twitter, and YouTube." 49 F.4th at 445. Users may access those Platforms without paying, but each sells advertising and other user data. *NetChoice* never expressly called such transactions sufficient to make the compelled speech of H.B. 20 compelled commercial speech, but such an understanding is necessary for any application of *Zauderer*. So we make that inference.

[57] *Fox*, 492 U.S. at 474–75.

[58] *Id.* at 474; *see also id.* (In *Riley*, "of course, the commercial speech (if it was that) was 'inextricably intertwined' because the state law *required* it to be included. By contrast, there is nothing whatever 'inextricable' about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without

Therefore, we review these speech regulations under the commercial speech doctrine.

2.

We next consider whether the law qualifies for *Zauderer*'s relaxed scrutiny.

In *Zauderer*, the Court upheld lawyer advertising regulations because the requirements mandated lawyers "include in [their] advertising purely factual and uncontroversial information about the terms under which [their] services will be available." 471 U.S. at 651. The Court reasoned that a lawyer's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal" because "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech . . . ." *Id.* Recent decisions have distilled that language to apply *Zauderer* scrutiny where a state compels "commercial enterprises to disclose purely factual and uncontroversial information about their services . . . ." *Chamber of Comm.*, 85 F.4th at 768 (quotation

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selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.").

Similarly here, no law requires a pornographic website to operate as a commercial entity (the only kind H.B. 1181 regulates), nor does any "law of man or of nature make[] it impossible to sell" pornography without teaching sexual education or otherwise expressing oneself through indecent-but-not-obscene speech. *Id.*

marks and citations omitted).[59] In other words, Texas must show that the warnings are both (1) purely factual and (2) uncontroversial. Because the state has not met its burden on the uncontroversial nature of the warnings on the record before us, *Zauderer* is inapplicable.[60]

Assuming the statements are factual, a compelled statement is "uncontroversial" for purposes of *Zauderer* where the truth of the statement is not subject to good-faith scientific or evidentiary dispute and where the statement is not an integral part of a live, contentious political or moral debate.[61] That standard does not mean that whenever the compelled speaker dislikes or disagrees with the message he must convey, the statement is controversial. Nor does it mean that that controversy exists

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[59] *See also NetChoice*, 49 F.4th at 485.

[60] We do not rule on whether the statements are factual, focusing instead on the controversial nature of the scientific statements.

[61] *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8–9 (1986) (Appellant's newsletter "thus extends well beyond speech that proposes a business transaction and includes the kind of discussion of '*matters of public concern*' that the First Amendment both fully protects and implicitly encourages." (emphasis added) (citations omitted)); *NIFLA*, 585 U.S. at 769 ("The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic. Accordingly, *Zauderer* has no application here.").

solely because an expert can be found who disagrees with a predominant view. It means only that there must be some widespread, good-faith dispute over the topic or the facts.

We need not determine the outer limits of what establishes "controversy" because Texas has failed to rebut plaintiffs' challenges in such a way that we are comfortably within its boundaries. Thus, *Zauderer* is inapplicable. We supply two of the many examples of the dueling experts and studies[62]: First, Texas cites a study finding a negative correlative relationship between (1) time spent watching porn and (2) gray-matter volume and brain function in 21-to-45-year-old men. Second, the state's experts describe the "host of mental health afflictions" that they link to viewing pornography.

But plaintiffs respond with similarly credentialed and persuasive experts who, on review of "the last several decades of research," find "no generally accepted, peer-reviewed research studies or scientific evidence which indicate that viewing adult-oriented erotic material causes physical, neurological, or psychological damage such as 'weakened brain function' or 'impaired brain development.'" And the plaintiffs' experts refute Texas's first point—which casts that correlative relationship as causal—by proffering that, to

[62] Although we only highlight these two, the record is replete with disputed claims and counterclaims, each allegedly supported by scientific study and analysis. These two exemplify the controversy, but we do not suggest that one study on each side and competing experts necessarily make a statement controversial.

the degree there are causal findings, they typically "run the opposite way of Texas's claims, i.e., porn viewing is an effect, not a cause of mental issues."

We are not scientific journal editors, much less social scientists, behavioral experts, or neurologists. The courts generally are not the place to hash out scientific debate, particularly not on so contentious a topic as the impacts of engaging with pornography. Experts must do that in academic journals, studies, and presentations. Therefore, the record leaves us with no option but to declare that the health impacts of pornography are currently too contentious and controversial to receive *Zauderer* scrutiny. *See NIFLA*, 585 U.S. at 769.[63]

3.

It is unsettled precisely which standard of scrutiny applies to compelled commercial speech that is not subject to *Zauderer* scrutiny. On the one hand, *Central Hudson* applied a form of intermediate scrutiny. On the other, *Central Hudson* dealt only with *restrictions* on commercial speech, not *compelled* speech. Yet, *NIFLA* suggests that compelled speech must survive, *at minimum*, intermediate scrutiny. *See* 585 U.S. at

[63] Of course, on a record containing more robust scientific support, Texas might be able to demonstrate the level of scientific agreement necessary to receive *Zauderer* review. As the district court pointed out, though, Texas never showed that Texas's Health and Human Services Commission made the findings contained in the health warnings, despite the three-time use of the Commission's name. *Free Speech Coal.*, 2023 WL 5655712, at *24. That alone might make the warnings controversial.

773. So, because H.B. 1181 fails *Central Hudson*'s intermediate scrutiny, we need not decide that issue here.[64]

Under *Central Hudson*, courts apply "a four-part analysis" to government-compelled restriction of commercial speech. 447 U.S. at 566. First, the court "must determine whether the expression concerns lawful activity and is not misleading." *Id.* (cleaned up). Second, the court asks "whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

That standard is stricter than rational-basis, but it is not a least-restrictive-means test. Instead, we ask whether it is a reasonable fit, "one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480 (internal quotation marks and citation omitted). The "government goal [must] be substantial, and the cost . . . carefully

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[64] We do note that in *Riley*, the Court acknowledged that there "is certainly some difference between compelled speech and compelled silence," but the Court went on to apply exacting scrutiny to compelled speech because, "in the context of protected speech [i.e., non-commercial speech], the difference is without constitutional significance . . . ." 487 U.S. at 796; *see also id.* at 797 (discussing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974)).

calculated." *Id.* And the governmental entity bears the burden of proving both the interest and the fit.

Because we address here only the application of H.B. 1181 to speech deemed (1) not obscene for adults but (2) obscene for minors, the expression at issue is lawful, meeting the first prong of *Central Hudson*. Next, we agree that Texas has a substantial—and even compelling[65]—interest in preventing minors from accessing pornography, meeting the second prong.[66]

But Texas fails the third and fourth prongs.

The health warnings, taken as a whole, might advance the state's stated interests. The warnings declare the potential harm of minors' engaging with pornography, and they do so in a noticeable fashion—in a way likely to discourage minors from using and adults from allowing their children to use the websites. But Texas must meet a higher standard than "might." "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that . . . its restrictions will in fact alleviate [the

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[65] *See Reno*, 521 U.S. at 863 n.30.

[66] Texas has not asserted an interest in preventing adult access to obscenity. Even to the degree the warnings would help achieve that legitimate interest, we cannot "supplant the precise interests put forward by the State with other suppositions." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)).

harms] to a material degree."[67] Because Texas has not made such a showing, we adopt the approach recently taken by the Ninth Circuit: "[C]ompelling sellers to warn consumers of a potential 'risk' never confirmed by any regulatory body—or of a hazard not 'known' to more than a small subset of the scientific community—does not directly advance" the government's interest. *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023). Therefore, Texas fails to satisfy the third prong.

Further, as in *NIFLA*, Texas does not adequately tailor the warnings to the interest. As the district court noted, because of the age-verification requirements, those warnings displayed on the landing page and subsequent pages will presumably not reach any minors. To the degree that minors do see the warnings, the warnings' language seems beyond the average child's reading comprehension ability: They use multisyllabic, scientific words and phrases such as "biologically addictive,"

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[67] *Went For It*, 515 U.S. at 626 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)); s*ee also Am. Acad. of Implant Dentistry v. Parker*, 860 F.3d 300, 309 (5th Cir. 2017) (discussing the third *Central Hudson* prong). To provide an example, Texas might have met this prong with studies finding the warnings caused minors not to watch pornography, regardless of the truthfulness of the warnings. But Texas has not provided such studies.

"desensitizes brain reward circuits," and "conditioned responses." Therefore, the warnings are too broad reasonably to fit the interest.[68]

Further, even if scientific findings supported the warnings, *but see supra* note 63, Texas has made no showing that they will discourage minors who have circumvented the age restrictions from accessing pornography. Additionally, the inclusion of a helpline for "mental health or substance use disorders" cannot be connected directly to *preventing* children from viewing pornography. § 129B.004(2).[69] Finally, Texas has not made any showing that it tried a government-funded public information campaign or that such a campaign would be ineffective. In other words, we see "numerous and obvious less-burdensome alternatives" to the health warnings. *Went For It*, 515 U.S. at 633 (quoting *Discovery Network*, 507 U.S. at 417 n.13). Thus, Texas

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[68] We do not mean to imply that *any* backup or safeguard would mean Texas has not adequately tailored the warnings to its interest. However, *this* backup strikes us as uniquely insufficiently tailored.

[69] Not only do plaintiffs dispute Texas's connection of pornography viewing to mental health issues, but also the helpline would presumably help only those children who have already viewed pornography. Therefore, it could not possibly be preventative. *Cf. NIFLA*, 585 U.S. at 769 ("The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services . . . .").

fails the fourth prong of *Central Hudson*, making the health warnings unconstitutionally compelled commercial speech.

C.

Finally, Plaintiffs contend that 47 U.S.C. § 230(c) preempts H.B. 1181. We conclude that it does not.

We start with the text of Section 230(c). Congress entitled Subsection (c) "Protection for 'Good Samaritan' blocking and screening of offensive material." Thus, Texas correctly suggests that Congress enacted § 230 to shield against liability for removal, but not promulgation, of "offensive material." Indeed, the text of § 230(c)(2) makes that clear.[70] Both provisions protect "providers" of "interactive computer service[s]" from liability stemming from attempts to "restrict" unwanted material. *Id.*

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[70] The subsection says,

> No provider or user of an interactive computer service shall be held liable on account of—
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> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

47 U.S.C. § 230(c)(2).

Subsection 230(c)(1), however, lacks that one-way language.[71] But, on its face, it still does not protect plaintiffs for two reasons. First, the act's context clarifies the subsection's open-ended language. *Cf. Yates v. United States*, 574 U.S. 528, 531–32 (2015) (plurality) (A fish is obviously a "tangible object," but it is not in the context of the Sarbanes-Oxley Act.). Indeed, Texas convincingly suggests that (c)(1) was meant to abrogate the holding in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). That court held an online service provider trying to filter out profane content liable for the remaining defamatory contents on a financial bulletin board.[72] But plaintiffs seek to turn that meaning on its head and make (c)(1) a shield for purposefully putting "offensive material" onto the Internet.

Second, particularly in light of that context, making plaintiffs liable under H.B. 1181 would not be "treat[ing them] as the publisher or speaker" of the underlying content. 47 U.S.C. § 230(c)(1). This is where *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008), complicates the analysis. There we held that § 230 shielded MySpace from negligence liability for publishing communications between a minor and an adult who later sexually assaulted her. *See id.* at 417–18. But that case is readily distinct.

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[71] That subsection reads, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

[72] *See* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 405 (2017).

In *MySpace*, "[p]arties complain[ed] that they were harmed by a Web site's publication of user-generated content." *Id.* at 419. And that is the point of Section 230: to immunize web service providers for harm caused by unremoved speech on their website. Like cellphone service providers, interactive computer service providers cannot be held liable for harmful communications that they fail to remove. But liability under H.B. 1181 is not like liability under a negligence claim. It is not reliant on the harm done by third-party content. It imposes liability purely based on whether plaintiffs comply with the statute, independently of whether the third-party speech that plaintiffs host harms anybody. As Texas puts it "if a minor circumvents age verification, ignores the health warnings, and is subsequently harmed by third-party content or resulting offline conduct," Section 230 would kick in and bar liability. That is the nature of Section 230's protections: to protect a provider from speaker-liability stemming from the speech it hosts. Liability under H.B. 1181 is plainly different.

Plaintiffs reject that harm-based theory based on a misreading of *MySpace*. Their contention fails for two reasons. First, it relies on a misrepresentation of the court's characterization of the Third Circuit's holding in *Green v. AOL*, 318 F.3d 465 (3d Cir. 2003). *Green* reasoned that Section 230 barred the following tort claim: "AOL was *negligent* in promulgating *harmful* content and in failing to address certain *harmful* content on its network." *Id.* at 471 (emphasis added). Of course, that parallels the claim in *MySpace*, but it is not analogous here, *see supra*. Second, even if we accepted plaintiffs' generous characterization of our court's characterization of the *Green* court's "recharacterization" of the *Green* plaintiffs' claims as applicable here, plaintiffs

still do not meet their own standard: "If recharacterizing the plaintiff's claims shows that the theory of liability is based, e.g., on decisions relating to the *monitoring, screening, and deletion* of content, the claims are barred and preempted." Brief for Appellee at 54 (emphasis added, internal citations and quotations omitted). But liability here is not based on "monitoring, screening, [or][73] deletion of content." Instead, it is based on a failure to age-verify or to include health warnings.

Plaintiffs continue by quoting *MySpace*, 528 F.3d at 420, to claim that the Act "force[s] upon [plaintiffs] a responsibility 'quintessentially related to a publisher's role,' to filter their audience . . . ." But publishers do not filter audiences; they filter content. And in *Green*, the court says exactly that. "[A]ctions quintessentially related to a publisher's role" refers to "monitoring, screening, and deletion of content." *MySpace*, 528 F.3d at 420 (quoting *Green*, 318 F.3d at 471). Plaintiffs mislead the reader.

Plaintiffs make several other claims as to why *MySpace* controls. First, they cite our statement in *MySpace* that "Congress provided broad immunity under the CDA to Web-based service providers for *all claims* stemming from their publication of information created by third parties . . . ." 523 F.3d at 418 (emphasis added by plaintiffs). That misses the point. The emphasis, properly placed, would read, "Congress provided broad immunity under the CDA to Web-based service providers for all claims stemming from their *publication of information created by third parties* . . . ." *Id.*

[73] We will charitably read plaintiffs' "and" as disjunctive.

(emphasis added). H.B. 1181 is not the sort of liability "stemming from their publication" of pornography that Section 230 immunizes. In fact, plaintiffs' reliance on that passage is belied immediately by the next quote they select: "Parties complaining that they were *harmed by a Web site's publication* of user-generated content . . . may sue the third-party user who generated the content." *Id.* at 419 (emphasis added). This underscores the importance of the harm analysis above.

Finally, plaintiffs also note that, in *MySpace* we mentioned in passing MySpace's failure to provide "age-verification software." *See id.* at 422. But that does not impact the analysis. It merely means that Section 230 shields from liability interactive computer service providers that do not age verify despite some putative obligation arising from tort law.

Therefore, Section 230 does not preempt H.B. 1181.

IV.

We conclude with the remaining equitable factors for preliminary injunctions. Although plaintiffs are unlikely to succeed on the merits of their challenge against H.B. 1181's age-verification requirement, they are likely to succeed against the health warnings. So, we turn to those.

The remaining factors favor the preliminary injunction against the health warnings. Texas challenges plaintiffs' assertion of irreparable harm, claiming first that the foreign plaintiffs have no constitutional rights that Texas could infringe and second that plaintiffs have not shown H.B. 1181 will negatively impact viewership. Plaintiffs respond by pointing out that "[t]he loss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitute irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)).[74]

Plaintiffs' position is compelling. Contrary to Texas's claims, all plaintiffs have First Amendment rights, insofar as they are speaking in the United States. We have never held that because of their lack of citizenship, non-Americans have no rights under the First Amendment when they speak in the United States, and we will not do so here. The district court properly distinguished *USAID v. Alliance for Open Society International, Inc.*, as applying to "foreign organizations operating abroad." 140 S. Ct. 2082, 2088 (2020). Here, we have foreign organizations speaking in the United States. In fact, because H.B. 1181's health warnings compel only speech to visitors from Texas, the organizations are effectively *only* speaking in Texas. Thus plaintiffs, domestic and foreign, would suffer irreparable harm without this injunction against the health warnings.

Next, we turn to the balance of harms and public interests. The state's interests and the public's have merged here. Texas asserts that the harm to the public interest of not enforcing a state's law tips the balance of equities in Texas's favor. Plaintiffs respond by explaining that, should plaintiffs ultimately prevail, Texas's sovereign immunity will prevent them from recovering compliance and litigation costs.

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[74] *See also Book People, Inc. v. Wong*, 91 F.4th 318, 340–41 (5th Cir. 2024).

But the government suffers no injury when a court prevents it from enforcing an unlawful law.[75] Thus, the balance of harms and the public interest weigh in plaintiffs' favor as to the health warnings.

* * * * *

For the above reasons, we VACATE the stay, VACATE the injunction as to the age-verification requirement, and AFFIRM the injunction as to the health warnings.

[75] *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 251–52 (5th Cir.) (citation omitted), *cert. granted sub nom. Danco Laboratories, L.L.C. v. All. for Hippocratic Med.*, 144 S. Ct. 537, *and cert. granted sub nom. FDA v. All. for Hippocratic Med.*, 144 S. Ct. 537, *and cert. denied*, 144 S. Ct. 537 (2023); *see also Book People*, 91 F.4th at 341.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, dissenting in part and concurring in part:

Advocate that he was, James Madison penned the Amendments to the work of the constitutional convention, ordering them in his perceived scale of value to their adoption by the States. Its valence in ratification aside, inherent in the First Amendment's seminal collage of religion, speech, press, assembly, and petition lie the seeds of a signal commitment to individual autonomy, yet to be realized, and in many ways a child itself until the 20th century when the sense of its embrace of individual worth soon became palpable.

The years that followed vindicated Madison's placement of the First Amendment with its rails for the paths of government, married to the individual's right of identity and self-expression in their myriad forms. At its core, the right of free speech moves with and finds expression in changes of technology, with accompanying efforts by Congress and state legislatures to find accommodation. In this dynamic mix, Texas has the right—indeed, the obligation—to protect its children. And consistent with this task, it is a given that the State enjoys great latitude in identifying and addressing injury to persons and institutions. Yet implicit in this legal churn remains the core principle that state power must operate within the sinews of the First Amendment, ever a challenge to all of government, a challenge requiring government to attend to its defense, ever faithful to Madison's gage of the reluctance of the States to relinquish

their sovereign interests to the forming of the Union, a concern he further responded to with the assuring language that "*Congress* shall make no law."[1]

I.

On August 4, 2023, a group of online pornography websites, performers, and advocates sued the State of Texas to enjoin H.B. 1181 from going into effect on September 1, 2023, contending that the law violated the First Amendment of the United States Constitution and was preempted by § 230 of the Communications Decency Act.[2]

The district court determined H.B. 1181 was subject to strict scrutiny as a content-based restriction on speech because it applies only to websites that contain "sexual material harmful to minors." All parties acknowledged the State's compelling interest in protecting minors, but the court held that H.B. 1181 likely failed strict scrutiny review because the statute was neither narrowly tailored nor the least restrictive

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[1] The swirl of the history of Madison's day and its contemporaries produces a rich flow of scholarship, *see e.g.*, David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of First Amendment*, 123 U. PA. L. REV. 45, 65 (1974); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982). I frame this writing with this brief evoking of history only to remind that the path behind informs the path forward, confronting but never losing the core values of speech and press with their changing raiment of modes and mediums.

[2] 47 U.S.C. § 230 ("CDA").

means of advancing the State's interest. The district court concluded that Plaintiffs demonstrated a substantial likelihood of success on the merits of their claim and granted the preliminary injunction.

Texas appealed the district court's order, arguing the court erred in applying strict scrutiny and finding that Plaintiffs demonstrated a substantial likelihood of success on the merits. In my view, H.B. 1181 is subject to strict scrutiny, and finding no error in the district court's factual findings, I would affirm and allow the parties to develop the factual record in the proper forum—trial.

II.

First we ask whether the district court applied the appropriate level of scrutiny in finding a substantial likelihood of success on the merits, a question of constitutional law reviewed de novo.[3] The State argues the district court erred in applying strict scrutiny because H.B. 1181 applies only to speech that is "obscene" for minors undeserving of First Amendment protection and, relying on *Ginsberg v. New York*, that rational basis is the appropriate metric.[4] The majority agrees, concluding that rational basis review applies because the State's compelling interest in protecting

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[3] *Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2006); *United States v. Guidry*, 456 F.3d 493, 506 (5th Cir. 2006) ("We review questions of constitutional law *de novo*.").

[4] *Ginsberg v. New York*, 390 U.S. 629 (1968).

children justifies regulating "the distribution *to minors* of materials obscene *for minors*." I disagree.

To these eyes, H.B. 1181 cannot be reasonably read to reach only obscene speech in the hands of minors. Although the statute incorporates *Miller v. California*'s definition of obscenity, H.B. 1181 limits access to materials that may be denied to minors but remain constitutionally protected speech for adults. It follows that the law must face strict scrutiny review because it limits adults' access to protected speech using a content-based distinction—whether that speech is harmful to minors.

A.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[5] It is well established that, except for several narrow categories of speech deemed unworthy of First Amendment protection, all speech is protected by the First Amendment and infringement upon protected speech receives heightened scrutiny.

No government can "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"[6] nor can our government regulate speech "because of disapproval of the ideas expressed."[7] Content-based regulations are then

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[5] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

[6] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

[7] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

presumed invalid, and the courts must apply heightened scrutiny to laws that disadvantage speech because of its content, those that compel speech, and statutes that infringe upon adults' constitutionally protected speech.[8]

The Supreme Court affirmed these principles in four cases since *Ginsberg*: *Sable Communications of California, Inc. v. F.C.C.*, *Reno v. American Civil Liberties Union*, *United States v. Playboy Entertainment Group, Inc.*, and *Ashcroft v. American Civil Liberties Union* ("*Ashcroft II*").[9] Each of these cases recognized the government's compelling interest in protecting children from obscene materials but nevertheless evaluated the laws at issue under strict scrutiny because the law infringed

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[8] *Id.* ("Content-based regulations are presumptively invalid.") (citation omitted); *Turner*, 512 U.S. at 642 ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.") (citation omitted); *Sable Commc'ns of Calif., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("Under our precedents, § 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear.") (citation omitted).

[9] *Sable*, 492 U.S. 115 (1989); *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000); *Ashcroft v. Am. C.L. Union* ("*Ashcroft II*"), 542 U.S. 656 (2004).

constitutionally protected speech or imposed distinctions based on content.[10] Stepping past this precedent, the majority's new rule unjustifiably places the government's interest upon a pedestal unsupported by Supreme Court precedent.

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[10] *See generally Sable*, 492 U.S. at 126 (considering 1988 amendments to § 223(b) of the Communications Act of 1934 which "sought to restrict the access of minors to dial-a-porn," recognizing the "Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages," and concluding "[t]he Government may serve this legitimate interest, but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms") (internal quotation and citation omitted); *Reno*, 521 U.S. at 860, 868–76 (considering § 223(a), (d) of Title V of the Communications Decency Act of 1996, which prohibited the transmission of "[any] communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age," recognizing "the governmental interest in protecting children from harmful materials," and applying strict scrutiny because § 223(a) imposed a content-based distinction); *id.* at 876 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.") (citing *Ginsberg*, 390 U.S. at 639; *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749 (1978)); *Playboy Ent. Grp., Inc.*, 529 U.S. at 806–12 (considering § 505 of the Telecommunications Act which regulated "channels primarily

B.

I turn now to the question of whether H.B. 1181 applies only to obscene speech, one of the few categories of speech outside the umbrella of protection afforded by the First Amendment.[11] Relevant here, the law applies only to "commercial entit[ies] that knowingly and intentionally publish[] or distribute[] material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors."[12] "Sexual material harmful to minors" is defined as "any material" that:

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dedicated to 'sexually explicit adult programming or other programming that is indecent,'" finding § 505 implemented a content-based distinction, and applying strict scrutiny despite recognizing the "overriding justification for the regulation is concern for the effect of the subject matter on young viewers"); *Ashcroft II*, 542 U.S. at 660–65 (affirming district court's conclusion that § 231 of the Child Online Protection Act was a content-based regulation, applying strict scrutiny, and finding that COPA was not the least restrictive means of achieving the government's "interest of preventing minors from using the Internet to gain access to materials that are harmful to them").

[11] Notably, this argument was not made before the district court. There, the State argued that H.B. 1181 addressed content obscene for children and "does not place any limits whatsoever on what porn adults can watch."

[12] TEX. CIV. PRAC. & REM. § 129B.002(a).

> (A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;
>
> (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:
>
> (i) a person's pubic hair, anus, or genitals or the nipple of the female breast;
>
> (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or
>
> (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[13]

Although obscene speech lies outside the First Amendment's umbrella of protection, not all sexual expression is obscene.[14] Indeed, "sexual expression which is indecent but not obscene is protected by the First Amendment."[15] What Plaintiffs refer to as

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[13] *Id.* § 129B.001(6).

[14] *See Miller v. California*, 413 U.S. 15, 24 (1973); *see generally Roth v. United States*, 354 U.S. 476 (1957). It is not "literally true" that certain categories of speech, including obscenity, are outside the "protection of the First Amendment." *See R.A.V.*, 505 U.S. at 383. Instead, "these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution." *Id.*

[15] *Sable*, 492 U.S. at 126.

"exclusively 'soft core' nude modeling," for example, constitutes non-obscene sexual expression, as would many romance novels, or—to use another example from the briefing—Marlon Brando movies. And protected sexual expression encompasses materials that are appropriate for adults but inappropriate for minors. For example, scenes from the popular show "Game of Thrones," the 1985 film "The Color Purple," or the 2011 film "The Girl with the Dragon Tattoo" all contain "depictions" of sexual intercourse that may be "patently offensive" to young minors and regulated under H.B. 1181, but still offer artistic or cinematic value for adults.

While I agree with the majority that H.B. 1181's plain text applies only to "sexual material harmful to *minors*,"[16] the statute cannot be reasonably read to regulate *only* obscene content. In the words of the district court, H.B. 1181 goes "beyond obscene materials" and "regulates all content that is prurient, offensive, and without value *to minors*."[17] In doing so, the law infringes upon adults' protected sexually expressive speech.

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[16] TEX. CIV. PRAC. & REM. § 129B.001(6) (emphasis added).

[17] "Because most sexual content is offensive to young minors," the district court found H.B. 1181 "covers virtually all salacious material," including "sexual, but non-pornographic, content posted or created by Plaintiffs."

Ultimately, the text does not support the argument that H.B. 1181 regulates only obscene speech.[18] H.B. 1181 regulates all material harmful to minors, which necessarily encompasses non-obscene, sexually expressive—and constitutionally protected—speech for adults. Thus, H.B. 1181 limits access to constitutionally protected speech, regardless of whether the viewer is a minor. Such action "is to burn the house to roast the pig."[19]

C.

As the regulated speech falls under the First Amendment's umbrella of protection, the issue is whether the district court properly found H.B. 1181 subject to strict scrutiny, a question of law reviewed de novo.[20] The majority finds H.B. 1181 subject only to rational basis review. I disagree.

1.

Content-based restrictions on protected speech are presumptively unconstitutional, valid only if the government proves they are narrowly tailored to further a compelling

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[18] To the extent the State suggests H.B. 1181 would be enforced only as to obscene content, we cannot "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

[19] *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

[20] *United States v. Richards*, 755 F.3d 269, 273 (5th Cir. 2014) (citations omitted).

interest.[21] By the statute's plain language, H.B. 1181 applies only to websites with content "more than one-third of which *is sexual material harmful to minors*."[22] Because H.B. 1181 regulates only a particular type of speech, "[t]he speech in question is defined by its content; and the statute which seeks to restrict it is content based."[23] As such, H.B. 1181 is subject to strict scrutiny.

2.

The district court found the State "largely concede[d]" that strict scrutiny should apply, but looking to *Ginsberg*, the State now asks this Court to find that this content-based restriction does not warrant strict scrutiny.[24] While the majority credits this argument, I cannot—for *Ginsberg* does not here call for rational basis review, and the Supreme Court has unswervingly applied strict scrutiny to content-based regulations that limit adults' access to protected speech.

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[21] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citing *R.A.V.*, 505 U.S. at 395).

[22] *See* TEX. CIV. PRAC. & REM. CODE § 129B.002(a) (emphasis added).

[23] *Playboy Ent. Grp., Inc.*, 529 U.S. at 811.

[24] Both Texas and the majority gloss H.B. 1181's breadth by claiming the law applies only to "commercial pornographic websites." But as discussed, *supra* Section II.B., H.B. 1181 regulates more than commercial pornography.

In *Ginsberg*, the Supreme Court upheld a New York criminal obscenity statute prohibiting the knowing sale of obscene materials to minors.[25] Ginsberg was convicted of violating the statute after he sold two "girlie magazines" to a sixteen-year-old. Ginsberg asserted that the New York statute violated the First Amendment because "the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor."[26] He went on to argue "that the denial to minors under 17 of access to material condemned by [the statute], insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty," which Ginsberg likened to the deprivations of liberty recognized in *Meyer v. State of Nebraska*, *Pierce v. Society of Sisters*, and *West Virginia State Board of Education v. Barnette*.[27]

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[25] *See Ginsberg*, 390 U.S. at 645.

[26] *Id.* at 636.

[27] *Id.* at 637–38; *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding a Nebraska statute prohibiting the teaching of any subject in any language other than the English language unconstitutional); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (finding the Compulsory Education Act of 1922 unconstitutionally interfered with parents' liberty to direct the upbringing and education of their children); *Barnette*, 319 U.S. at 642 (holding that schools cannot

The Supreme Court disagreed, focusing on the fact that the prosecution concerned a single sale in Ginsberg's store to a minor. Despite observing that the magazines were "not obscene for adults," the Court held the New York regulation did not invade the "minors' constitutionally protected freedoms."[28] Explaining that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," the Court found the law rationally related to the State's interest in protecting minors, and upheld Ginsberg's conviction.[29]

Ginsberg's force here is its recognition of a state's power to regulate minors in ways it could not regulate adults. But this overriding power to protect children does not answer our essential question: whether H.B. 1181 imposes a content-based restriction or causes an "unnecessarily broad suppression of speech addressed to adults."[30] If so, "the answer should be clear: The standard is strict scrutiny."[31]

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compel children to salute the flag or state the Pledge of Allegiance without violating the First Amendment).

[28] *Ginsberg*, 390 U.S. at 638.

[29] *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)); *id.* at 643.

[30] *Reno*, 521 U.S. at 875.

[31] *Playboy Ent. Grp., Inc.*, 529 U.S. at 813.

Ginsberg is further inapplicable because application of rational basis rested on the notion that minors have more limited First Amendment rights than adults[32] and because the statute did not infringe upon adults' access to the same materials.[33]

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[32] *Ginsberg*, 390 U.S. at 636 ("[Ginsberg] accordingly insists that the denial to minors under 17 of access to material condemned by s 484—h, insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty."); *see also Erznoznik*, 422 U.S. at 214 n.11 ("The First Amendment rights of minors are not 'co-extensive with those of adults.'"); *Bellotti v. Baird*, 443 U.S. 622, 637 n.15 (1979) ("[T]he State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, *Tinker v. Des Moines School Dist*., 393 U.S. 503 (1969), illustrates that it may not arbitrarily deprive them of their freedom of action altogether.").

Indeed, the Supreme Court has cited *Ginsberg* for the proposition that minors have more limited First Amendment rights than adults. *See Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968); *Miller*, 413 U.S. at 36 n.17; *Erznoznik*, 422 U.S. at 212–14; *Carey v. Population Servs., Int'l*, 431 U.S. 678, 692 (1977); *Pacifica*, 438 U.S. at 757 (Stewart, J., concurring in result); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (opinion of Brennan, J.).

[33] Contrary to the majority's claim that "[t]he statute at issue in *Ginsberg* necessarily implicated, and intruded upon, the privacy of those adults seeking to purchase 'girlie magazines,'" *Ginsberg* came to the opposite conclusion. *Ginsberg*, 390

Notably, Plaintiffs here, unlike Ginsberg, do not seek greater access for minors to these materials. And the New York statute at issue in *Ginsberg* did not burden the free speech interests of adults, but H.B. 1181 does; H.B. 1181 requires that adults comply with the age verification procedure and view the required health disclosures before accessing protected speech. Therefore, *Ginsberg*'s justification for rational basis review—that minors have more limited First Amendment rights than adults—has no purchase here, as we are dealing with a challenge to an adult's ability to access constitutionally protected materials on the ubiquitous internet, not over-the-counter magazine sales in a drug store.

The majority cites to *Erznoznik v. City of Jacksonville* for the broad contention that more stringent regulations of content are permissible for minors *without any regard* to burdens placed on adult speech. *Erznoznik* invalidated a Jacksonville ordinance that prohibited drive-in theaters from exhibiting films showing bare buttocks or breasts.[34] In the majority's view, had the definition of obscenity been narrowed to only depictions obscene for children, the *Erznoznik* Court would have taken no issue with the burdens imposed on adults. With respect, the Court did consider the burdens on

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U.S. at 634–35 (determining the magazines at issue "are not obscene for adults," and stating that the "[New York statute] does not bar the appellant from stocking the magazines and selling them to persons 17 years of age or older, and therefore the conviction is not invalid under our decision in *Butler v. State of Michigan*").

[34] *See Erznoznik*, 422 U.S. at 207–08 (restating § 220.313 of the municipal code).

adults. Specifically, the Court noted that "the deterrent effect of this ordinance [was] both real and substantial," as it "applie[d] to all persons employed by or connected with drive-in theaters" and forced "the owners and operators of these theaters" to either "restrict their movie offerings or construct adequate protective fencing which may be extremely expensive of even physically impracticable" in order to avoid prosecution.[35] It also explained that the ordinance deterred theaters "from showing movies containing any nudity, however innocent or even educational." Contrary to the majority's view, and as we have aways done, *Erznoznik* requires an exacting comparison of the state interest involved (including the interest in protecting children) against the methods chosen to effectuate the state's interest and its effects on the broader adult population.[36]

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[35] *Id.* at 218.

[36] The majority opines "it is never obvious whether an internet user is an adult or a child," so that "any attempt to identify the user will implicate adults in some way" and "any attempt to protect children will be subject to strict scrutiny, often a death knell in and of itself." But strict scrutiny need not sound the "death knell." The majority here begs the question of how states, parents, and websites can ensure that only adults access the materials at issue, a factual question best suited for trial. Finally, distinguishing between minor and adult viewers is within technical achievement. Plaintiffs proposed several means by which Texas could do so without impinging upon adults' constitutional rights. *See infra* Section III.A.2. A trial is the

It is no failure of advocacy that the State has cited to no case since *Ginsberg* in which the Supreme Court applied rational basis review to regulations impinging adults' access to protected speech.[37] No such case exists. Instead, since *Ginsberg*, the Supreme Court has consistently applied strict scrutiny to content-based regulations that infringe upon adults' protected speech.

In *Sable*, the Supreme Court addressed § 223(b) of the Communications Decency Act of 1934, as amended in 1988.[38] Section 223 imposed a blanket prohibition on indecent and obscene interstate commercial telephone messages, including prerecorded "dial-a-porn" services.[39] The CDA's proscriptions were justified based on the government's interest in protecting children from harmful materials.[40]

The Supreme Court upheld § 223(b)'s ban of obscene commercial telephone messages but struck the limitations on "indecent" communications as stepping on adults' access to constitutionally protected sexual expression.[41] Citing *Ginsberg*, the

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proper forum for determining whether Plaintiffs' proposal indeed presents a viable, less restrictive means to accomplish Texas's goal.

[37] The majority likewise fails to identify such a case.

[38] 47 U.S.C. § 223; *Sable*, 492 U.S. at 117.

[39] 47 U.S.C. § 223 (1988).

[40] *Sable*, 492 U.S. at 126 (describing government's interest as "legitimate interest in protecting children from exposure to indecent dial-a-porn messages").

[41] *Id.* at 131.

Court acknowledged the federal government's compelling interest in protecting the "physical and psychological well-being of minors" but nevertheless required the statute be "narrowly drawn."[42] In short, the Court applied strict scrutiny because "the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages."[43]

The Communications Decency Act drew challenge again in *Reno v. American Civil Liberties Union*.[44] In *Reno*, the Court engaged § 223 (a) and (d), which criminalized the "indecent transmission" and "patently offensive display" of "obscene or indecent" messages to any recipient under 18 years of age.[45] As the Supreme Court had not yet articulated a standard for restrictions on internet communications, the first question for the Court was the appropriate level of scrutiny. The government urged the Court to apply rational basis review like *Ginsberg*, or alternatively, intermediate scrutiny as the Court had done in *F.C.C. v. Pacifica Foundation* and *City of Renton v. Playtime Theatres, Inc*.[46]

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[42] *Id.* at 126.

[43] *Id.* at 131.

[44] *See Reno*, 521 U.S. at 849–85.

[45] *Id.* at 849.

[46] *See* Brief for Appellant, *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997) (No. 96-511), 1997 WL 32931, 19–24.

The Supreme Court disagreed with the government. First, it found that the CDA had four important textual differences from the New York statute at issue in *Ginsberg*.[47] Then, the *Reno* Court held *Pacifica* inapplicable because the *Pacifica* broadcast regulation was narrower than the CDA, did not involve a punitive component, and concerned a medium which, as a historical matter, had "received the most limited First Amendment protection."[48] Finally, *Reno* found that the "time, place, and manner" restrictions in *Playtime Theatres* were inapposite because the CDA was designed to target the "primary effects" of offensive speech and not the "secondary effects" at issue in *Playtime Theatres*.[49] The Court concluded that "these precedents,

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[47] The Court found "[i]n four important respects, the statute upheld in *Ginsberg* was narrower than the CDA." These included that: (1) under the CDA "neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute"; (2) the CDA extended beyond mere commercial transactions; (3) the CDA neither defined "indecent" nor contained "any requirement that the 'patently offensive' material covered by § 223(d) lack serious literary, artistic, political, or scientific value"; and (4) the CDA applied to "all those under 18 years," which was an additional year than the statute in *Ginsberg*. *Reno*, 521 U.S. at 865–67.

[48] *Id.* (internal citations omitted).

[49] The opinion further rejected the government's argument that the CDA was "'cyberzoning' on the Internet" equivalent to local zoning ordinances. *Id.* at 867–68. Because the CDA "applies broadly to the entire universe of cyberspace" and its

then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions."[50]

The Court went on to distinguish "cyberspace" from traditional mediums of expression.[51] In particular, the Court found "the vast democratic forums of the Internet" had never been subject to the same degree of "government supervision and regulation that has attended the broadcast industry."[52] Moreover, the internet was not as "invasive" as radio, in that internet communications "do not 'invade' an individual's home or appear on one's computer screen unbidden."[53] Indeed, because internet users must take "affirmative steps" to access sexually explicit content, the Court noted that "users seldom encounter content by accident" and the "odds are slim that a user would

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purpose was to protect children from the "primary effects of indecent and patently offensive speech, rather than any secondary effects of such speech," the *Reno* Court determined that the CDA was a "content-based blanket restriction on speech, and, as such, cannot be 'properly analyzed as a form of time, place, and manner regulation.'" *Id.* at 868 (cleaned up).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 868–69.

[53] *Id.* at 869.

come across a sexually explicit sight by accident."[54] Ultimately, the Court in *Reno* found that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[55] As a content-based regulation of speech, the CDA faced the "most stringent review of its provisions" and failed, as it was not narrowly tailored and less restrictive alternatives were available.[56]

Displeased with the *Reno* decision, Congress enacted the Child Online Protection Act ("COPA").[57] The COPA imposed a $50,000 fine or up to six months' imprisonment

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[54] *Id.* (internal quotations omitted); *see also id.* at 870 (explaining that the decision in *Sable* distinguished "dial-a-porn," prerecorded sexually explicit phone calls, from broadcast radio because "the dial-it medium requires the listener to take affirmative steps to receive the communication").

[55] *Id.* at 870.

[56] *Id.* at 868.

[57] 47 U.S.C. § 231. In between *Reno* and *Ashcroft II*, the Supreme Court decided *United States v. Playboy Ent. Grp., Inc.*, and held that § 505 of the Telecommunications Act, which regulated "channels primarily dedicated to 'sexually explicit adult programming or other programming that is indecent,'" drew a content-based distinction between "indecent" and non-indecent material. *Playboy Ent. Grp., Inc.*, 529 U.S. at 811–12. The Court found its "precedent[] teach[es] these principles": first, "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails,

for anyone who knowingly used the internet to make "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[58] The statute distinguished permissible from impermissible communications based on whether they were "harmful to minors."[59] The COPA defined "harmful to minors" by adopting *Miller*'s definition of obscenity.[60]

In *Ashcroft II*, several internet service providers, "Web speakers[,] and others concerned with protecting the freedom of speech" challenged the COPA as a content-based speech restriction.[61] As in *Sable* and *Reno*, the government asserted the COPA

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even where no less restrictive alternative exists," *id.* at 813; second, "cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts." *id.* Third, when a law regulates protected speech, even "unwanted, indecent speech that comes into the home without parental consent," "the answer should be clear: The standard is strict scrutiny," *id.* at 814. As the Court succinctly put it: "[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Id.*

[58] 47 U.S.C. § 231(a)(1).

[59] *Id.*

[60] *Compare* 47 U.S.C. § 231(e)(6), *with Miller*, 413 U.S. at 24–25.

[61] *Ashcroft II*, 542 U.S. at 656 (capitalization in original).

was constitutional given the government's interest in protecting minors from harmful materials.[62] The district court applied strict scrutiny, found the COPA was likely to deter adults from accessing protected speech, and concluded that the government could not "meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to harmful material."[63] Accordingly, the district court preliminarily enjoined the statute's enforcement.[64]

The Supreme Court agreed and affirmed the district court.[65] In doing so, *Ashcroft II* restated *Reno*'s rule that strict scrutiny applied to statutes that "effectively suppress[] a large amount of speech that adults have a constitutional right to receive and to address to one another."[66] *Ashcroft II* reiterated that "content-based restrictions on speech [are] presumed invalid, and that the Government bear[s] the burden of showing their constitutionality."[67] Ultimately, the Court upheld the

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[62] *Id.* at 659–60.

[63] *Id.* at 664 (cleaned up).

[64] *Id.*

[65] *Id.* at 670 ("The reasoning of *Playboy Entertainment Group* and the holdings and force of our precedents require us to affirm the preliminary injunction.").

[66] *Id.* at 665 (citing *Reno*, 521 U.S. at 874).

[67] *Id.* at 660 (internal citations omitted).

preliminary injunction after finding a number of plausible, less restrictive alternatives, including blocking and filtering software.[68]

The Supreme Court has consistently applied strict scrutiny to content-based restrictions that impair adults' access to protected speech. Contrary to the majority's views, *Ginsberg* is distinguishable and does not change this analysis. H.B. 1181 imposes a content-based restriction on speech that burdens adults' access to that speech. Bound by *Sable*, *Reno*, and *Ashcroft II*, this Court must apply strict scrutiny.

3.

In an effort to escape the Supreme Court's insistence upon strict scrutiny for content-based restrictions, the majority—and the State—would differentiate H.B. 1181 from the CDA in *Reno* and the COPA in *Ashcroft II*. These distinctions are unpersuasive.

i.

First, the State attempts to distinguish this case from *Reno*, arguing that H.B. 1181 is narrower than the CDA and more closely tracks *Miller*'s definition of obscenity.[69] Indeed, *Reno* found the CDA's definition of obscenity to be impermissibly broader than

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[68] *Id.* at 667–70.

[69] The State argues the CDA was unconstitutionally overbroad because "it omitted *Miller*'s element that obscenity must relate to 'sexual conduct'" but that H.B. 1181 "neither criminalizes pornography nor omits this crucial element; it only takes steps to limit its distribution to children and warn of associated risks."

Miller's for several reasons: *Miller*'s definition of obscenity was limited to conduct defined by state law, while the CDA's was not; and *Miller*'s definition was limited to sexual conduct, whereas the CDA also covered excretory activities and "organs of both a sexual and excretory nature."[70]

H.B. 1181 is strikingly similar to the CDA and, in some ways, goes even further. Like the CDA, H.B. 1181 does not limit regulated speech to conduct proscribed by Texas law.[71] Like the CDA, H.B. 1181 regulates more than just "sexual conduct."[72] The CDA prohibited speech regarding "excretory activities" as well as "organs" of both a sexual and excretory nature,[73] and H.B. 1181 similarly restricts depictions of "pubic hair" and "the nipple of the female breast."[74] By its text, H.B. 1181 goes further than the CDA regarding the format of depictions it covers, as it applies to "*descriptions* of actual, *simulated, or animated* displays or depictions" of specified body parts, conduct,

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[70] *Reno*, 521 U.S. at 871–73; *Miller*, 413 U.S. at 16 n.1 (cleaned up).

[71] TEX. CIV. PRAC. & REM. CODE § 129B.001(6) (omitting reference to state law).

[72] *Id.*

[73] 47 U.S.C. § 223 (1996).

[74] TEX. CIV. PRAC. & REM. CODE § 129B.001(6).

and undefined "exhibitions,"[75] while the CDA applied, *inter alia*, to "image[s]."[76] In essence, Texas's contention that H.B. 1181 closely tracks *Miller* fails to persuade.

Lastly, the majority discounts *Reno* on the basis that it did not distinguish the internet from in-person communications, to which I say: read *Reno*. The opinion reviewed the levels of scrutiny applied across numerous cases and mediums—including those applied in *Ginsberg*, *Pacifica*, *Playtime Theatres*, and *Sable*—before concluding "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [the internet]."[77]

ii.

Texas's attempt to distinguish *Ashcroft II* is similarly flawed. As an initial matter, the State understates the similarities between H.B. 1181 and the COPA. Where the COPA distinguished content "harmful to minors," H.B. 1181 uses the phrase "sexual material harmful to minors." The statutory definitions of "harmful to minors" and "sexual material harmful to minors" are, however, functionally identical.[78] These similarities are not superficial, they are substantive. Therefore, as in *Ashcroft II*, strict scrutiny applies.

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[75] *Id.* (emphasis added).

[76] 47 U.S.C. § 223 (d), (h); *Reno*, 521 U.S. at 860; TEX. CIV. PRAC. & REM. CODE § 129B.001(6).

[77] *Reno*, 521 U.S. at 870.

[78] *Compare* 47 U.S.C. § 231(e)(6), *with* TEX. CIV. PRAC. & REM. § 129B.001(6).

Moreover, Texas's argument that *Brown v. Entertainment Merchants Association* reaffirmed *Ginsberg*, while condoned by the majority, stretches *Brown*'s holding.[79] Texas is correct that *Brown* affirmed that a state has a compelling interest in protecting minors from obscenity.[80] But that is where the similarities to *Ginsberg* end. The *Brown* Court did not apply *Ginsberg*'s rational basis review. Instead, the Court

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[79] *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011).

[80] *Id.* at 794 ("No doubt a State possesses legitimate power to protect children from harm . . . but that does not include a free-floating power to restrict the ideas to which children may be exposed.") (citing *Ginsberg*, 390 U.S. at 640–641; *Prince*, 321 U.S. at 165).

Brown heard a challenge to California Assembly Bill 1179 (2005), CAL. CIV. CODE §§ 1746–1746.5 (2009), which prohibited the sale or rental of "violent video games" to minors and required packaging to indicate "18" as the appropriate age level for players. The statute defined "violent" games as those that permitted users to kill, maim, dismember, or sexually assault an "image of a human being" while playing if a "reasonable person, considering the game as a whole, would find [it] appeals to a deviant or morbid interest of minors," is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *See* CAL. CIV. CODE § 1746(d)(1) (defining "violent video game").

found the California statute at issue constituted a content-based restriction of protected speech and applied strict scrutiny.[81]

Finally, the majority's critique that *Ashcroft II* contained "startling omissions" regarding its analytical framework ignores that the Supreme Court itself previously found that strict scrutiny applied.[82] In *Ashcroft II*, the Supreme Court simply treated it as a self-evident proposition that strict scrutiny applied. This Court cannot fault *Ashcroft II* for applying the level of scrutiny clearly established by *Sable* and *Reno*, or for declining to engage in repetitive analysis. And the majority's implication that the Supreme Court knowingly applied the wrong level of scrutiny merely because the issue was not "jurisdictional" needs no response.

* * *

The majority's attempts to distinguish *Ginsberg* from *Sable*, *Reno*, and *Ashcroft II* are unconvincing. H.B. 1181 implements a content-based distinction: it applies only if over one third of an entity's commercial content is "harmful to minors." While the

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[81] *Brown*, 564 U.S. at 799 (finding the law "imposes a restriction on the content of protected speech, it is invalid unless [the government] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest").

[82] Texas similarly contends that the *Ashcroft II* "Court never addressed whether strict scrutiny was the proper standard because the government conceded the point."

majority claims "the statute in *Sable* swept in a much larger swath of speech than the speech targeted here," it fails to explain how § 224(b)'s ban on "indecent" material is broader than that regulated by H.B. 1181. Further, the Supreme Court has rejected the majority's contention that there is a difference between regulatory burdens and bans: "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."[83]

In sum, I agree with the majority that *Ginsberg* remains good law and indubitably recognizes the government's power to protect children from age-inappropriate materials. But content-based laws that infringe upon protected speech receive strict scrutiny. H.B. 1181 imposes a content-based restriction on speech that burdens adults' access to that speech and is subject to strict scrutiny.

III.

To prevent minors from accessing potentially harmful speech, H.B. 1181 "suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[84] Under strict scrutiny, the statute must be narrowly drawn to further Texas's compelling interest and the restriction must amount to the "least restrictive means to further the articulated interest."[85]

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[83] *Playboy Ent. Grp., Inc.*, 529 U.S. at 812.

[84] *Id.* at 874.

[85] *Sable*, 492 U.S. at 126.

There was no challenge before the district court to the State's compelling interest in protecting minors from inappropriate, explicit content. Rather, the district court held that H.B. 1181 failed strict scrutiny review because it was neither narrowly tailored nor the least restrictive means of achieving the State's interest. Hence, the district court concluded Plaintiffs demonstrated a substantial likelihood of success on the merits of their claim and granted the preliminary injunction. We review these findings for clear error.[86]

A.

First, the age verification component of H.B. 1181 requires regulated commercial entities to implement "reasonable age verification methods" to ensure that all website users are over the age of 18.[87] "Reasonable age verification methods" include requiring

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[86] *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016); *see also Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, 894 F.3d 692, 696 (5th Cir. 2018) ("A grant of a preliminary injunction is reviewed for abuse of discretion. Factual determinations within the preliminary injunction analysis are reviewed for clear error[.]") (internal citation omitted).

[87] TEX. CIV. PRAC. & REM. § 129B.002(a). "Reasonable" age verification methods, set out in § 129B.003, provides:

> (b) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to:
>
> (1) provide digital identification; or

website viewers to either "provide digital identification" or "comply with a commercial age verification system that verifies age" using either government-issued identification or "a commercially reasonable method that relies on public or private transactional data to verify the age of an individual."[88]

The district court found that this provision of the statute was not narrowly tailored, as it was underinclusive, vague, and overbroad in its regulation of adults' protected speech. I agree.

> (2) comply with a commercial age verification system that verifies age using:
>
> (A) government-issued identification; or
>
> (B) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual.

Id. § 129B.003(b). The statute does not define a "commercially reasonable method that relies on public or private transactional data."

[88] *Id.* § 129B.003(b). "Digital identification" refers to "information stored on a digital network that may be accessed by a commercial entity and that serves as proof of the identity of an individual." *Id.* § 129B.003(a). Although companies must require such verification, the statute prohibits commercial entities from retaining this information. *See id.* § 129B.002(b) ("A commercial entity that performs the age verification required by Subsection (a) or a third party that performs the age verification required by Subsection (a) may not retain any identifying information of the individual.").

1.

i.

The district court found H.B. 1181's age verification mandate "severely underinclusive" because the law does not regulate sites that are "most likely to serve as a gateway to pornography use." This conclusion rested on expert declarations that highlighted the types of entities left unregulated by H.B. 1181. These reports emphasized that internet service providers are explicitly exempt from the statute.[89] Consequently, this exemption "ignores visual search[es], much of which is sexually explicit or pornographic," and could be easily accessed by children after a simple "misspelled search." Further relying on the experts' reports, the district court concluded that social media platforms are also implicitly exempted from the statute because "they likely do not distribute at least one-third sexual material." The district court found this exemption problematic because some social media sites, like Reddit or Tumblr, contain "entire communities and forums . . . dedicated to posting online pornography with no regulation under H.B. 1181." Likewise, the district court found that social media websites like Instagram and Facebook "can show material which is sexually explicit for minors without compelled age verification." Ultimately, the

[89] *Id.* § 129B.005(b) (internet service provider exemption). However, this exemption exists "to the extent the provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors." *Id*.

district court concluded that, because of these exceptions, H.B. 1181 "fails to reduce the online pornography that is most readily available to minors."

At this juncture, Texas has failed to persuade that this finding was clearly erroneous. The State argues the age verification requirement is not underinclusive but, instead, only targets sites "whose business model is significantly driven by distributing sexual material harmful to minors," unlike search engines and social media websites that have either taken steps to protect minors or "do not seek profit from peddling depictions of bestiality and sexual assault." This argument fails at the starting gate because it was not made before the district court and is thus forfeited on appeal. Equally important, the State offered no evidence that the Texas legislature tailored H.B. 1181 to address pornography websites *because* their "business model" is tailored to selling pornography to minors. Without evidence in the record, this argument cannot stand.

Rather, the present record supports the district court's conclusion that while H.B. 1181 will regulate adult video companies, it "will do little else to prevent children from accessing pornography." The district court evaluated the provided expert reports and based its conclusions on the evidence before it. I am not left with a "definite and firm conviction that a mistake has been committed,"[90] a conclusion reinforced by the

[90] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

"great deference" owed to "the findings of the trial court with respect to duly admitted expert testimony."[91]

ii.

Turning to vagueness, the district court further held that the age verification component of H.B. 1181 was "problematic because of several key ambiguities" in the statutory language. To begin, the court evaluated § 129B.002 and found that by lumping together young minors with those near the age of majority, the statute overlooked the reality that material "harmful to a younger minor is vastly different . . . than material that is harmful to a minor just shy of" majority.[92] Similar problems stemmed from the statute's failure to define "serious literary, artistic, political, or scientific value for minors."[93] As such value varies with age group, the district court found that H.B. 1181 would chill constitutionally protected speech.

Additionally, the district court found H.B. 1181's scope was "subject to multiple interpretations as to the scope of its liability" because it was unclear whether the

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[91] *McClain v. Lufkin Indus., Inc*., 519 F.3d 264, 279 (5th Cir. 2008) (citing *Cleveland ex rel. Cleveland v. United States*, 457 F.3d 397, 407 (5th Cir. 2006)).

[92] *Am. C.L. Union v. Ashcroft*, 322 F.3d 240, 268 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004).

[93] TEX. CIV. PRAC. & REM. § 129B.001(6)(C) (noting, without explanation, that "[s]exual material harmful to minors" must "taken as a whole, lack[] serious literary, artistic, political, or scientific value for minors").

"one-third" requirement modified "material" or "website." Finally, the court was concerned that H.B. 1181 did not define a "commercially reasonable method" of age verification. The district court indicated these vague provisions were problematic and spoke "to the statute's broad tailoring."[94] In response to these challenges, the State asserts that "one-third" modifies "website" and argues any problems with vagueness could be resolved through "certification."[95]

Even if we accepted this interpretation, the State does not address the district court's remaining concerns regarding the definitions of a "commercially reasonable method" of age verification or "serious literary, artistic, political, or scientific value for minors." More to the point, the district court did not rest its holding on a vagueness challenge. The purchase of its observations was that H.B. 1181 was not narrowly tailored.

iii.

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[94] The district court noted: "Overall because the Court finds the law unconstitutional on other grounds, it does not reach a determination on the vagueness question. But the failure to define key terms in a comprehensible way in the digital age speaks to the lack of care to ensure that this law is narrowly tailored." *See also Reno*, 521 U.S. at 871–72 ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.").

[95] The State also maintains that the "one-third" ambiguity is "hardly relevant" because "Pornographers make their money selling pornography" and "will meet the one-third trigger regardless of how the Court measures the denominator."

In granting the preliminary injunction, the district court found that the age verification requirements were impermissibly broad and would infringe upon adults' constitutionally protected speech. The court determined that the statute was "largely identical" to the COPA, found unconstitutional in *Ashcroft II*; likely to chill substantial speech for adults, as it does not require the government to delete user data and "risk[ed] forcing individuals to divulge specific details of their sexuality to the state government to gain access to certain speech"; and effectively "reduce[d] the adult population to only what is fit for children."[96] The State disputes these conclusions and argues that the statute "does not prohibit *any* speech, only [requires] that [Plaintiffs] check the ages of their customers," and will not chill speech because the age verification requirements "preserve[] online anonymity."

These arguments fail for four reasons. First, that H.B. 1181 "does not prohibit *any* speech" but merely restricts access to speech is an empty argument because "[t]he distinction between laws burdening and laws banning speech is but a matter of degree."[97] Second, H.B. 1181 encompasses nearly all salacious material because it may be harmful to young minors, *see supra* Section II.B, and as such, the statute restricts adults' access to both obscene *and* non-obscene speech. Third, the State does not address the district court's concerns that government entities and third-party

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[96] *See also Reno*, 521 U.S. at 875 (cleaned up) (citation omitted); *Ashcroft II*, 542 U.S. at 665–70; 47 U.S.C. § 231(e)(6).

[97] *Playboy Ent. Grp., Inc.*, 529 U.S. at 812.

intermediaries are not required to delete users' data. H.B. 1181 prohibits commercial entities and third parties performing age verification from retaining identifying information, but the bill imposes no burden on governmental entities nor "any intermediary between the commercial websites and the third-party verifiers" to do the same.[98] Simply claiming that the "age verification preserves online anonymity" does not make it so. Finally, this response ignores the "special First Amendment concerns" of the chilling effects on speech when the state government can log and track adults' access to sexual material.[99] It is canon that overbroad regulations "have the potential to chill, or deter, speech outside their boundaries."[100] The risk of

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[98] *See* TEX. CIV. PRAC. & REM. CODE § 129B.002(b).

[99] *Reno*, 521 U.S. at 871–72. The district court specifically identified privacy concerns regarding accessing homosexual material. Because the State has not repealed its criminal sodomy laws, despite the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), the court found "it is apparent that people who wish to view homosexual material will be profoundly chilled from doing so if they must first affirmatively identify themselves to the state."

[100] *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). The threat of self-censorship is present in all regulations on speech, not merely those that threaten criminal prosecution. *See United States v. Hansen*, 599 U.S. 762, 810–11 (2023) (Jackson, J., dissenting) ("Moreover, criminal prosecutions are not the only method by which statutes can be wielded to chill free speech . . . . There can be no doubt that this kind

censorship is particularly high for regulations of obscenity and sexual expression, which are "often separated . . . only by a dim and uncertain line."[101]

Here, the record supports the district court's conclusion that the age verification mandate will chill protected speech; moreover, it suggests the majority's claim that H.B. 1181 has a "*de minimis* effect on privacy" understates the privacy issues at play. The mandate requires adults to affirmatively identify themselves by providing government identification before accessing desired content. This requirement "deters adults' access to legal sexually explicit material" and goes "far beyond the interest of protecting minors." Because neither the government nor "any intermediary" is required to delete information obtained, the district court found that adults would be "particularly concerned about accessing controversial speech when the state government can log and track that access." Texas provides no persuasive rebuttal.

2.

A content-based statute that impermissibly burdens adults' protected speech "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[102] The State bears the

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of Government surveillance—targeted at journalists reporting on an important topic of public concern, no less—tends to chill speech, even though it falls short of an actual prosecution.").

[101] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

[102] *Ashcroft II*, 542 U.S. at 665 (citing *Reno*, 521 U.S. at 874).

burden of proving its chosen method is constitutional,[103] which often requires proof that the legislature considered alternative, less restrictive means.[104] The State has offered no evidence on this latter point and failed to meet its burden.

Before the district court, Plaintiffs offered two less restrictive methods to shield children from inappropriate sexual content: (1) requiring internet service providers, or ISPs, to block specified content until adults opt-out of the block; and (2) "content filtering" by implementing adult controls on children's devices. The district court found that Plaintiffs' proposed alternatives were less restrictive of adult speech, citing the State's own exhibits that indicated "content filtering" was the "most effective method of limiting any harm to minors." The district court concluded that content blocks would address the "under-inclusivity issue" and "comport[] with the notion that

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[103] *Id.*

[104] *Id.* ("When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute."); *see, e.g.*, *Reno*, 521 U.S. at 879 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA . . . . Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.").

parents, not the government, should make key decisions on how to raise their children."

On appeal, Texas contends that content blocking and filtering are not effective, less restrictive alternatives to age verification. It argues that the proposed age verification methods do not require the disclosure of sensitive information and that companies could use techniques such as "selfie matching" or age estimation.[105]

This argument effectively asks the Court to reweigh the evidence and review the district court's findings de novo. We may not do so. The State made these arguments before the district court, which, in its opinion, discussed the State's expert report and explained why it found the contents unpersuasive. The district court considered and rejected these arguments, and I would find no clear error in its determination that the Texas legislature failed to consider less restrictive means to accomplish its goals.

B.

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[105] In its briefing, Texas cites an expert report stating parents are unaware of content-blocking or that children "know how to use it or have circumvented it some other way." The State also asserts that "age verification has proven an ineffective mechanism to limit exposure to adult content by minors" and directs the Court to its expert report on the topic. However, given that the State *proposes* age verification as an essential component of the statute, the Court presumes that this is a typographical error. The State's cited expert report states that "*filtering* has proven an ineffective mechanism[.]"

Next, I turn to H.B. 1181's health warnings provision. H.B. 1181 requires regulated commercial entities to post three warnings purportedly authored by Texas Health and Human Services, as well as a phone number for the U.S. Substance Abuse Mental Health Services Administration.[106] I would affirm the district court's enjoining of the health warnings for the reasons articulated by the district court. Although I would apply strict scrutiny, I concur with the majority's judgment that the compelled disclosures do not survive scrutiny. At this junction, the notice requirements are unenforceable.

IV.

The district court held that the Plaintiffs who merely host third-party content—MG Freesites LTD, WebGroup Czech Republic, NKL Associates, s.r.o., and MediaMe SRL—are entitled to an injunction under Section 230 of the CDA. Specifically, the district court explained that Section 230 immunizes these Plaintiffs against H.B. 1181's enforcement because the statute purports to penalize them for hosting sexual content created by others.[107] This analysis is sound, faithful to the statutory text of the CDA and binding case law.

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[106] TEX. CIV. PRAC. & REM. § 129B.004.

[107] The district court noted that "[t]o the extent that domestic website Plaintiffs and foreign website Plaintiffs create or develop the content they themselves post, they are not entitled to immunity."

Relevant here, the CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[108] The law further provides that "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[109] The CDA is intended "to promote rather than chill Internet speech. . . . [paving] the way for a robust new forum for public speech as well as a trillion-dollar industry centered around user-generated content."[110]

The State first asserts Section 230 does not preempt H.B. 1181 because the statute "neither holds Pornographers liable for third-party content . . . nor imposes liability for good-faith measures to restrict access to offensive material." Second, the State argues Plaintiffs cannot take advantage of the immunity provision because they are "responsible, in whole or in part, for the creation or development of information provided through the Internet." Third, the State contends foreign corporations may not assert First Amendment claims because they do not have constitutional rights. Lastly, the State argues that to the extent Section 230 protects Plaintiffs, they cannot assert First Amendment claims.

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[108] 47 U.S.C. § 230(c)(1).

[109] *Id.* § 230(e)(3).

[110] *Bennett v. Googde, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (cleaned up) (citations omitted).

The State's first two arguments are foreclosed be *Doe v. MySpace*, wherein this Court noted that "Congress provided broad immunity under the CDA to Web-based service providers for *all* claims stemming from their publication of information created by third parties[.]"[111] Although "[p]arties complaining that they were harmed by a Web site's [sic] publication of user-generated content . . . may sue the third-party user who generated the content," they may not sue "the interactive computer service that enabled them to publish the content online."[112]

In *Doe*, the plaintiff sued MySpace for negligence in allegedly failing to take precautions to prevent sexual predators from communicating with minors and specifically complained that MySpace failed to implement age-verification software.[113] But this Court held that the CDA barred the claim: "notwithstanding [plaintiff's] assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented" the plaintiff from communicating with the sexual predator, the "allegations are merely another way of claiming that MySpace was liable for publishing the communications."[114]

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[111] *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008) (emphasis added).

[112] *Id.* at 419.

[113] *Id.* at 416, 422.

[114] *Id.* at 420.

The State tries to distinguish this case from *Doe*, but its arguments are meritless. First, it asserts that "H.B. 1181 seeks to hold pornographic sites responsible for failing to protect minors from content *they generate and promote*, not just third-party content." However, the district court considered thoroughly the various Plaintiffs' business models and found that some of the Plaintiffs, including "WebGroup, which operates XVideos, only host[] third-party content, and therefore [are] entitled to Section 230 protection." These findings of fact are to be upheld unless they are clearly erroneous. I find no error.

Second, the State argues that after Plaintiffs "use the age-verification methods . . . their job is done," implying that H.B. 1181 does not directly penalize parties for hosting sexual content. But this Court held explicitly in *Doe* that requiring websites that only host third-party content to implement age-verification measures violates Section 230. The CDA immunizes platforms from *all* liability associated with hosting third-party content and it preempts all statutes inconsistent with this mandate. H.B. 1181 imposes severe civil liability, mandatory disclosures, and age verification requirements based on the presence of third-party content. That websites will be safe from H.B. 1181's significant civil penalties *if* they implement the required age-verification system is no answer.

Third, the State argues Plaintiffs are still "responsible" for the content they host such that they lose Section 230 protection. Specifically, the State asserts that Plaintiffs are not entitled to immunity under Section 230 because they "promote content in special parts of their websites" and "affirmatively license and advertise rather than passively

host content." But this argument is also unpersuasive. That licensing and promoting content created by third parties causes developers to lose Section 230 immunity is not supported by any precedent of this Court. It would also swallow the CDA's rule of immunity and undermine Congress's clear goals to insulate website owners and developers from liability stemming from the publication of third-party content.

Next, the State's argument that foreign corporations do not have constitutional rights, such that the foreign Plaintiffs cannot benefit from First Amendment protections, fails to persuade. The State bases its argument on *Agency for International Development v. Alliance for Open Society International* ("*AOSI II*"), which held that foreign organizations operating outside the United States are not entitled to the protections of the United States Constitution.[115] But *AOSI II* has no bite in this case where "the recipients of [Plaintiffs'] speech and speech-related conduct" are in the United States.[116] Instead, "[a]s the [Supreme] Court has recognized, foreign citizens *in the United States* may enjoy certain constitutional rights."[117] Moreover, this argument

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[115] *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.* ("*AOSI II*"), 140 S. Ct. 2082, 2086 (2020).

[116] *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 743 (9th Cir. 2021), *cert. denied sub nom. David v. Kazal*, 142 S. Ct. 1674 (2022).

[117] *AOSI II*, 140 S. Ct. at 2086 (emphasis in original) (citations omitted).

overlooks Plaintiffs' abilities to vindicate the First Amendment rights of their U.S. site visitors.[118]

Lastly, I cannot agree with the State's argument that those parties asserting Section 230 immunity cannot also bring First Amendment claims. The State relies on this Court's language in *NetChoice* to support its contention: "§ 230 reflects Congress's judgment that the [websites] are not acting as speakers or publishers when they host user-submitted content."[119] The State argues Plaintiffs' attempt to assert a Section 230 claim on behalf of themselves and First Amendment claims on behalf of their customers fails because "the challenge to HB [sic] 1181's notice requirement is not asserted on behalf of customers [] and the age-verification claim is not limited to the First Amendment rights of their customers."

As an initial matter, the district court never discussed whether the health notices requirement was barred by Section 230. So, I will not address that question. With regard to the age-verification requirement, I would find no error in the district court's analysis. First, the district court found that Plaintiff Free Speech Coalition has

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[118] And as the district court noted, *AOSI II* also differs from the case at hand because that ruling focused on challenging rules or policymaking with extraterritorial effect, whereas Plaintiffs here "seek to exercise their First Amendment rights only as applied to their conduct inside the United States and as a preemptive defense to civil prosecution."

[119] *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 468 (5th Cir. 2022).

associational standing; thus, Plaintiffs may bring a First Amendment facial challenge to H.B. 1181 and argue that it is an overbroad content-based regulation.[120] Second, although Plaintiffs entitled to Section 230 immunity are "carriers" and not "creators" of speech, they may still assert First Amendment claims on behalf of adults wishing to view protected sexual content. As the district court explained:

> Beyond their own First Amendment injuries, Plaintiffs have standing for their overbreadth challenge. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Sec. of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.").

The district court did not err when it held those Plaintiffs that only hosted third-party content were entitled to Section 230 immunity, nor did it err when it held that the First Amendment claims regarding H.B. 1181's age verification requirement may

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[120] As the district court described:

> An association has standing to bring claims on behalf of its members when "(1) individual members would have standing, (2) the association seeks to vindicate interests germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the individual members' participation." *Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin*, 37 F.4th 1078, 1084 (5th Cir. 2022). Free Speech Coalition's members would have standing to sue in their own right, as they suffer the same injuries as the named Adult Video Companies. These interests fall within Free Speech Coalition's mission, which is to advocate for the distribution of adult videos and the First Amendment rights of its performers and producers.

exist alongside Section 230 liability claims. Both rulings comport with the text of Section 230 and *Doe v. MySpace*.

V.

It is significant to note that H.B. 1181 fails exacting scrutiny at this stage in large part for want of evidence. Aside from a single "Bill Analysis" completed by the Texas Senate Research Center—which the State did not provide to the district court but can nonetheless be considered—the record is bereft of evidence responsive to the burdens of strict scrutiny.[121] That is not to say that the legislature did not consider alternatives or that the State will be unable to provide this and other evidence at trial. At this junction and with this record, however, I would not upset the district court's finding that Plaintiffs have a substantial likelihood of success on the merits.

That H.B. 1181 now fails strict scrutiny does not foreclose further attempts by the State to legislate on this issue. To the contrary, Texas has the right—and to these eyes, the obligation—to protect its minors, and in doing so, it must have the means to

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[121] *See* FED. R. EVID. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001) ("An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court.") (citing FED. R. EVID. 201(b)); Texas Bill Analysis, H.B. 1181, 5/15/2023.

frustrate their access to pornographic materials consistent with the First Amendment and Section 230. The State may decide that the first step of this march is to place the onus on parents to monitor their children's viewing habits and provide them the tools to do so. Indeed, to quote the State: "parents are the first line of defense." Implicit in this reality is that educating parents addresses the State's concern that children "are often more adept at circumventing such software than [parents] are at issuing it"[122] without infringing adults' access to protected speech.

Continuing on that path, the State can look again to requiring electronic filters on devices, as considered in the "Bill Analysis" conducted by the Senate,[123] such as blocking software or shared-data applications that provide parents with affordable access to their children's devices. While the decision to travel a particular legislative pathway is beyond this Court's compass, illuminating both the available legal options and their outer rails is not. At the end of the day, the goals of H.B. 1181 will not be thwarted. Rather, legal pathways for its eventual success will be laid. For now, I see the pathways to statutory protection inevitably turning the focus to parents, arming them with means of protecting their children.

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[122] Like COPA, H.B. 1181 "presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties." *Ashcroft II*, 542 U.S. at 670.

[123] Texas Bill Analysis, H.B. 1181, 5/15/2023.

The interest of the sellers of pornography and the interest of the State here converge—both seek the benefit of technology that will enable websites to bypass the eyes of children in their passage of material to adult purchasers. The sellers of the product have powerful incentives to find the means, and we have the proper forum for their display—a trial. Whether such technology exists and its utility are questions of fact for trial. I note only that the websites' ability—or lack thereof—to provide such a product would be telling.

As I am persuaded that, on the record before him, the able veteran district judge did not err in finding a likelihood of success on the merits, I would affirm the grant of a preliminary injunction and return the case to the district court for further proceedings. Facts matter. Facts decide cases and trial is their proper forum.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23-50627

FREE SPEECH COALITION, INCORPORATED;
MG PREMIUM, LIMITED; MG FREESITES, LIMITED; WEBGROUP CZECH REPUBLIC. A.S.;
NKL ASSOCIATES, S.R.O.; SONESTA TECHNOLOGIES, S.R.O.;
SONESTA MEDIA, S.R.O.; YELLOW PRODUCTION, S.R.O.; PAPER STREET MEDIA, L.L.C.;
NEPTUNE MEDIA, L.L.C.; JANE DOE; MEDIAME, S.R.L.;
MIDUS HOLDINGS, INCORPORATED,

Plaintiffs—Appellees,

versus

KEN PAXTON, *Attorney General, State of Texas*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-917

Before HIGGINBOTHAM, SMITH, and ELROD, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART and REVERSED IN PART, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en Banc, or motion for stay of mandate, whichever is later. *See* FED. R. APP. P. 41(b). The court may shorten or extend the time by order. *See* 5TH CIR. R. 41 I.O.P.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

No. 1:23-CV-917-DAE

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

Plaintiffs,

vs.

ANGELA COLMENERO, in her official capacity as

Interim Attorney General for the State of Texas,

Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR

A PRELIMINARY INJUNCTION

Before the Court is Plaintiff Free Speech Coalition, et al.'s ("Plaintiffs") motion for a preliminary injunction (Dkt. # 5). On August 23, the Court held a hearing on the matter. Upon careful consideration of the arguments raised by the parties in the briefing and at the hearing, the Court—for reasons that follow—GRANTS Plaintiffs' motion as to their First Amendment claims and GRANTS the motion in part as to their Section

230 claims. Defendant Colmenero is preliminarily ENJOINED from enforcing H.B. 1181.

I. BACKGROUND

This case concerns a law passed by the State of Texas that restricts access to pornographic websites by requiring digital age verification methods and warnings about the alleged harms caused by pornography. *See* Act of June 12, 2023, Ch. 676, § 2 (H.B. 1181) Tex. Sess. Law Serv. (Vernon's) (hereinafter, "HB 1181"). Plaintiffs, comprised of online pornography websites, performers, and advocates, bring suit to stop the law from being enforced before it takes effect on September 1, 2023.

A. The Parties

Plaintiffs can largely be split into three categories. First is Free Speech Coalition, Inc. ("Free Speech Coalition"), a nonprofit trade association of adult content performers, producers, distributors, and retailers. (Compl., Dkt. # 1, at 4). Free Speech Coalition assists its members in their First Amendment expression, and its members include adult content performers and businesses that produce and sell adult content. (*Id.*) Free Speech Coalition alleges that "many of [its] members are . . . gravely concerned about the consequences of [H.B. 1181], but who fear for their safety should they come forward to challenge [H.B. 1181] in court." (*Id.*). Free Speech Coalition also alleges that it has been forced to divert resources from its normal day-to-day activities in order to track legislation, meet with attorneys, and engage in risk-management to minimize the harm that age-verification statutes like H.B. 1181 pose to their members.

Second, several Plaintiffs are companies that produce, sell, and license adult content. Many of these are incorporated abroad, while others are U.S.-based companies. Plaintiff MG Premium Ltd. is a Cypriot company that operates SpiceVids.com, Brazzers.com, and FakeTaxi.com, all of which are subscription-based adult-content websites. (*Id.* at 4–5). MG Premium Ltd writes, hires, and does pre- and post-production work for the adult videos, uploading them to their own sites and to others. (*Id.* at 5). Similarly, Plaintiff MG Freesites Ltd operates Pornhub.com, which hosts uploaded content owned, copyrighted, and controlled by third parties. (*Id.*) Plaintiff WebGroup Czech Republic, a.s., operates xvideos.com, a free website that hosts adult videos. (*Id.*) Plaintiff NKL Associates, s.r.o, operates xnxx.com, which similarly hosts free adult videos. (*Id.*) Plaintiff Sonesta Technologies, s.r.o. operates BangBros.com, a subscription-based website offering adult videos. (*Id.* at 6). Plaintiff Yellow Production, s.r.o. owns and produces FakeTaxi and licenses its content to other adult websites, including Pornhub, Xvideos, Xnxx, and SpiceVids.

Three website Plaintiffs reside and principally operate in the United States. Plaintiff Paper Street Media, LLC resides in Florida and operates TeamSkeet, a network of subscription-based adult websites. Paper Street owns the intellectual property rights to these videos, and shoots with adult performers, writes the scripts, and hires and employs the production teams. (*Id.*) Plaintiff Neptune Media likewise resides in Florida and operates the MYLF adult content network, which is similarly comprised of several adult-content subscription services and websites. (*Id.* at 7). Plaintiffs MediaME SRL, a Romanian company, hosts free adult entertainment websites, while

Plaintiff Midus Holdings, Inc., another Florida company, operates subscription-based sites. (*Id.* at 7–8). These companies operating in and outside the United States (collectively, "the Adult Video Companies") oppose H.B. 1181 and allege that it would unconstitutionally restrict their free expression and compel them to post government-mandated speech. They also oppose the law on the basis that it violates the immunity vested on website publishers by Section 230 of the Communications Decadency Act ("CDA").

Third and finally, Plaintiff Jane Doe is an adult performer whose content is featured on several adult websites, including Pornhub.com, as well as CamSoda, Sextpanther, and MyFreeCams. (*Id.*; Doe Decl., Dkt. 5-6).[1] Doe opposes the restrictions that H.B. 1181 would place on their ability to reach audiences and is against the messages

[1] As of the date of this order, Defendant has not challenged Jane Doe's pseudonymity. Because her standing is not independently necessary for Plaintiffs' motion to succeed and because Doe has presented facially legitimate concerns regarding intimidation, the Court will allow her to proceed pseudonymously at this early and expedited stage. *See U.S. Navy SEALs 1-26 v. Austin*, 594 F. Supp. 3d 767, 782 n.5 (N.D. Tex. 2022) (allowing preliminary injunction to proceed before resolving question of anonymity), *stay pending appeal denied by* 27 F.4th 336 (5th Cir. 2022), *appeal dismissed as moot* 72 F.4th 666 (5th Cir. 2023). However, the Court will order briefing on Doe's ability to proceed pseudonymously following the issuance of this order.

websites would have to convey about the purported harmful effects of pornography. (*Id.*)

Defendant Angela Colmenero is sued in her official capacity as Interim Attorney General for the State of Texas. Plaintiffs bring suit against her under the *Ex parte Young* exception to sovereign immunity, arguing that she has the authority to enforce H.B. 1181. (*Id.* at 3).

B. H.B. 1181

On June 12, 2023, Texas Governor Greg Abbott signed H.B. 1181 into law. (*Id.* at 8). H.B. 1181 is set to take effect on September 1, 2023. H.B. 1181 contains two requirements, both of which are challenged in this litigation. First, the law requires websites to use "reasonable age verification methods . . . to verify that an individual attempting to access the material is 18 years of age or older." H.B. 1181 § 129B.002. Second, the law requires adult content websites to post a warning about the purported harmful effects of pornography and a national helpline for people with mental health disorders. H.B. 1181 § 129B.003.

The law defines "sexual material harmful to minors" as including any material that "(A) the average person applying contemporary community standards would find, taking the material as a whole is and designed to appeal or pander to the prurient interest" to minors, (B) is patently offensive to minors, and (C) "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." *Id.* § 129b.001.

The law regulates a "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform,

more than one-third of which is sexual material harmful to minors . . . ." *Id.* § 129B.002. H.B. 1181 requires these companies to "comply with a commercial age verification system that verifies age using: (A) government-issued identification; or (B) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual." H.B. 1181 § 129B.003. "Transactional data" refers to a "sequence of information that documents an exchange . . . used for the purpose of satisfying a request or event. The term includes records from mortgage, education, and employment entities." *Id.* H.B. 1181 does not allow the companies or third-party verifiers to "retain any identifying information of the individual." *Id.* § 129B.002.

In addition to the age verification, H.B. 1181 requires adult content sites to post a "public health warning" about the psychological dangers of pornography. In 14-point font or larger, sites must post:

> TEXAS HEALTH AND HUMAN SERVICES WARNING:
>
> Pornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function.
>
> TEXAS HEALTH AND HUMAN SERVICES WARNING:
>
> Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses.
>
> TEXAS HEALTH AND HUMAN SERVICES WARNING:
>
> Pornography increases the demand for prostitution, child exploitation, and child pornography.

Id. § 129B.004.

Although these warnings carry the label "Texas Health and Human Services," it appears that the Texas of Health and Human Services Commission has not made these findings or announcements.

Finally, the law requires that websites post the number of a mental health hotline, with the following information:

> 1-800-662-HELP (4357) THIS HELPLINE IS A FREE, CONFIDENTIAL INFORMATION SERVICE (IN ENGLISH OR SPANISH) OPEN 24 HOURS PER DAY, FOR INDIVIDUALS AND FAMILY MEMBERS FACING MENTAL HEALTH OR SUBSTANCE USE DISORDERS. THE SERVICE PROVIDES REFERRAL TO LOCAL TREATMENT FACILITIES, SUPPORT GROUPS, AND COMMUNITY BASED ORGANIZATIONS.

Id.

H.B. 1181 authorizes the Texas Attorney General to bring an action in state court to enjoin the violation and recover up to $10,000.00 for each day of a violation, if it is "in the public interest." *Id.* § 129B.005. If a minor accesses sexual material, the Attorney General may seek an additional amount up to $250,000.00 per violation. *Id.*

II. LEGAL STANDARDS

A. Preliminary Injunction

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def.*

Council, Inc., 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. *PCI Transp. Inc. v. W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

III. DISCUSSION – LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs' motion and Defendant's response raise four merits issues: (1) do Plaintiffs have standing to bring suit, (2) is the age verification requirement unconstitutional, (3) is the health warning unconstitutional, and (4) does Section 230 of the CDA preempt the law? The Court will address each in turn.

A. Standing

Plaintiffs have standing to bring suit. To have Article III standing, a plaintiff must "(1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) *as revised* (Oct. 30, 2020) (citing *Lujan v. Def's. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Here, Plaintiffs bring a pre-enforcement challenge to a statute that threatens substantial civil penalties. In the context of pre-enforcement challenges, an injury-in-fact is established when the plaintiff "(1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably proscribed by the policy in question, and (3) the threat of future enforcement of the challenged policies is substantial." *Fenves*, 979 F.3d at 330 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

i. Injury in Fact

Plaintiffs' expression is afforded a constitutional interest. Plaintiffs seek to produce, distribute, and post legal adult content online, free of overbroad restrictions and without being compelled to speak about the purported harms of sexually explicit videos. Jane Doe and members of Free Speech Coalition seek to continue performances in adult videos with wide audiences. This conduct is regulated by H.B. 1181, which sets restrictions on when and how adult videos can be posted. Beyond the restrictions on speech, the law interferes with the Adult Video Companies' ability to conduct business, and risks deterring adults from visiting the websites. Finally, "the law is aimed directly at plaintiffs, who . . . will have to take significant and costly compliance measures," which suffices to show pre-enforcement injury. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 386, 392 (1988). The compliance costs here are substantial, because commercially available age verifications services are costly, even prohibitively so. Plaintiffs' complaint includes several commercial verification services, showing that they cost, at minimum, $40,000.00 per 100,000 verifications.

As to the required disclosures, compelled speech necessarily involves a constitutional interest. *Janus v. Am. Fed'n. of State, Cnty., and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018) ("When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions."); *see also W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (noting that a law commanding "involuntary affirmation" of objected-to beliefs

would require "even more immediate and urgent grounds" than a law demanding silence).

H.B. 1181 imposes substantial liability for violations, including $10,000.00 per day for each violation, and up to $250,000.00 if a minor is shown to have viewed the adult content. Finally, the threat of future enforcement is substantial—the Attorney General has not disavowed enforcement of the law, and there is no reason to believe that the law will not be enforced against those who violate it. "[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Speech First*, 979 F.3d at 335 (cleaned up).

Free Speech Coalition has associational standing. An association has standing to bring claims on behalf of its members when "(1) individual members would have standing, (2) the association seeks to vindicate interests germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the individual members' participation." *Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin*, 37 F.4th 1078, 1084 (5th Cir. 2022). Free Speech Coalition's members would have standing to sue in their own right, as they suffer the same injuries as the named Adult Video Companies. These interests fall within Free Speech Coalition's mission, which is to advocate for the distribution of adult videos and the First Amendment rights of its performers and producers. *See Nat'l Ass'n for Advancement of Colored*

People v. Button, 371 U.S. 415, 429 (1963) ("[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.").

Defendant contends that Free Speech Coalition lacks associational standing because it has not identified one member with individual standing in its motion for a preliminary injunction. (Def.'s Resp., Dkt. # 27, at 5 (citing *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010)). While an association does have to identify a member with individual standing, it need not do so in the preliminary injunction motion in addition to the complaint. In Plaintiffs' complaint, they identify members of the association, including directors, distributors, and actors. And in their reply, Plaintiffs identify Paper Street Media, LLC, an American company, as a member. (Boden Decl., Dkt. # 28-5, at 2). *NAACP v. City of Kyle* itself examined associational standing based upon the "evidence in the record," and Plaintiffs likewise identified a member with individual standing in their reply brief. 626 F.3d at 237; *see also All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 23-10362, 2023 WL 5266026, at *11–14 (5th Cir. Aug. 16, 2023) (discussing associational standing based in part on declarations made in support of preliminary injunction).

Beyond their own First Amendment injuries, Plaintiffs have standing for their overbreadth challenge. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Sec. of State of Md. v. Joseph H.*

Munson Co., Inc., 467 U.S. 947, 956 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.").

ii. Foreign Websites have First Amendment Protection for Domestic Operations

Defendant repeatedly emphasizes that the foreign website Plaintiffs "have no valid constitutional claims" because they reside outside the United States. (Def.'s Resp., Dkt. # 27, at 6–7). First, it is worth noting that this argument, even if successful, would not bar the remaining Plaintiffs within the United States from bringing their claims. Several website companies, including Midus Holdings, Inc., Neptune Media, LLC, and Paper Street Media, LLC, along with Jane Doe and Free Speech Coalition (with U.S. member Paper Street Media, LLC), are United States residents. Defendant, of course, does not contest that these websites and Doe are entitled to assert rights under the U.S. Constitution. Regardless of the foreign websites, the domestic Plaintiffs have standing.

As to the foreign websites, Defendant cites *Agency for Intl. Dev. v. All. for Open Socy. Intl., Inc.*, 140 S. Ct. 2082 (2020) ("AOSI"), which reaffirmed the principle that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution." *Id.* at 2086. *AOSI*'s denial of standing is distinguishable from the instant case. That case involved foreign nongovernmental organizations ("NGOs") that received aid—outside the United States—to distribute outside the United States. These NGOs operated abroad and challenged USAID's ability to condition aid based on whether an NGO

had a policy against prostitution and sex trafficking. The foreign NGOs had no domestic operations and did not plan to convey their relevant speech into the United States. Under these circumstances, the Supreme Court held that the foreign NGOs could not claim First Amendment protection. *Id.*

AOSI differs from the instant litigation in two critical ways. First, Plaintiffs do not seek to challenge rule or policymaking with extraterritorial effect, as the foreign plaintiffs did in *AOSI.* By contrast, the foreign Plaintiffs here seek to exercise their First Amendment rights only as applied to their conduct inside the United States and as a preemptive defense to civil prosecution. Indeed, courts have typically awarded First Amendment protections to foreign companies with operations in the United States with little thought. *See*, *e.g.*, *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881 (9th Cir. 2016) (in a case against British newspaper, noting that defamation claims "are significantly cabined by the First Amendment"); *Mireskandari v. Daily Mail and Gen. Tr. PLC*, CV1202943MMMSSX, 2013 WL 12114762 (C.D. Cal. Oct. 8, 2013) (explicitly noting that the First Amendment applied to foreign news organization); *Times Newspapers Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 192 (C.D. Cal. 1974) (same); *Goldfarb v. Channel One Russia*, 18 CIV. 8128 (JPC), 2023 WL 2586142 (S.D.N.Y. Mar. 21, 2023) (applying First Amendment limits on defamation to Russian television broadcast in United States); *Nygård, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008) (granting First Amendment protections to Finnish magazine); *United States v. James*, 663 F. Supp. 2d 1018, 1020 (W.D. Wash. 2009) (granting foreign media access to court documents under the First Amendment). It would make little

sense to allow Plaintiffs to exercise Frist Amendment rights as a defense in litigation but deny them the ability to raise a pre-enforcement challenge to imminent civil liability on the same grounds.

Second, unlike the foreign plaintiffs in *AOSI*, the foreign website Plaintiffs in the instant case *do* operate in the United States for all purposes relevant to this litigation. As regulated by H.B. 1181, their speech and conduct occurs in Texas. Their pre-enforcement challenge, by definition, requires Plaintiffs to show that the risk of civil prosecution in Texas is concrete and imminent. *AOSI* itself reaffirmed that "foreign citizens in the United States may enjoy certain constitutional rights . . . ." *Id.* at 2086. To the extent their conduct "operates" in the United States and subjects them to real or imminent liability here, the foreign website Plaintiffs receive First Amendment protection.[2]

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[2] Defendant repeatedly suggests that Plaintiffs should not able to avail themselves of First Amendment protections when they have not availed themselves of personal jurisdiction in Texas. (Def.'s Resp., Dkt. #27, at 7, 21). To this end, they rely on a single district court opinion where a foreign plaintiff was determined not to be subject to personal jurisdiction for posting online pornography as related to child sex-trafficking claims. *Doe v. WebGroup Czech Republic*, No. 221CV02428VAPSKX, 2022 WL 982248 (C.D. Cal. Jan. 13, 2022). Although personal jurisdiction is not strictly before us, the Court is skeptical of this analysis as applied to H.B. 1181. Unlike child sex-trafficking claims, viewing pornography in a state is more directly related to the claims that

The constitutional rights of foreign companies operating in the United States is particularly important in the First Amendment context. "The First Amendment protects speech for the sake of both the speaker and the recipient." *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 743–44 (9th Cir. 2021), *cert. denied* 142 S. Ct. 1674 (2022).

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would be brought by the Attorney General under H.B. 1181. *See Luv N'care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006) (examining, among other things, whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts). And foreign pornography websites have been held subject to U.S. jurisdiction in other contexts. *Hydentra HLP Int. Ltd. v. Sagan Ltd.*, 783 Fed. Appx. 663 (9th Cir. 2019) (unpublished); *George S. May Intern. Co. v. Xcentric Ventures, LLC*, 409 F. Supp. 2d 1052 (N.D. Ill. 2006) (holding out-of-state defendant subject to personal jurisdiction in similar analysis); *AMA Multimedia LLC v. Sagan Ltd.*, CV-16-01269-PHX-DGC, 2016 WL 5946051 (D. Ariz. Oct. 13, 2016). But if there was any doubt, purposeful availment would likely be established when a website knowingly accepts driver's license data from a state resident, transmits that data to the state, and then proceeds to grant that visitor access to the site, as H.B. 1181 requires. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (examining website interactivity as keystone for personal jurisdiction); *see also Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 318 (5th Cir. 2021) (noting that courts in the circuit use the *Zippo* test). At any rate, it is the threat of enforcement, not the existence of personal jurisdiction, that would lead to First Amendment chill.

"It is now well established that the Constitution protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citations omitted); *see also Va. State Bd. of Pharmacy*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists, the protection afforded is to the communication, to its source and to its recipients both."). To hold otherwise would drastically expand the government's ability to restrict ideas based on their content or viewpoint. States could ban, for example, the Guardian or the Daily Mail based on their viewpoint, because those newspapers are based in the United Kingdom. Alternatively, those websites could be subject to relaxed defamation laws without any First Amendment protection. This is not the law, and the Court does not read *AOSI* to abrogate First Amendment protection for speech occurring in the United States and directed at the United States but hosted by foreign entities. *See Thunder Studios, Inc.*, 13 F.4th at 743–44 (extending First Amendment rights to foreign plaintiff for purposes of civil lawsuit in the United States); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (acknowledging the First Amendment rights of listeners in the United States but noting that they do not override discretionary immigration decisions).

iii. Traceability and Redressability

Plaintiffs' injuries are traceable to Defendant, and Defendant does not contest this in her response. (Def.'s Resp., Dkt. # 27). The Texas Attorney General is tasked with bringing civil prosecutions under H.B. 1181. Their injuries will be redressed by an injunction or declaration that the law is unconstitutional. *See Natl. Press*

Photographers Assn. v. McCraw, 594 F. Supp. 3d 789, 800–01 (W.D. Tex. 2022), *appeal docketed* No. 22-500337 (May 3, 2022) ("[A] declaratory judgment will have the practical effect of allowing them to exercise their First Amendment rights by removing the fear of prosecution . . . .") (citing *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

B. Sovereign Immunity

While Plaintiffs raise the issue of sovereign immunity in their preliminary injunction motion, Defendant does not contest the issue in her response. (Def.'s Resp., Dkt. # 27). Because the issue is jurisdictional, the Court will briefly address it. *See*, *e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The Eleventh Amendment typically deprives federal courts of jurisdiction over "suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). Under the *Ex parte Young* exception to sovereign immunity, lawsuits may proceed in federal court when a plaintiff requests prospective relief against state officials in their official capacities for ongoing federal violations. 209 U.S. 123, 159–60 (1908). "For the *[Ex parte Young]* exception to apply, the state official, 'by virtue of his office,' must have 'some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'" *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (quoting *Young*, 209 U.S. at 157).

Neither a specific grant of enforcement authority nor a history of enforcement is required to establish a sufficient connection. *City of Austin*, 943 F.3d 993 at 1001; *Air*

Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp., 851 F.3d 507, 519 (5th Cir. 2017). There need be only a "scintilla of enforcement by the relevant state official" for *Ex parte Young* to apply. *City of Austin*, 943 F.3d at 1002 (quotations omitted). Actual threat of or imminent enforcement is "not required." *Air Evac*, 851 F.3d at 519.

Colmenero is plainly tasked with enforcing H.B. 1181. Section 129B.006 vests the Attorney General with the exclusive authority to bring an action. H.B. 1181 § 129B.006(a) ("If the attorney general believes that an entity is knowingly violating . . . this chapter[,] the attorney general may bring an action . . . to enjoin the violation, recover a civil penalty, and obtain other relief the court considers appropriate."). Moreover, the attorney general "may recover reasonable and necessary attorney's fees and costs incurred in an action under this section." *Id.* § 129B.006(b)(6).

Once it is clear that the named defendant is proper, the Court conducts a *Verizon* "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Commn. of Maryland*, 535 U.S. 635, 645 (2002). The complaint meets these requirements. It alleges a violation of the United States Constitution through the First, Fifth, and Fourteenth Amendments. And the complaint further alleges that the law is preempted by Section 230 of the CDA. The relief is prospective because Plaintiffs seek an injunction prohibiting future enforcement of the law. Plaintiffs' relief falls under the *Ex parte Young* exception.

C. The Age Verification Requirement is Subject to Strict Scrutiny

i. *Strict Scrutiny Applies*

First, the Court must determine which level of scrutiny to apply. H.B. 1181 differentiates between sexual and non-sexual material for minors, so a short overview of historical regulations on minors' access to pornography is helpful. In 1968 in *Ginsberg v. State of New York*, the Supreme Court upheld a conviction of a person under a state statute that criminalized knowingly providing obscene materials "for minors" to minors. 390 U.S. 629, 638 (1968). Because obscene materials fell outside the scope of First Amendment protection, the Court analyzed the statute under rational basis scrutiny and upheld the law. *Id.*

However, beginning in the 1990s, use of the "for minors" language came under more skepticism as applied to internet regulations. In *Reno v. ACLU*, the Supreme Court held parts of the CDA unconstitutional under strict scrutiny. 521 U.S. 844, 850 (1997). The Court noted that the CDA was a content-based regulation that extended far beyond obscene materials and into First Amendment protected speech, especially because the statute contained no exemption for socially important materials for minors. *Id.* at 865. The Court noted that accessing sexual content online requires "affirmative steps" and "some sophistication," noting that the internet was a unique medium of communication, different from both television broadcast and physical sales. *Id.* at 854. The Court held *Ginsberg* distinct on four separate grounds and largely found it inapplicable to digital regulations like the CDA. *Id.* at 864–68.

After *Reno v. ACLU*, the federal government tried again, passing the Child Online Protection Act ("COPA"), which restricted the ability to post content online that was harmful to minors for commercial purposes. *Ashcroft v. ACLU*, 535 U.S. 564 (2002); Child Online Protection Act, 47 U.S.C. § 231 (1998). In separate decisions, the Third Circuit held that the law was similarly unconstitutional under strict scrutiny. *Am. Civ. Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004); *Am. Civ. Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert denied* 555 U.S. 1137 (2009). Most notably, the Third Circuit held COPA subject to strict scrutiny because its "definition of harmful material is explicitly focused on minors, it automatically impacts non-obscene, sexually suggestive speech that is otherwise protected for adults." *ACLU v. Ashcroft*, 322 F.3d at 252. COPA has remained enjoined since the Third Circuit and Supreme Court's *ACLU* decisions.

Just like COPA, H.B. 1181 regulates beyond obscene materials. As a result, the regulation is based on whether content contains sexual material. Because the law restricts access to speech based on the material's content, it is subject to strict scrutiny. *Id.; Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 649–50 (7th Cir. 2006) (noting courts have applied strict scrutiny to "a number of statutes . . . that included the *Miller* language or some hybrid of *Miller* and *Ginsberg*"); *ACLU v. Reno*, 521 U.S. at 864–68.

Defendant largely concedes that strict scrutiny applies, (Def.'s Resp., Dkt. # 27, at 6, 9), but hopes that H.B. 1181 should "be subject to a lower standard of judicial scrutiny because it regulates only 'commercial entities, publication and distribution

of material harmful to minors." (*Id.* at 9 (citing *Ashcroft v. ACLU*, 542 U.S. at 676 (Scalia, J., dissenting))). As Defendant tacitly acknowledges, a district court is not at liberty to disregard existing Supreme Court precedent in favor of a dissenting opinion. Nor is Defendant entitled to contest Plaintiffs' likelihood of success based on the possibility that the Supreme Court may revisit its precedent. This Court cannot reduce the applicable level of scrutiny based on a non-binding, dissenting opinion.

In a similar vein, Defendant argues that Plaintiffs' content is "obscene" and therefore undeserving of First Amendment coverage. (*Id.* at 6). Again, this is precedent that the Supreme Court may opt to revisit, but we are bound by the current *Miller* framework. *Miller v. California*, 413 U.S. 15, 24 (1973).[3] Moreover, even if we were to abandon *Miller*, the law would still cover First Amendment-protected speech. H.B. 1181 does not regulate obscene content, it regulates all content that is prurient, offensive, and without value *to minors*. Because most sexual content is offensive to young minors, the law covers virtually all salacious material. This includes sexual, but non-pornographic, content posted or created by Plaintiffs. *See* (Craveiro-Romão Decl., Dkt. # 28-6, at 2; Seifert Decl., Dkt. # 28-7, at 2; Andreou Decl., Dkt. # 28-8, at 2). And it includes Plaintiffs' content that is sexually explicit and arousing, but that a jury would not consider "patently offensive" to adults, using community standards

[3] In particular, *Miller* requires that patently offensive material be so defined by the applicable state statute. *Id.* That cannot be the case here for H.B. 1181, which defines material only with reference to whether it is obscene for minors.

and in the context of online webpages. (*Id.*); *see also United States v. Williams*, 553 U.S. 285, 288 (2008); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002). Unlike *Ginsberg*, the regulation applies regardless of whether the content is being knowingly distributed to minors. 390 U.S. at 639. Even if the Court accepted that many of Plaintiffs' videos are obscene to adults—a question of fact typically reserved for juries—the law would still regulate the substantial portion of Plaintiffs' content that is not "patently offensive" to adults.[4] Because H.B. 1181 targets protected speech, Plaintiffs can challenge its discrimination against sexual material.

Defendant also suggests that the Court consider H.B. 1181 a "time, place, and manner" restriction. (Def.'s Resp., Dkt. # 27, at 6 ("A law requiring porn sites to turn away children is no different than one that prohibits a strip club from operating next to an elementary school or allowing a 13-year-old to enter.")). Again, this seems to be inserted largely for the purposes of Supreme Court review as the notion is plainly foreclosed by *ACLU v. Reno.* There, the Supreme Court held that a law that "applies broadly to the entire universe of cyberspace" and seeks to protect children from

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[4] *See*, *e.g.*, *United States v. Cary*, 775 F.3d 919, 926 (7th Cir. 2015) ("[A]dult pornography, unlike child pornography, generally has First Amendment protection."); *Farrell v. Burke*, 449 F.3d 470, 497 (2d Cir. 2006) ("Pornographic materials—at least those that are not obscene—receive full First Amendment protection when in the possession of ordinary adults . . . ."); *United States v. Eaglin*, 913 F.3d 88, 99 (2d Cir. 2019) (same).

offensive speech "is a content-based blanket restriction on speech, and, as such, cannot be 'properly analyzed as a form of time, place, and manner regulation.'" *ACLU v. Reno*, 521 U.S. at 868 (quoting *Renton v. Playtime Theatres*, 475 U.S. 41, 46 (1986)).[5] And while Defendant and amici[6] argue that H.B. 1181 is akin to a time, place, and manner restriction because of pornography's secondary effects, they ignore the well-established precedent that "'[r]egulations that focus on the direct impact of speech on its audience' are not properly analyzed under *Renton*." *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also ACLU v. Reno*, 521 U.S. at 868 (same); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

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[5] It is worth further noting that H.B. 1181 does not operate like the sort of "strip club" restriction that Defendant analogizes to. It does not just regulate the virtual equivalent of strip clubs or adult DVD stores. Rather, a more apt analogy would be that H.B. 1181 forces movie theaters to catalog all movies that they show, and if at least one-third of those movies are R-rated, H.B. 1181 would require the movie theater to screen everyone at the main entrance for their 18+ identification, regardless of what movie they wanted to see. Defendant is fully entitled to seek appellate review and reconsideration of existing precedent. But the law is still broader than even those time, place, and manner restrictions.

[6] (Amicus Br., Dkt. # 29-2).

Because the law regulates speech based upon the content therein, including content deserving of First Amendment protection, it must survive strict scrutiny. To endure strict scrutiny, H.B. 1181 must: (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve it, and (3) be the least restrictive means of advancing it. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989).

ii. *H.B. 1181 Nominally Protects a Compelling State Interest*

Plaintiffs concede for the purposes of this motion that Defendant's stated interest here is compelling. It is uncontested that pornography is generally inappropriate for children, and the state may regulate a minor's access to pornography. *Ginsberg*, 390 U.S. at 63. The strength of that interest alone, however, is not enough for a law to survive strict scrutiny. The state must still show that H.B. 1181 is narrowly tailored and the least restrictive means of advancing that interest. It fails on both these grounds.

D. The Statute is not Narrowly Tailored

i. The law is underinclusive

Although the state defends H.B. 1181 as protecting minors, it is not tailored to this purpose. Rather, the law is severely underinclusive. When a statute is dramatically underinclusive, that is a red flag that it pursues forbidden viewpoint discrimination under false auspices, or at a minimum simply does not serve its purported purpose. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

H.B. 1181 will regulate adult video companies that post sexual material to their website. But it will do little else to prevent children from accessing pornography.

Search engines, for example, do not need to implement age verification, even when they are aware that someone is using their services to view pornography. H.B. 1181 § 129B.005(b). Defendant argues that the Act still protects children because they will be directed to links that require age verification. (Def.'s Resp., Dkt. # 27, at 12). This argument ignores visual search, much of which is sexually explicit or pornographic, and can be extracted from Plaintiffs' websites regardless of age verification. (Sonnier Decl., Dkt. # 31-1, at 1–2). Defendant's own expert suggests that exposure to online pornography often begins with "misspelled searches[.]" (Dines Decl., Dkt. # 27-1, at 2).

Even more problematic is that H.B. 1181 applies only to the subset of pornographic websites that are subject to personal jurisdiction in Texas. Indeed, Defendant implicitly concedes this when they argue that the foreign Adult Video Company Plaintiffs are not subject to jurisdiction in the United States. If foreign websites are not subject to personal jurisdiction in Texas, then H.B. 1181 will have no valid enforcement mechanism against those websites, leaving minors able to access any pornography as long as it is hosted by foreign websites with no ties to the United States.

In addition, social media companies are de facto exempted, because they likely do not distribute at least one-third sexual material. This means that certain social media sites, such as Reddit, can maintain entire communities and forums (i.e., subreddits), dedicated to posting online pornography with no regulation under H.B. 1181. (Sonnier Decl., Dkt. # 31-1, at 5). The same is true for blogs posted to Tumblr, including

subdomains that only display sexually explicit content. (*Id.*) Likewise, Instagram and Facebook pages can show material which is sexually explicit for minors without compelled age verification. (Cole Decl., Dkt. # 5-1, at 37–40). The problem, in short, is that the law targets websites as a whole, rather than at the level of the individual page or subdomain. The result is that the law will likely have a greatly diminished effect because it fails to reduce the online pornography that is most readily available to minors. (*Id.* at 36–38; Dines Decl., Dkt. # 27-1, at 2).

The compelled disclosures are especially underinclusive. H.B. 1181's health warnings apply to websites with one-third sexual material, but these websites will already screen out minors through age verification. By contrast, websites with less than one-third sexual material do not need to post any warning at all, even though they have no age verification requirement. The result is that a health disclaimer, ostensibly designed for minors, will be seen by adults visiting Pornhub, but not by minors visiting pornographic subreddits.

In sum, the law is severely underinclusive. It nominally attempts to prevent minors' access to pornography, but contains substantial exemptions, including material most likely to serve as a gateway to pornography use. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448–49 (2015) ("[U]nderinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint . . . ."); *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011) ("[The] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it . . . ."). The Court

need not determine whether the under-inclusiveness is independently fatal at this stage. Rather, it is one of many elements of H.B. 1181 that show the law is not narrowly tailored.

ii. The statute's sweep is unclear

The statute's tailoring is also problematic because of several key ambiguities in H.B. 1181's language. Although the Court declines to rest its holding on a vagueness challenge, those vagueness issues still speak to the statute's broad tailoring. First, the law is problematic because it refers to "minors" as a broad category, but material that is patently offensive to young minors is not necessarily offensive to 17-year-olds. As previously stated, H.B. 1181 lifts its language from the Supreme Court's holdings in *Ginsberg* and *Miller*, which remains the test for obscenity. H.B. 1181 § 129B.001; *Miller*, 413 U.S. at 24; *Ginsberg*, 390 U.S. at 633. As the Third Circuit held, "The type of material that might be considered harmful to a younger minor is vastly different—and encompasses a much greater universe of speech—than material that is harmful to a minor just shy of seventeen years old. . . ." *ACLU v. Ashcroft*, 322 F.3d at 268.[7] H.B. 1181 provides no guidance as to what age group should be considered for "patently offensive" material. Nor does the statute define when material may have

[7] H.B. 1181 is even more problematic than COPA, because it defines "minor" as all individuals under 18, while COPA set the limit at 17. *See ACLU v. Reno*, 521 U.S. at 865–66 (noting that CDA was problematic because it defined minors to include 17-year-olds).

educational, cultural, or scientific value "for minors," which will likewise vary greatly between 5-year-olds and 17-year-olds.

The result of this language as applied to online webpages is that constitutionally protected speech will be chilled. A website dedicated to sex education for high school seniors, for example, may have to implement age verification measures because that material is "patently offensive" to *young* minors and lacks educational value for *young* minors. Websites for prurient R-rated movies, which likewise are inappropriate and lacking artistic value for minors under the age of 17, would need to implement age verification (and more strangely, warn visitors about the dangers of pornography).

Second, H.B. 1181 is subject to multiple interpretations as to the scope of its liability. H.B. 1181 limits its coverage to a "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors." H.B. 1181 § 129B.002(a). But it is unclear whether "one-third" modifies "material" or "website." Does "material" refer to all content posted on a site, or does it apply to any single piece of content? By example, if a small fraction of YouTube's videos contain sexual material, does it need to verify user's ages with the State? The law's text is vague on this point, but risks enormous financial harm, including fines up to $250,000 per violation if Defendant opts for the broader interpretation.[8] And

[8] This interpretation is problematic because it is severely underinclusive. If the Attorney General adopts the narrower definition, then a website could quite easily

the law offers no guidance as to how to calculate the "one-third"—whether it be the number of files, total length, or size.

Third, H.B. 1181 similarly fails to define proper age verification with sufficient meaning. The law requires sites to use "any commercially reasonable method that relies on public or private transactional data" but fails to define what "commercially reasonable" means. *Id.* § 129B.03(b)(2)(B). "Digital verification" is defined as "information stored on a digital network that may be accessed by a commercial entity and that serves as proof of the identify of an individual." *Id.* § 129B.003(a). As Plaintiffs argue, this definition is circular. In effect, the law defines "identity verification" as information that can verify an identity. Likewise, the law requires "14-point font," but text size on webpages is typically measured by pixels, not points. *See* Erik D. Kennedy, *The Responsive Website Font Size Guidelines*, Learn UI Design Blog (Aug. 7, 2021)

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evade the law by simply adding non-sexual material up to the point that it constitutes at least two-thirds of the site. Indeed, the cost of hosting additional content may be much lower than the costs of age verification and compelled speech. *See* (Compl., Dkt. # 1, at 24 (raising the possibility that "a link to all the anodyne content in the local public library" could circumvent the law)). And at that point, the law would effectively become moot, doing little to regulate adult video companies beyond forcing them to host non-sexual materials. If the Attorney General opts for the broader interpretation, then the law encounters other grave challenges by sweeping far beyond its purported effects.

(describing font sizes by pixels) (Dkt. # 5-1 at 52–58). Overall, because the Court finds the law unconstitutional on other grounds, it does not reach a determination on the vagueness question. But the failure to define key terms in a comprehensible way in the digital age speaks to the lack of care to ensure that this law is narrowly tailored. *See Reno*, 521 U.S. at 870 ("Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment.").

iii. *The law is overbroad, even under narrow constructions*

Even if the Court were to adopt narrow constructions of the statute, it would overburden the protected speech of both sexual websites and their visitors. Indeed, Courts have routinely struck down restrictions on sexual content as improperly tailored when they impermissibly restrict adult's access to sexual materials in the name of protecting minors. *See*, *e.g.*, *Ex Parte Lo*, 424 S.W.3d 10, 23 (Tex. Crim. App. 2013) (striking down restrictions on "grooming" as overbroad and not narrowly tailored); *Garden Dist. Book Shop, Inc. v. Stewart*, 184 F. Supp. 3d 331, 338–40 (M.D. La. 2016) (striking down law that criminalized publication of "material harmful to minors" under strict scrutiny); *Am. Booksellers Found. for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011) (striking down law that restricted dissemination of material depicting sexual activity under strict scrutiny); *ACLU v. Johnson*, 194 F.3d 1149, 1158–60 (10th Cir. 1999) (distinguishing *Ginsberg* and following *Reno* to find a statute criminalizing dissemination of material harmful to

minors was overbroad); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 234–36 (4th Cir. 2004) (same).

Plaintiffs are likely to succeed on their overbreadth and narrow tailoring challenge because H.B. 1181 contains provisions largely identical to those twice deemed unconstitutional in COPA. *See ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004); *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert denied* 555 U.S. 1137 (2009).[9] COPA defined material "harmful to minors" as:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals

[9] The Supreme Court's affirmance of the Third Circuit's decision in *ACLU v. Ashcroft* focused on the type of restriction used, not whether the law was narrowly tailored. *See Ashcroft v. ACLU*, 542 U.S. at 665 ("[W]e decline to consider the correctness of the other arguments relied on by the Court of Appeals."). However, upon remand, the Third Circuit again held that the law was not narrowly tailored in a final decision on the merits. *ACLU v. Mukasey*, 534 F.3d at 197–98 ("[W]e are quite certain that . . . the Government has not met its burden of showing that [the law] is narrowly tailored so as to survive strict scrutiny analysis and thereby permit us to hold it constitutional."). The Supreme Court declined a petition for writ of certiorari as to the nationwide permanent injunction. Accordingly, while the ACLU discussion of narrow tailoring is not strictly binding authority, the Court affords it substantial weight.

> or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

ACLU v. Mukasey, 534 F.3d at 191 (citing 47 U.S.C. § 231(e)(6)).

By comparison, H.B. 1181 defines material "harmful to minors" as:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest; (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated display or depiction of: (i) a person's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

H.B. 1181 § 129B(6)(B).

The statutes are identical, save for Texas's inclusion of specific sexual offenses. Unsurprisingly, then, H.B. 1181 runs into the same narrow tailoring and overbreadth issues as COPA. In particular, the use of "for minors" and "with respect to minors" has been held overbroad in the context of internet speech. As *ACLU v. Ashcroft* held:

> The term "minor," as Congress has drafted it, thus applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen. In abiding by this definition, Web publishers who seek to determine whether their Web sites will run afoul of COPA cannot tell which of these "minors" should be considered in deciding the particular content of their Internet postings. Instead, they must guess at which minor should be considered in determining whether the content of their Web site has "serious ... value for [those] minors." 47 U.S.C. § 231(e)(6)(C). Likewise, if they try to comply with COPA's "harmful to minors" definition, they must guess at the potential audience of minors and their ages so that the publishers can refrain from posting material that will trigger the prurient interest, or be patently offensive with respect to those minors who may be deemed to have such interests.

322 F.3d at 254.

Despite this decades-long precedent, Texas includes the exact same drafting language previously held unconstitutional. H.B. 1181 only exempts sexual material that "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." H.B. 1181 § 129B.001(6)(C). Material that is sexual will likely satisfy H.B. 1181's test, because it is inappropriate for minors, even though it is not obscene for adults. Any prurient material risks being regulated, because it will likely be offensive to minors and lack artistic or scientific value to them. Although this may be permissible when someone knowingly sells material to a minor, such as in *Ginsberg*, it is constitutionally problematic applied to online speech, where the speech is necessarily broadcast widely. *See ACLU v. Ashcroft*, 535 U.S. at 568; *Am. Booksellers Found. for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078, 1082 (D. Al. 2011) (noting an online statute is "dramatically different" from another statute that "applies only to personally directed communication between an adult and a person that the adult knows or should know is a minor."); *Ent. Software Ass'n*, 469 F.3d at 649–50 (noting that "a number of statutes have been found unconstitutional that included the *Miller* language or some hybrid of *Miller* and *Ginsberg*" in the context of restrictions on material for minors).

Defendant argues that its language is permissible because the Supreme Court in *Sable* allowed the government to protect minors from non-obscene material. (Def.'s Resp., Dkt. # 27, at 17 (citing *Sable Commun. of California, Inc.*, 492 U.S. at 126)). Defendant stretches the holding of *Sable* too far. While *Sable* upheld the government's interest in "shielding minors from the influence of literature that is not obscene by

adult standards," it still noted that those restrictions must survive strict scrutiny. *Sable*, 492 U.S. at 126. Nothing in *Sable* or Defendant's response differentiates this analysis or restricts the broad scope of H.B. 1181. Moreover, in the *ACLU* decisions, the Third Circuit found that the addition of "for minors" was constitutionally problematic because it chills substantial speech for adults based on whether it is inappropriate for minors. 322 F.3d at 266–71; 534 F.3d at 190–93, 205–07. And the Supreme Court reaffirmed in *Reno v. ACLU* that the government may not "reduce the adult population to only what is fit for children." 521 U.S. 875 (cleaned up) (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996)).

Accordingly, the *ACLU* decisions control here. The law sweeps far beyond obscene material and includes all content offensive to minors, while failing to exempt material that has cultural, scientific, or educational value to adults only. At the same time, the law allows other websites to show and display explicit material, as long as they have two-thirds non-obscene content. The result is that H.B. 1181's age verification is not narrowly tailored and fails strict scrutiny.[10]

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[10] Plaintiffs also ask the Court to hold that H.B. 1181 is unconstitutionally overbroad. In general, "[t]he overbreadth doctrine is strong medicine" that should be employed "only as a last resort." *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999). Plaintiffs have standing to challenge H.B. 1181 under strict scrutiny. The law is unconstitutional as it regulates Plaintiffs' websites because

E. H.B. 1181 is Overly Restrictive

To endure strict scrutiny, a statute must employ the least restrictive means of protecting minors. *Reno*, 521 U.S. at 874 ("That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."). The government bears the burden to show that less restrictive means would not be as effective. *Ashcroft v. ACLU*, 542 U.S. at 669. Again, because H.B. 1181 substantially restricts adults' protected speech, it is not sufficiently tailored. Nonetheless, the Court also finds that the age verification enforcement mechanism is overly restrictive.

i. *Compelled verification chills protected speech*

Like the narrow tailoring, this issue has been addressed by the Third Circuit and Supreme Court regarding COPA. In particular, whereas the Supreme Court did not

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it discriminates broadly and uses restrictive means to do so. Plaintiffs' websites are the target of the H.B. 1181, which cannot constitutionally regulate their sites. It necessarily follows, then, that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1344–48. (2000) (suggesting that certain doctrinal tests logically lead to the conclusion that a statute is facially invalid). It is the structure of the law, and not its application to any particular Plaintiff, that renders it unconstitutional.

discuss COPA's overbreadth, its did discuss less restrictive means, making it binding precedent. *Id.* at 666–73. As the district court found, and the Supreme Court affirmed, "Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them." *Id.* The Court elaborated that filtering software is less restrictive because "adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers." *Id.* at 667.

Defendant argues that *Ashcroft v. ACLU*'s analysis no longer applies because it was based on the evidentiary record made by the district court in 1999, which is not applicable to the instant case and of limited relevance to modern internet usage. (Def.'s Resp., Dkt. # 27, at 8–12). As Defendant argues, H.B. 1181 uses more secure information, requires companies to delete their data, and is designed for convenience and privacy protection. (*Id.* at 11). The Court does not dispute that online interactions have changed since the Supreme Court's decisions in 1997 and 2004. *See Reno v. ACLU*, 521 U.S.; *Ashcroft v. ACLU*, 542 U.S. But as determined by the facts on the record and presented at the hearing, age verification laws remain overly restrictive. Despite changes to the internet in the past two decades, the Court comes to the same conclusion regarding the efficacy and intrusiveness of age verification as the *ACLU* courts did in the early 2000s.

First, the restriction is constitutionally problematic because it deters adults' access to legal sexually explicit material, far beyond the interest of protecting minors. The Third Circuit's holding regarding COPA applies equally to H.B. 1181:

> "[The law] will likely deter many adults from accessing restricted content because they are unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial. People may fear to transmit their personal information, and may also fear that their personal, identifying information will be collected and stored in the records of various Web sites or providers of adult identification numbers."

ACLU v. Ashcroft, 322 F.3d at 259.[11]

Indeed, as the Third Circuit noted, the "Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech . . . ." *Id.* (collecting cases). The same is true here—adults must affirmatively identify themselves before accessing controversial material, chilling them from accessing that speech. Whatever changes have been made to the internet since 2004, these privacy concerns have not gone away, and indeed have amplified.

Privacy is an especially important concern under H.B. 1181, because the government is not required to delete data regarding access, and one of the two permissible mechanisms of age-verification is through government ID. People will be particularly concerned about accessing controversial speech when the state

[11] If anything, the language from *ACLU v. Ashcroft* is more relevant to today than it was when it was written, given the ubiquity of modern technology.

government can log and track that access. By verifying information through government identification, the law will allow the government to peer into the most intimate and personal aspects of people's lives. It runs the risk that the state can monitor when an adult views sexually explicit materials and what kind of websites they visit. In effect, the law risks forcing individuals to divulge specific details of their sexuality to the state government to gain access to certain speech. Such restrictions have a substantial chilling effect. *See Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 754 ("[T]he written notice requirement will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the patently offensive channel.").

The deterrence is particularly acute because access to sexual material can reveal intimate desires and preferences. No more than two decades ago, Texas sought to criminalize two men seeking to have sex in the privacy of a bedroom. *Lawrence v. Texas*, 539 U.S. 558 (2003). To this date, Texas has not repealed its law criminalizing sodomy.[12] Given Texas's ongoing criminalization of homosexual intercourse, it is

[12] The attorney general has explicitly taken the position that state laws remain in place even when held unconstitutional. *Fund Texas Choice v. Paxton*, 1:22-CV-859-RP (W.D. Tex. filed Aug. 24, 2022) (Def.'s Resp., Dkt. # 33, at 28 (citing *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017)).

apparent that people who wish to view homosexual material will be profoundly chilled from doing so if they must first affirmatively identify themselves to the state.[13]

Defendant contests this, arguing that the chilling effect will be limited by age verification's ease and deletion of information. This argument, however, assumes that consumers will (1) know that their data is required to be deleted and (2) trust that companies will actually delete it. Both premises are dubious, and so the speech will be chilled whether or not the deletion occurs. In short, it is the deterrence that creates the injury, not the actual retention. Moreover, while the commercial entities (e.g., Plaintiffs) are required to delete the data, that is not true for the data in transmission. In short, any intermediary between the commercial websites and the third-party verifiers will not be required to delete the identifying data.

Even beyond the capacity for state monitoring, the First Amendment injury is exacerbated by the risk of inadvertent disclosures, leaks, or hacks. Indeed, the State of Louisiana passed a highly similar bill to H.B. 1181 shortly before a vendor for its Office of Motor Vehicles was breached by a cyberattack. In a related challenge to a similar law, Louisiana argues that age-verification users were not identified, but this misses the point. *See Free Speech Coalition v. Leblanc*, No. 2:23-cv-2123 (E.D. La. filed June 20, 2023) (Defs.' Resp., Dkt. # 18, at 10). The First Amendment injury does not

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[13] *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.").

just occur if the Texas or Louisiana DMV (or a third-party site) is breached. Rather, the injury occurs because individuals know the information is at risk. Private information, including online sexual activity, can be particularly valuable because users may be more willing to pay to keep that information private, compared to other identifying information. (Compl. Dkt. # 1, at 17); Kim Zetter, *Hackers Finally Post Stolen Ashley Madison Data*, Wired, Aug. 18, 2015, https://www.wired.com/2015/08/happened-hackers-posted-stolen-ashley*madison-data* (discussing Ashley Madison data breach and hackers' threat to "release all customer records, including profiles with all the customers' secret sexual fantasies and matching credit card transactions, real names and addresses."). It is the threat of a leak that causes the First Amendment injury, regardless of whether a leak ends up occurring.

In short, while the internet has changed since 2004, privacy concerns have not. Defendant offers its digital verification as more secure and convenient than the ones struck down in COPA and the CDA. This simply does not match the evidence and declarations supported in the parties' briefing. Users today are more cognizant of privacy concerns, data breaches have become more high-profile, and data related to users' sexual activity is more likely to be targeted. (Sonnier Decl., Dkt. #5-2, at 44–56; Allen Decl., Dkt. # 27-4, at 4–5). The risks of compelled digital verification are just as large, if not greater, than those in *ACLU v. Ashcroft.* 322 F.3d at 259.

ii. Less restrictive alternatives are available

Plaintiffs offer several alternatives that would target minor's access to pornography with fewer burdens on adults' access to protected sexually explicit materials. First,

the government could use internet service providers, or ISPs, to block adult content until the adults opt-out of the block. This prevents the repeated submission of identifying information to a third party, and operating at a higher level, would not need to reveal the specific websites visited. If implemented on a device-level, sexual information would be allowed for adults' devices but not for children when connected to home internet.

In addition, Plaintiffs propose adult controls on children's devices, many of which already exist and can be readily set up. This "content filtering" is effectively the modern version of "blocking and filtering software" that the Supreme Court proposed as a viable alternative in *Ashcroft v. ACLU.* 542 U.S. at 666–73. Blocking and filtering software is less restrictive because adults may access information without having to identify themselves. And the Court agreed with the finding that "filters are more effective than age-verification requirements." *Id.* at 667. Nor is this cabined to the early 2000s—a 2016 district court in Louisiana likewise expressed a preference for blocking and filtering over age verification. *Garden Dist. Book Shop, Inc.*, 184 F. Supp. 3d at 339.

(a) Defendant's expert highlights alternatives that H.B. 1181 does not allow

Defendant's own expert shows how H.B. 1181 is unreasonably intrusive in its use of age verification. Tony Allen, a digital technology expert who submitted a declaration on behalf of Defendant, suggests several ways that age-verification can be less restrictive and costly than other measures. (Allen Decl., Dkt. # 26-6). For

example, he notes that age verification can be easy because websites can track if someone is already verified, so that they do not have to constantly prove verification when someone visits the page. But H.B. 1181 contains no such exception, and on its face, appears to require age verification for each visit. H.B. 1181 § 129B.003. Commercial age verification systems must use "public or private transactional data" which by its definition includes "records from mortgage, education, and employment entities" but does include third-party verification. *Id.* § 129B.001. The same goes for Allen's discussion of "vouching"—where age is verified based on others' credibility. (Allen Decl., Dkt. # 26-6, at 12). H.B. 1181 does not appear to allow for vouching because it is not based on transactional data. H.B. 1181 § 129B.003.

Similarly, Allen discusses how websites may check age using age estimation based on a user's voice or face. (Allen Decl., Dkt. # 26-6, at 8, 10–12). But it is not clear that "transactional" data includes biometric verification. H.B. 1181 § 129B.003. Allen also suggests digital identity apps can make the process easier, but then acknowledges that "Texas does not yet have a state issued digital identification card or app." (*Id.* at 9). In short, Allen identifies multiple ways that age verification can be less intrusive on users and websites. But H.B. 1181 does not allow these methods.

(b) Defendant's scientific research emphasizes the benefits of parental-led content filtering

Beyond Defendant's technical expert, one of their medical surveys also suggests that content filtering can be effective compared to legal bans. The position, taken from

a literature review of medical research on children's access to online sexual material, is worth quoting at length:

> In order to contain the risk of inadvertent exposure for children, some technical measures may be adopted by websites, social networks, Internet search engines and Internet providers. **Most search engines offer options for safe browsing and are able to block pop-up ads, which are one of the most prominent causes of unintended exposition to age-inappropriate content.** However, **many authors agree that despite the existence of legal bans for minors' use of adult sites and the implementation of these measures, it is concretely extremely difficult to block access.** Although the web is indeed the major source of pornographic material, the problem can hardly be solved by simply adopting technical limitations. Instead, its deep social roots stress the importance of education and communication with parents, teachers and healthcare professionals.
>
> The literature divides strategies of parental approach in mainly two categories: restrictive mediation and active mediation. Restrictive mediation mostly consists of defining rules about the use of Internet in terms of timing, setting and type of online activity, and possibly making use of the aforementioned technical aids. Active mediation, on the contrary, requires a sharper awareness from parents who qualify themselves as promoters of a safe and responsible use of Internet. This kind of mediation seems to be favoured by Italian parents (56%) and mostly chosen when dealing with younger boys and girls. **These mediation strategies have been shown their effectiveness in contrasting the use of [sexually explicit material], and many studies confirm that careful parental control and supervision remain key protective factors.**

(Def.'s Resp., Dkt. # 27-2, at 9–10 (citing Niccolò Principi, et al., *Consumption of sexually explicit internet material and its effects on minors' health: latest evidence from the literature*,74 Minerva Pediatr., 332 (June 2022) ("Principi Article") (internal citations omitted) (emphasis added)).

In short, Defendant's own study suggests several ways that H.B. 1181 is flawed. As the study points out, pop-up ads, not pornographic websites, are the most common

forms of sexual material encountered by adolescents. The study also confirms that blocking pornographic websites and material altogether is extremely difficult to accomplish through "legal bans." And most crucially, the study highlights the importance of content filtering alongside parental intervention as the most effective method of limiting any harm to minors. Defendant cannot claim that age-verification is narrowly tailored when one of their own key studies suggests that parental-led content-filtering is a more effective alternative.

(c) Content filtering is more tailored to sexual material than age verification

Content-filtering also helps address the under-inclusivity issue. At the hearing, Defendant argued that if H.B. 1181 covered more websites, such as search engines, then Plaintiffs would instead argue that it is overbroad. The point is well-taken, but it misses a crucial aspect: the law would be overbroad because age verification is a broad method of enforcement. Under H.B. 1181, age verification works by requiring a user's age at a website's landing page. This forces Texas (and other states) to choose some broad threshold (e.g., one-third) for what percentage of a website must be sexual before requiring age verification. But this is not true for content filtering, which applies to the material on a webpage, not just the site as a whole. So users can browse Reddit, but will be screened from the sexual material within the site by the content filter. (Sonnier Decl., Dkt. # 31-1, at 3–4). Similarly, a user can search Google, but not encounter pornographic images. (*Id.*) This is the definition of tailoring: content

filtering, as opposed to age verification, can more precisely screen out sexual content for minors without limiting access to other speech.

Content filtering is especially tailored because parents can choose the level of access. In other words, parents with an 8-year-old can filter out content inappropriate for an 8-year-old, while parents with a 17-year-old can filter out content inappropriate for a 17-year-old. Using age verification, a 17-year-old will be denied access to material simply because it might be inappropriate for a young minor. Content filtering, by contrast, allows for much more precise restrictions within age groups.

In general, content filtering also comports with the notion that parents, not the government, should make key decisions on how to raise their children. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 824–25 (2000) ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."). Likewise, even as it upheld obscenity laws, *Ginsberg* affirmed that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." 390 U.S. at 639.

Content filtering allows parents to determine the level of access that their children should have, and it encourages those parents to have discussions with their children regarding safe online browsing. As the Principi article notes, it is this combination that is most effective for preventing unwanted exposure to online pornography. (Principi article, Dkt. # 27-2, at 9–10). Age verification, by contrast, places little to no

control in the hands of parents and caretakers.[14] Thus, content filtering keeps the "parents' claim to authority in their own household to direct the rearing of their children . . . ." *Id.: see also Brown*, 564 U.S. at 832–35 (2011) (detailing the Founding Era's attitudes towards raising children and noting that the "history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children.") (Thomas, J., dissenting).

(d) Content filtering is less burdensome and more effective

Again, changes to the internet since 2003 have made age verification more—not less—cumbersome than alternatives. Parental controls are commonplace on devices. They require little effort to set up and are far less restrictive because they do not target adults' devices.

Moreover, content filtering is likely to be more effective because it will place a more comprehensive ban on pornography compared to geography-based age restrictions, which can be circumvented through a virtual private network ("VPN") or a browser using Tor. Adult controls, by contrast, typically prevent VPNs (or Tor-capable browsers) from being installed on devices in the first place. (*See* Sonnier Decl., Dkt. #

[14] Parents may only allow access through age verification by providing their ID or credentials to a minor. This is unlikely in light of the obvious awkwardness of a teenager asking their parents' permission each time they wish to view sexual content.

31-1, at 3–4). And minors who wish to access pornography are more likely to know how to use Tor or VPNs. (Sonnier Decl., Dkt. # 5-1, at 45).

In addition, content filtering blocks out pornography from foreign websites, while age verification is only effective as far as the state's jurisdiction can reach. This is particularly troublesome for Texas because, based on the parties here alone, foreign websites constitute some of the largest online pornographic websites globally. If they are not subject to personal jurisdiction in the state, they will have no legal obligation to comply with the H.B. 1181. Age verification is thus limited to Texas's jurisdictional reach. Content filtering, by contrast, works at the device level and does not depend on any material's country of origin.

Defendant disputes the effects of content filtering and argues that it is only as effective as the caretakers' ability to implement it. But even as Defendant's technical expert noted at the hearing, content filtering is designed for parents and caretakers to be easy to use in a family. The technical knowledge required to implement content-filtering is quite basic, and usually requires only a few steps. (Sonnier Decl., Dkt. # 31-1, at 3–4; Dkt. # 5-2, at 15–17). And the legislature made no findings regarding difficulty of use when it passed the law.

At the hearing, Defendant's expert repeatedly emphasized that parents often fail to implement parental controls on minors' devices. But Defendant has not pointed to any measures Texas has taken to educate parents about content filtering. And more problematically, the argument disregards the steps Texas *could* take to ensure content filtering's use, including incentives for its use or civil penalties for parents or

caretakers who refuse to implement the tool. Indeed, draft bills of H.B. 1181 included such a measure, but it was abandoned without discussion. (Pls.' Reply, Dkt. # 31, at 7). In *Ashcroft v. ACLU*, the Supreme Court gave this precise argument "little weight," noting that the government has ample means of encouraging content filtering's use. 542 U.S. at 669–70. In short, Texas cannot show that content filtering would be ineffective when it has detailed no efforts to promote its use.

(e) Texas has not met its burden

In sum, Plaintiffs have shown that content filtering offers a more tailored, less restrictive method of ensuring that minors do not access adult sexual content. This finding is not surprising, because Defendant offers zero evidence that the legislature even considered the law's tailoring or made any effort whatsoever to choose the least-restrictive measure. To satisfy strict scrutiny, Texas must provide evidence supporting the Legislature's judgments. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195–96 (1997). This is Texas's burden to meet—not Plaintiffs'. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015). But it is virtually impossible for Texas to make this showing when the Legislature did not consider the issue at all. *See*, *e.g.*, *Ass'n of Club Executives of Dallas, Inc. v. City of Dallas, Texas*, 604 F. Supp. 3d 414, 426 (N.D. Tex. 2022) ("[N]o evidence was presented that the City considered less restrictive means of achieving its stated interest"); *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1255 (10th Cir. 2021) ("[W]hile such a less-restrictive-means analysis need not entail the government affirmatively proving that it tried less-restrictive mean . . . it does entail the government giving serious consideration to such less-restrictive means before

opting for a particular regulation."). The state cannot show that it made *any* analysis as to the differences between age verification and content filtering, despite established Supreme Court precedent favoring the latter. *Ashcroft v. ACLU*, 542 U.S. at 668. The complete failure of the legislature to consider less-restrictive alternatives is fatal at the preliminary injunction stage.

Based on the evidence in the parties' briefing, declarations, and hearing testimony, it is clear that age verification is considerably more intrusive while less effective than other alternatives. For that reason, it does not withstand strict scrutiny.

F. H.B. 1181 Unconstitutionally Compels Speech

There is no doubt that H.B. 1181 forces the adult video companies into compelled speech. The law requires that they post three disclaimers, calling pornography "potentially biologically addictive [and] proven to harm human brain development" among other purported neurological issues. H.B. 1181 § 129B.004(1). The sites must also state, "Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses." *Id.* It must also state, "Pornography increases the demand for prostitution, child exploitation, and child pornography." *Id.* Finally, sites must provide the number of a national mental health illness hotline. *Id.*

This is compelled speech. The government is forcing commercial sites to speak and broadcast a proposition that they disagree with. The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus*, 138 S. Ct. at 2463 (collecting cases) (quotations

omitted). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command . . . ." *Id.; see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("NIFLA"). Even if, as Defendant argues, the law compels only commercial speech, it does not pass constitutional muster.

i. *Strict Scrutiny Applies to the Disclosures*

(a) *The law targets speech by its content, not its commercial nature*

Although H.B. 1181 targets for-profit websites, the speech it regulates is likely non-commercial. First, H.B. 1181's compelled disclosures are content-based, regardless of whether they regulate commercial activity. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 429–30 (1993) ("It is the absence of a neutral justification . . . that prevents the city from defending its [] policy as content neutral."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) ("Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans. . . . Commercial speech is no exception."); *Intl. Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 706 (6th Cir. 2020) (applying strict scrutiny standard to content-based commercial regulations); *Reed*, 576 U.S. at 166 ("Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny."). H.B. 1181 targets speech based upon the "subject matter [and] its content." *Reed*, 576 U.S. at 163. Speakers who promote the regulated subject matter must then place disclosures on their advertisements and landing pages. The threshold inquiry examines the content of a website, not whether

something is an advertisement. H.B. 1181 cannot have effect without reference to content. Therefore, because the law targets speech based on its content, it is subject to strict scrutiny. *Discovery Network*, 507 U.S. at 429–30; *Reed*, 576 U.S. at 166.

Separately, the regulation is also content-based under the logic of *NIFLA*. The heath disclosure notice "compel[s] individuals to speak a particular message" and "such notices alter the content of their speech." *NIFLA*, 138 S. Ct. at 2371 (cleaned up). As in *NIFLA*, individuals must "provide a government-drafted script" regarding the controversial effects of pornography, "as well as contact information" for mental health services. *Id.* And just like *NIFLA*, the speakers must provide information that is "devoted to opposing" the speaker's actual preferred message. *Id.* Because the compelled disclosure alters the content of Plaintiffs' speech, H.B 1181 is content-based under *NIFLA*.[15] The logic of *NIFLA* demands that the law be subject to strict scrutiny.

(b) The proposed targets are not commercial transactions

Even setting aside *Discovery Network* and *Reed*, H.B. 1181 does not regulate commercial transactions related to speech. "[T]he core notion of commercial speech [is] speech which does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983) (cleaned up). Alternatively, speech may be commercial if it constitutes "expression related solely to the economic interests of

[15] This applies even if, as Defendant argues, Plaintiffs produce only obscene material.

the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Unlike cigarettes, lightbulbs, or food content, where compelled disclosures have been upheld, sexual material is not a fungible consumer good. Rather, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *ACLU v. Reno*, 521 U.S. at 875. At the outset, then, doctrines surrounding commercial speech disclosures likely do not apply, because the law regulates First Amendment-protected activity beyond "propos[ing] a commercial transaction." And while performers may earn money on sexual expression, they do not have a "sole" economic interest in that performance.

Volokh v. James is helpful. 22-CV-10195 (ALC), 2023 WL 1991435, at *7–8 (S.D.N.Y. Feb. 14, 2023). There, the court dealt with a requirement that certain online platforms create a mechanism to file complaints about "hateful speech" and disclose the policy for dealing with the complaints. *Id.* at *1–2. The court found that the disclosures did not constitute commercial speech because "the policy requirement compels a social media network to speak about the range of protected speech it will allow its users to engage (or not engage) in." *Id.* at 7. The court noted that "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Id.* at *8 (citing *Riley*, 487 U.S. at 796). "Where speech is 'inextricably intertwined with otherwise fully protected speech, it does not retain any of its potential commercial character.'" *Id.* Like *Volokh*, the law targets protected speech based on its content outside of commercial applications. The lessened commercial speech standard does not apply.

Defendant argues that the speech is commercial because the landing pages for the paid subscription sites "is nothing more than a place to click and then follow a prompt to enter your payment information . . . ." (Def.'s Resp., Dkt. # 27, at 16). Again, this ignores the content-based nature of the regulation in the first place. But even setting that aside, the argument is dubious. First, existing subscribers will have already paid, so the "proposed commercial transaction" will only apply to new visitors. For returning subscribers, the page is not proposing a transaction. Second, by way of example, several newspapers offer landing pages (or paywalls) that force visitors to purchase a subscription before reading an article. Yet it is doubtful that these websites would have diminished First Amendment rights as a result.[16] It is the content the websites offer, and not the existence of a paywall, that should determine its commercial nature, because paid access that makes speech commercially viable is "inextricably intertwined" with the speech itself. *Riley*, 487 U.S. at 796.

Defendant is on slightly stronger footing as to the requirements for advertisements, but the Court still finds them to be inextricably intertwined with non-commercial speech. Plainly, the advertisements by themselves are commercial, to the extent they link to paid-subscription websites, because they propose a transaction. Under *Bolger*, courts should examine (1) an advertising format, (2) reference to a specific product,

[16] Similarly, it is doubtful that the government could regulate shrink-wrapped books in a bookstore differently than others because those books require a transaction before accessing the content therein.

and (3) economic motivation for publication. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

Setting aside the content-based nature of H.B. 1181 as a whole, the advertisements likely constitute commercial speech, even when those advertisements relate to protected speech. *Id.* at 66. Plainly, they meet the first and third criteria of *Bolger*. However, it is a close call whether those advertisements are inextricably intertwined with protected speech. *See Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012) ("[T]he inextricably intertwined test operates as a narrow exception to the general principle that speech meeting the *Bolger* factors will be treated as commercial speech."); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 879 F.3d 101, 108–09 (4th Cir. 2018). Assuming that the law is not content based as a whole, the compelled disclosures are likely commercial as applied to advertising. However, the difficulty regarding the "inextricably intertwined" standard shows why the compelled disclosures must be considered content-based at the outset. To ignore the content-based nature of the regulation overall would be to allow the government to regulate disfavored speech with less scrutiny, so long as the government only targets the commercial aspects of that speech. Nonetheless, because Defendant considers the disclosures commercial speech, the Court will also analyze them under commercial speech precedent.

ii. The compelled disclosures do not survive strict scrutiny

Assuming that strict scrutiny applies, the compelled disclosures do not pass constitutional muster. Under strict scrutiny, the law must be narrowly tailored to

serve a compelling government interest. *See*, *e.g.*, *Playboy Entm't Grp., Inc.*, 529 U.S.at 813 (2000). As previously stated, the state has a compelling interest in preventing minors from accessing pornography. However, for many reasons, the disclosures are not narrowly tailored. First, and most critically, the disclosures do not target a minor's access to pornography because a minor will be screened out by the age-verification mechanism. Assuming age-verification works, minors will not be able to access the content on pornographic websites. As a result, the law targets the group *outside* the state's interest (i.e., adults who wish to view legal explicit materials).[17] A law cannot be narrowly tailored to the state's interest when it targets the group exactly outside of the government's stated interest.

More generally, the state has not met its burden that the disclosures are narrowly tailored in general. They require large fonts, multiple warnings, and phone numbers to mental health helplines. But the state provides virtually no evidence that this is an effective method to combat children's access to sexual material. The messages themselves do not mention health effects on minors. And the language requires a relatively high reading level, such as "potentially biologically addictive," "desensitizes brain development," and "increases conditioned responses." H.B. 1181 § 129B.004. Quite plainly, these are not disclosures that most minors would understand.

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[17] The state has not argued a compelling interest in preventing *adults* from accessing pornography. Indeed, Defendant argues that the law is permissible precisely because it *does not* restrict adult access. (Def.'s Resp., Dkt. # 27, at 13).

Moreover, the disclosures are restrictive, impinging on the website's First Amendment expression by forcing them to speak government messages that have not been shown to reduce or deter minors' access to pornography. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023) ("[T]he government may not compel a person to speak its own preferred messages."). Under strict scrutiny, the disclosures do not survive.

iii. H.B. 1181 Fails as a Commercial Speech Regulation

(a) The regulations do not directly advance a substantial government interest

Even using commercial speech standards, the disclosures do not pass muster. For a commercial speech regulation to survive, it must directly advance a substantial government interest and be narrowly tailored so as not to be more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566. For the same reasons that the law fails strict scrutiny, it fails the more relaxed commercial speech standard. Although the compelled disclosures apply almost exclusively to adults, the state claims its interest is in "protecting children from porn." (Def.'s Resp., Dkt. # 27, at 16). This is not "directly advancing" the interest because only adults can access the material on websites that post this warning. Moreover, the disclosures are plainly more excessive than necessary, requiring the parties to post in all caps, three times, "TEXAS HEALTH AND HUMAN SERVICES WARNING." H.B. 1181 § 129.B.004. And, as discussed below, the disclosures state scientific findings as a matter of fact, when in reality, they range from heavily contested to unsupported by the evidence. *See infra*, Section III.F.iii.b.

In its response, the state does not assert an interest in protecting *adults* from non-obscene pornography, who will be the actual target of the messages. It is likely that this interest would not be substantial or permissible. The mere fact that non-obscene pornography greatly offends some adults does not justify its restriction to all adults. *See Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *Matal v. Tam*, 582 U.S. 218, 243–44 ("Giving offense is a viewpoint. We have said time and time again that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") (cleaned up); *see also* Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 Cal. L. Rev. 297, 325–26 (1988) ("[T]he government would acquire enormous and intolerable powers of censorship if it were to be given the authority to penalize any speech that would tend to induce in an audience disagreeable attitudinal changes with respect to future conduct.").

This applies equally to commercial speech. *C. Hudson*, 447 U.S. at 578 ("No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.") (Blackmun, J., concurring); *Zauderer v. Off. of Disc. Counsel of S. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (differentiating government regulations meant to protect consumers from those that seek to "prescribe what shall

be orthodox in politics, nationalism, religion, or other matters of opinion") (*quoting W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

In short, if the interest is in protecting children, then it may arguably be substantial, but it is advanced indirectly. If the interest is in changing adults' attitudes on porn and sexuality, then the state cannot claim a valid, substantial interest. Either way, the compelled messages fail under *Central Hudson.*

(b) *Zauderer* does not apply

Defendant argues that H.B. 1181 regulates commercial speech in a manner that is "truthful, non-misleading, and [requires] relevant disclosures" and is therefore constitutional. (Def.'s Resp., Dkt. # 27, at 13 (citing *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012)). But *Texas Med. Providers* dealt with speech regarding abortion, and the case adopted its language from since-overruled abortion precedent regarding "undue burdens." *Texas Med. Providers*, 667 F.3d at 577 (citing *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)). It does not apply to other forms of commercial speech. Instead, the relaxed standard for certain compelled disclosures applies if they contain "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. If the information is "purely factual and uncontroversial," the government must only show that the compelled disclosures reasonably relate to a substantial government interest and are not "unjustified or unduly burdensome." *Id.*

At the initial stage, H.B. 1181 still fails, because the government lacks a substantial interest that reasonably relates to the regulation. It is unreasonable to warn *adults* about the dangers of legal pornography in order to protect *minors*. But even assuming this was a cognizable interest, *Zauderer* would still not apply. First, H.B. 1181's messages are unduly burdensome. The requirement requires no fewer than four distinct messages to be presented each time a person visits the landing page or advertisement. The disclosures must be in 14-point font size, which is again unclear and burdensome because digital fonts on webpages are not measured in points. This is particularly difficult for advertisements, because they rarely take up an entire page. Often, online advertisements are limited to a small sliver of a webpage. Requiring large font sizes in the context of advertisements would likely be overly burdensome because they risk swallowing up the entire advertisement itself. *See Ibanez v. Fla. Dept. of Bus. and Prof. Reg., Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (holding a compelled message was unconstitutional when it "effectively rule[d] out" the initial message). And the warnings themselves are somewhat deceptive. Defendant has not shown that the Texas Health and Human Services Commission has actually endorsed the message or made the relevant medical findings, despite requiring speakers to display "TEXAS HEALTH AND HUMAN SERVICES WARNING" three separate times in all

caps.[18] Because of the size and repeated nature of the warnings, as well as their potential for misleading visitors, they are likely to be unduly burdensome.

Second, the disclosures are deeply controversial. To receive the more lenient Zauderer standard, the message at issue must be "purely factual and uncontroversial information." *Id.* Outside of factual and non-controversial information, *Zauderer*'s relaxed standard does not apply. *See Hurley v. Irish–Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). The warnings are controversial, both as a matter of fact and opinion.

The Court assumes, at the preliminary injunction stage, that the health disclosures—as opposed to the mental health hotline—are "purely factual."[19] Regardless of their accuracy, the health disclosures purport to show scientific findings. The mental health line, however, is not factual. It does not assert a fact, and instead

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[18] Ironically, while *Zauderer* allowed the government to regulate deceptive speech, here, it is the government's message that is potentially deceptive. 471 U.S. at 651.

[19] In particular, whether the disclosures are "purely factual" depends on whether scientifically contested statements are still "factual." *See*, *e.g.*, *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518, 528 (D.C. Cir. 2015); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014); Am. *Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 763 (9th Cir. 2019) (Ikuta, J., concurring in part and dissenting in part). But the Court reserves the "purely factual" question for a later stage, because factual or not, the disclosures are plainly controversial.

requires companies to post the number of a mental health hotline. The implication, when viewers see the notice, is that consumption of pornography (or any sexual material) is so associated with mental illness that those viewing it should consider seeking professional crisis help. The statement itself is not factual, and it necessarily places a severe stigma on both the websites and its visitors.[20]

Much more seriously, however, is the deep controversy regarding the benefits and drawbacks of consumption of pornography and other sexual materials. Just like debates involving abortion, pornography is "anything but an uncontroversial topic." *Natl. Inst. of Fam. and Life Advocates v. Becerra*, *138 S. Ct. 2361*, *2372* (*2018*). Defendant's own exhibit admits this. (Principi article, Dkt. # 27, at 2 ("Scientific evidence supporting the negative effects of exposure to [sexually explicit internet material] is controversial, and studies addressing this topic are difficult because of important methodological discrepancies.")). As a political, religious, and social matter, consumption of pornography raises difficult and intensely debated questions about what level and type of sexual exposure is dangerous or healthy. *See*, *e.g.*, Jeneanne

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[20] For an expression to be purely factual, "it must be information with an objective truth or existence." *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 6:20-CV-00176, 2022 WL 17489170 (E.D. Tex. Dec. 7, 2022) (appeal docketed, Feb. 6, 2023) (citing Lawrence Solum, *Legal Theory Lexicon: Fact and Value*, https://lsolum.typepad.com/legaltheory/2019/07/legal-theory-lexicon-fact-and-value.html (July 7, 2019)).

Orlowski, *Beyond Gratification: The Benefits of Pornography and the Demedicalization of Female Sexuality*, 8 Modern Am. 53 (Fall 2012) (arguing for constitutional protection of non-obscene pornography); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 Harv. Women's L.J. 1 (1985) (arguing, among other things, that pornography depicts and leads to the subordination of women); Athanasia Daskalopoulou & Maria Carolina Zanette, *Women's Consumption of Pornography: Pleasure, Contestation, and Empowerment*, 54 Sociology 969 (2020) (noting that female consumption of pornography is both "empowering and disciplining" for women); Samuel L. Perry, *Banning Because of Science or In Spite of it? Scientific Authority, Religious Conservatism, and Support for Outlawing Pornography*, *1984–2018*, 100 Social Forces 1385 (March 2022) (examining scientific citations in anti-pornography advocacy and suggesting that the anti-pornography movement is growing "more connected to religious conservatism than views about scientific authority"). The intense debate and endless sociological studies regarding pornography show that it is a deeply controversial subject. The government cannot compel a proponent of pornography to display a highly controversial "disclosure" that is profoundly antithetical to their beliefs.

Beyond the differing moral values regarding pornography, the state's health disclosures are factually disputed. Plaintiffs introduce substantial evidence showing that Texas's health disclosures are either inaccurate or contested by existing medical research. Dr. David Ley, for example, is a clinical psychologist in the states of New Mexico and North Carolina who specializes in treating sexuality issues. (Ley Decl.,

Dkt # 5-3, at 1–4). As Ley states, "There currently exists no generally accepted, peer-reviewed research studies or scientific evidence which indicate that viewing adult oriented erotic material causes physical, neurological, or psychological damage such as 'weakened brain function' or 'impaired brain development.'" (*Id.*) Included in Ley's declaration are more than 30 psychological studies and metanalyses contradicting the state's position on pornography. (*Id.*) Moreover, Ley points out that the mental health hotline number is unsupported because the standard manual of classification of mental disorders, the DSM-5-TR, does not consider pornography addiction as a mental health disorder, and in fact, explicitly rejected that categorization as unsupported in 2022. (*Id.* at 5–6). Finally, the hotline, which links to the Substance Abuse and Mental Health Services Administration helpline, will be of little to no aid because they are likely not trained to deal with pornographic use or addiction. (*Id.* at 5–7).

Defendant, meanwhile, introduces evidence suggesting that pornography *is* dangerous for *children* to consume. One study of boys in Belgium, for example, suggests that "an increased use of Internet pornography decreased boys' academic performance six months later." (Bouché Decl. Dkt. # 26-8, at 2). Another meta-analysis suggests that pornography is harmful to adolescents but encourages parental intervention alongside content filtering to mitigate these harms. (Principi Article, Dkt. #. 27-6, at 9–10). These studies, however, are inapplicable to the compelled disclosures, which make no mention of the effects on children and are primarily targeted at adults.

Each portion of the compelled message is politically and scientifically controversial. This is a far cry from cigarette warnings. Unlike cigarettes, pornography is the center of a moral debate that strikes at the heart of a pluralistic society, involving contested issues of sexual freedom, religious values, and gender roles. And the relevant science, shows, at best, substantial disagreement amongst physicians and psychologists regarding the effects of pornography.[21] Even if the disclosures are commercial speech, *Zauderer* cannot apply.

G. Section 230

Separate from the First Amendment claim, Plaintiffs argue that Section 230 of the CDA preempts H.B. 1181. (Mot. Prelim. Inj., Dkt. # 5, at 17–18). The CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). "Websites are the most common interactive computer services." *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019).

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[21] At worst for Texas, the science shows that many of their claims are entirely without support. For example, one disclosure requires websites to state that pornography "desensitizes brain reward circuits [and] increases conditioned responses" for viewers. H.B. 1181 129B.004. Defendant's study, however, shows that "sensation seeking" is predictive of pornography consumption, not the other way around. (Bouché Decl. Dkt. # 26-8, at 2). No other studies appear to support the position.

In *Doe v. MySpace, Inc.*, the Fifth Circuit held that "Congress provided broad immunity under the CDA to Web-based service providers for all claims stemming from their publication of information created by third parties[.]" 528 F.3d 413, 418 (5th Cir. 2008). This includes sexual materials. *See*, *e.g.*, *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 813, 828 (M.D. Tenn. 2013) (applying section 230 to a Tennessee law "criminaliz[ing] the sale of certain sex-oriented advertisements"). Under section 230, "[p]arties complaining that they were harmed by a Web site's publication of user-generated content . . . may sue the third-party user who generated the content." *MySpace*, 528 F.3d at 419. But they cannot sue "the interactive computer service that enabled them to publish the content online." *Id.*

Defendant seeks to differentiate *MySpace* because the case dealt with a negligence claim, which she characterizes as an "individualized harm." (Def.'s Resp., Dkt. # 27, at 19). *MySpace* makes no such distinction. The case dealt with a claim for individualized harm but did not limit its holding to those sorts of harms. Nor does it make sense that Congress's goal of "[paving] the way for a robust new forum for public speech" would be served by treating individual tort claims differently than state regulatory violations. *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (cleaned up). The text of the CDA is clear: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). "[A]ny" state law necessarily includes those brought by

state governments, so Defendant's distinction between individual vs. regulatory claims is without merit.[22]

The Fifth Circuit "and other circuits have consistently given [Section 230(c)] a wide scope." *Google, Inc. v. Hood*, 822 F.3d 212, 220-21 (5th Cir. 2016) (quoting *MySpace*, 528 F.3d at 418). "The expansive scope of CDA immunity has been found to encompass state tort claims, alleged violations of state statutory law, requests for injunctive relief, and purported violations of federal statutes not specifically excepted by § 230(e)." *Hinton* v. *Amazon.com.dedc*, *LLC*, 72 F. Supp. 3d 685, 689 (S.D. Miss. 2014) (citing cases).

Next, Defendant argues that Section 230 does not apply because only the domestic websites are protected by the law, and those websites only post their own content—not those of third parties. (Def.'s Resp., Dkt. # 27, at 19–20 (citing *AOSI*, 140 S. Ct. at 2087)). *AOSI* does not deal with protection under Section 230, and the Supreme Court's dicta regarding extraterritoriality deals with the statutory rights of "foreign citizens *abroad*"—not those speaking within the country. *AOSI*, 140 S. Ct. at 2087. Cases that do discuss Section 230, dealing with conduct that occurs domestically, have extended

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[22] Even if Section 230 did apply exclusively to individual harms, the law would still be preempted, because H.B. 1181 creates increased penalties when an individual minor accesses a violating website. H.B. 1181 § 129B.006(b). Pure regulatory violations lead to $10,000.00 in damages, but the state imposes an additional $240,000.00 in damages for a minor's access to the website.

the law's protection to foreign publishers. *See Force v. Facebook, Inc.*, 934 F.3d 53, 74 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *Fairfield Sentry Ltd.* (*In Liquidation*) *by and through Krys v. Citibank, N.A. London*, 630 F. Supp. 3d 463, 495 (S.D.N.Y. 2022).[23] As the Second Circuit held in *Force*:

> "[W]e conclude from the text of Section 230, particularly the words "shall be treated," that its primary purpose is limiting civil liability in American courts. The regulated conduct—the litigation of civil claims in federal courts—occurs entirely domestically in its application here. We thus hold that the presumption against extraterritoriality is no barrier to the application of Section 230(c)(1) in this case."

934 F.3d at 74.

Thus, the foreign website Plaintiffs may claim the protection of Section 230 when failing to do so would subject them to imminent liability for speech that occurs in the United States. *Force*, 934 F.3d at 74. Because the foreign website Plaintiffs host content provided by other parties, they receive protection under Section 230. *MySpace*, 528 F.3d at 419.

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[23] The Ninth Circuit came to a similar conclusion, finding that the "relevant conduct occurs where immunity is imposed . . . ." *Gonzalez v. Google LLC*, 2 F.4th 871, 888 (9th Cir. 2021). The Supreme Court granted cert, but declined to reach the Section 230 analysis because it found that the statute at issue did not apply to the Defendants' conduct. *Gonzalez v. Google LLC*, 598 U.S. 617 (2023); *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

As Defendant notes, the second element of immunity under § 230(c) "requires that the claims are all based on content provided by *another* information content provider." *Wells v. YouTube, LLC*, 3:20-CV-2849-S-BH, 2021 WL 2652966, at *3 (N.D. Tex. May 17, 2021) (emphasis added), *adopted* 3:20-CV2849-S-BH, 2021 WL 2652514 (N.D. Tex. June 28, 2021). To the extent that the domestic website Plaintiffs and foreign website Plaintiffs create or develop the content they themselves post, they are not entitled to immunity. 47 U.S.C. § 230(c)(1); *id.* § 230(f)(3). Based on Plaintiffs' pleadings, it is clear that certain websites create their own content to be posted. For example, MG Premium Ltd owns the website Brazzers.com and creates content for the site. Those Plaintiffs that develop and post their own content are not entitled to an injunction on Section 230 grounds. Still, other Plaintiffs, such as WebGroup, which operates XVideos, only hosts third-party content, and therefore is entitled to Section 230 protection.

Because certain Plaintiffs are likely to succeed on the Section 230 claims, they are entitled to a preliminary injunction. "[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) ("[I]mmunity is an immunity from suit rather than a mere defense to liability and . . . is effectively lost if a case is erroneously permitted to go to trial."). Because Section 230 provides

immunity, rather than a simple defense to liability, those Plaintiffs are entitled to an injunction.

Specifically, Plaintiffs MG Freesites LTD, WebGroup Czech Republic, NKL Associates, s.r.o., and MediaMe SRL shall be entitled to an injunction under Section 230.

IV. DISCUSSION – HARM AND EQUITIES

A. Irrepable Harm

Plaintiffs are likely to suffer irreparable harm in the absence of an injunction. To show irreparable harm, "[t]he plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). In addition, ongoing, non-recoverable compliance costs constitute irreparable harm, even where the district court does not consider evidence of the costs credible, so long as the harm is more than de minimis. *Rest. L. Ctr. v. U.S. Dept. of Lab.*, 66 F.4th 593 (5th Cir. 2023).

Without a preliminary injunction, Plaintiffs will suffer several types of irreparable harm. First, they will endure non-recoverable compliance costs. Under Fifth Circuit precedent, "[N]onrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm." *Id.* (citing *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022)). "Complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Id.* A court should emphasize compliance costs' recoverability, rather than their magnitude. *Id.*

Defendant's argument directly contradicts the Fifth Circuit's instruction in *Restaurant Law.* Defendant states that "Plaintiffs provide insufficient evidence to show that any alleged monetary losses are significant" in light of their large global operations. (Def.'s Resp., Dkt. # 27, at 22). This runs headfirst into the *Restaurant Law*'s holding that "the key inquiry is 'not so much the magnitude but the irreparability.'" 66 F.4th at 597 (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)). Like *Restaurant Law*, Plaintiffs' monetary injuries are nonrecoverable—Defendant does not contend otherwise. And they are more than de minimis, because Plaintiffs will have to find, contract with, and integrate age verification systems into their websites. These services come at substantial cost—at the cheapest around $40,000.00 per 100,000 visits. (Compl., Dkt. # 1, at 18; Sonnier Decl., Dkt. # 5-2, at 54). Under *Restaurant Law*, the ongoing compliance costs constitute irreparable harm.

Second, Plaintiffs will incur irreparable harm through violations of their First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In *ACLU v. Ashcroft*, the Third Circuit considered this issue so obvious that it devoted no more than a footnote to the question. 322 F.3d at 251 n.11 (noting that likelihood of success on the merits "is the only [prong] about which any real debate exists"). A party cannot speak freely when they must first verify the age of each audience member, and this has a particular chilling effect when the identity of audience members is potentially stored by third parties or the government.

Irreparable harm is particularly acute in the context of compelled speech because the association of a speaker with the compelled message cannot be easily undone. *See Barnette*, 319 U.S. at 633 (noting that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence). This harm includes, as Plaintiffs argue, a loss of goodwill. H.B. 1181 will force Plaintiffs to display a controversial position as though it were scientific fact, and this will result in incalculable damages to their goodwill and reputation. Wright & Miller, Federal Practice and Procedure: Civil § 2948.1 ("Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is viewed as irreparable.").

Defendant argues that these losses are "compensable." (Def.'s Resp., Dkt. # 27, at 21–22). But to be compensable, damages must be capable of calculation or estimation. *Innovative Manpower Sols., LLC v. Ironman Staffing, LLC*, 929 F. Supp. 2d 597, 620 (W.D. La. 2013). Here, they are not, because the loss of goodwill and visitors may endure for years beyond this litigation. Second, and more seriously, Defendant ignores that the state is entitled to sovereign immunity from monetary claims. *VanDerStok v. Garland*, No. 4:22-CV-00691-O, 2022 WL 4809376, at *3 (N.D. Tex. Oct. 1, 2022) (citing *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021)); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72–73 (2000). Because the monetary losses are significant and non-recoverable, their imminent occurrence constitutes irreparable harm.

Finally, in the context of Section 230, Plaintiffs will suffer irreparable harm by having to expend non-recoverable resources litigating lawsuits where federal law expressly prohibits causes of action from being brought. 47 U.S.C. § 230(e)(3).

In short, Plaintiffs have shown that their First Amendment rights will likely be violated if the statute takes effect, and that they will suffer irreparable harm absent an injunction. Defendant suggests this injury is speculative and not-imminent, (Def.'s Resp., Dkt. # 27, at 21–23), but this is doubtful. H.B. 1181 takes effect on September 1—mere days from today. That is imminent. Nor is the harm speculative. The Attorney General has not disavowed enforcement. To the contrary, her brief suggests a genuine belief that the law should be vigorously enforced because of the severe harms purportedly associated with what is legal pornography. (*Id.* at 1–5). It is not credible for the Attorney General to state that "[p]orn is absolutely terrible for our kids" but simultaneously claim that they will not enforce a law ostensibly aimed at preventing that very harm. Because the threat of enforcement is real and imminent, Plaintiffs' harm is non-speculative. It is axiomatic that a plaintiff need not wait for actual prosecution to seek a pre-enforcement challenge. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). In short, Plaintiffs have more than met their burden of irreparable harm.

B. The Balance of Harms and Public Interest Favor an Injunction

"[E]nforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). "Injunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life Church v. City*

of Holly Springs, Miss., 697 F.3d 279, 298 (5th Cir. 2012) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). The Fifth Circuit recently reaffirmed this principle, explicitly noting that although the government "suffers a form of irreparable injury" when it is enjoined from enforcing its statutes, it likewise has no "interest in enforcing a regulation that violates federal law." *All. for Hippocratic Med.*, 2023 WL 5266026, at *28 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012)). As the circuit court noted, when assessing the state's interest in a law that conflicts with federal statutes or the Constitution, the "government/public-interest analysis collapses with the merits." *Id.* Because H.B. 1181 is likely unconstitutional, the state cannot claim an interest in its enforcement. *Id.*

C. Scope of the Injunction

The Court finds that H.B. 1181 is unconstitutional on its face. The statute is not narrowly tailored and chills the speech of Plaintiffs and adults who wish to access sexual materials. "[I]f the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is proper." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, (2016) (cleaned up), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). A statute that is unconstitutional on its face "is invalid in toto—and therefore incapable of any valid application." *People for Ethical Treatment of Animals v. Hinckley*, 526 F. Supp. 3d 218, 226 (S.D. Tex. 2021) (cleaned up). H.B. 1181 is unconstitutional on its face. The text of the law is facially content based because it screens out sexual content for regulation. *See infra*, Section III.C.i. And the law is not narrowly tailored because it

substantially regulates protected speech, is severely underinclusive, and uses overly restrictive enforcement methods. *See infra*, Section III.D. "As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling" protected speech. *Citizens United v. Fed. Election Commn.*, 558 U.S. 310, 329 (2010); Fallon, *supra* note 10, at 1344–48; *see also Am. Civ. Liberties Union v. Mukasey*, 534 F.3d (affirming nationwide injunction against Attorney General for enforcement of COPA as unconstitutional on its face), *cert denied* 129 S. Ct. 1033. Accordingly, the Court will enjoin Defendant Colmenero from taking any enforcement action under H.B. 1181 pending further order or final judgment.[24]

V. CONCLUSION

At the core of Defendant's argument is the suggestion that H.B. 1181 is constitutional if the Supreme Court changes its precedent on obscenity. Defendant may certainly attempt a challenge to *Miller* and *Reno* at the Supreme Court. But it cannot argue that it is likely to succeed on the merits as they currently stand based upon the mere possibility of a change in precedent. Nor can Defendant argue that the status quo is maintained at the district court level by disregarding Supreme Court precedent. The status quo has been—and still is today—that content filtering is a narrower alternative than age verification. *Ashcroft v. ACLU*, 542 U.S. at 667.

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[24] As previously stated, the injunction for Plaintiffs' Section 230 claims shall apply only to Plaintiffs MG Freesites LTD, WebGroup Czech Republic, NKL Associates, s.r.o., and MediaMe SRL.

The Court agrees that the state has a legitimate goal in protecting children from sexually explicit material online. But that goal, however crucial, does not negate this Court's burden to ensure that the laws passed in its pursuit comport with established First Amendment doctrine. There are viable and constitutional means to achieve Texas's goal, and nothing in this order prevents the state from pursuing those means. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd*, 534 F.3d 181. ("I may not turn a blind eye to the law in order to attempt to satisfy my urge to protect this nation's youth by upholding a flawed statute, especially when a more effective and less restrictive alternative is readily available[.]").

Because the Court finds that H.B. 1181 violates the First Amendment of the United States Constitution, it will GRANT Plaintiffs' motion for a preliminary injunction, (Dkt. # 5), as to their First Amendment claims and GRANT the motion in part and DENY the motion in part as to their Section 230 claims.

Defendant Angela Colmenero, in her official capacity as Attorney General for the State of Texas, is preliminarily ENJOINED from enforcing any provision of H.B. 1181.

IT IS SO ORDERED.

DATED: Austin, Texas, August 31, 2023.

/s/ David Alan Ezra
David Alan Ezra
Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23-50627

FREE SPEECH COALITION, INCORPORATED;
MG PREMIUM, LIMITED; MG FREESITES, LIMITED; WEBGROUP CZECH REPUBLIC. A.S.;
NKL ASSOCIATES, S.R.O.; SONESTA TECHNOLOGIES, S.R.O.;
SONESTA MEDIA, S.R.O.; YELLOW PRODUCTION, S.R.O.; PAPER STREET MEDIA, L.L.C.;
NEPTUNE MEDIA, L.L.C.; JANE DOE; MEDIAME, S.R.L.;
MIDUS HOLDINGS, INCORPORATED,

Plaintiffs—Appellees,

versus

KEN PAXTON, *Attorney General, State of Texas*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-917

Before HIGGINBOTHAM, SMITH, and ELROD, *Circuit Judges*

IT IS ORDERED that appellees' unopposed motion to stay the mandate pending the filing and disposition of a petition for writ of certiorari is DENIED. IT IS FURTHER ORDERED that appellees' opposed motion to vacate the stay pending appeal is DENIED.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, dissenting:

I respectfully dissent from the majority's decision to deny Appellees' unopposed motion to stay the mandate pending appeal and disposition of its petition for writ of certiorari.

Under Federal Rule of Appellate Procedure 41(d), this court may stay its mandate pending the filing and disposition of a petition for writ of certiorari in the Supreme Court if the petition presents a substantial question and there is good cause.[1] The substantial question of law here presented begs for resolution by the high court. The

[1] FED. R. APP. P. 41(d). This analysis is guided by whether there is a "reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Baldwin v. Magio*, 715 F.2d 152, 153 (5th Cir. 1983) (citation omitted).

decision conflicts with Supreme Court precedent and decisions of our sister circuits.[2] And I would stay the mandate because Appellees face a risk of enforcement proceedings under the likely unconstitutional statute.[3] The request before us is

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[2] *See Sable Commc'ns of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000); *Ashcroft v. Am. C.L. Union*, 542 U.S. 656 (2004); *see also Am. C.L. Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (holding that statute prohibiting dissemination by computer of material harmful to minors violated the First Amendment because it unconstitutionally burdened otherwise protected adult communication on the internet); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003) (finding the same regarding Vermont statute prohibiting distribution to minors of sexually explicit material "harmful to minors"); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (finding the same regarding Virginia statute making it unlawful to sell, rent, loan, or display to a juvenile, or use an internet service provider to commit the prior acts, any material that depicted "sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles").

[3] *See Cole v. Carson*, 957 F.3d 484, 486 (5th Cir. 2020) (Ho, J., dissenting) ("We grant stays pending appeal or certiorari where further proceedings could irreparably injure the very interests at stake on appeal."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The

"modest,"[4] as Appellees have committed to an expedited briefing schedule, making it likely the Supreme Court will resolve their petition before the end of June. Any stay will likely terminate in three to four months—less time than it took for this court to rule on the merits of the district court's preliminary injunction.

I would also grant Appellees' request to vacate the stay pending appeal. It signifies that Texas does not oppose staying the mandate, the effect of which is the loss of the administrative stay. And stays pending appeal are intended to restore the status quo.[5] It bears emphasis that H.B. 1181 was enjoined before it went into effect. The stay would preserve the status quo by prohibiting enforcement of the law.

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loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citation omitted).

[4] *Cole*, 957 F.3d. at 487.

[5] *Nken v. Holder*, 556 U.S. 418, 428–29 (2009) ("A stay 'simply suspend[s] judicial alteration of the status quo[.]'") (citation omitted).

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23-50627

FREE SPEECH COALITION, INCORPORATED;
MG PREMIUM, LIMITED; MG FREESITES, LIMITED; WEBGROUP CZECH REPUBLIC. A.S.;
NKL ASSOCIATES, S.R.O.; SONESTA TECHNOLOGIES, S.R.O.;
SONESTA MEDIA, S.R.O.; YELLOW PRODUCTION, S.R.O.; PAPER STREET MEDIA, L.L.C.;
NEPTUNE MEDIA, L.L.C.; JANE DOE; MEDIAME, S.R.L.;
MIDUS HOLDINGS, INCORPORATED,

Plaintiffs—Appellees,

versus

KEN PAXTON, *Attorney General, State of Texas*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-917

UNPUBLISHED ORDER

Before HIGGINBOTHAM, SMITH, and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's opposed motion to stay the district court's injunction pending appeal is GRANTED. The administrative stay issued by the administrative panel on September 19, 2023, is VACATED.[1] The merits panel heard oral arguments on this expedited appeal on October 4, 2023, and will issue an expedited opinion as soon as reasonably possible.

[1] Judge Higginbotham would deny Appellant's motion for stay pending appeal.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23-50627

FREE SPEECH COALITION, INCORPORATED;
MG PREMIUM, LIMITED; MG FREESITES, LIMITED; WEBGROUP CZECH REPUBLIC. A.S.;
NKL ASSOCIATES, S.R.O.; SONESTA TECHNOLOGIES, S.R.O.;
SONESTA MEDIA, S.R.O.; YELLOW PRODUCTION, S.R.O.; PAPER STREET MEDIA, L.L.C.;
NEPTUNE MEDIA, L.L.C.; JANE DOE; MEDIAME, S.R.L.;
MIDUS HOLDINGS, INCORPORATED,

Plaintiffs—Appellees,

versus

ANGELA COLMENERO, *Attorney General,*
State of Texas,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-917

UNPUBLISHED ORDER

Before STEWART, GRAVES, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellant's opposed motion to stay the district court's injunction pending appeal is CARRIED WITH THE CASE. The district court's preliminary injunction is ADMINISTRATIVELY STAYED, and the appeal is EXPEDITED to the next available oral argument panel.

APPENDIX G

CIVIL PRACTICE AND REMEDIES CODE

TITLE 6. MISCELLANEOUS PROVISIONS

CHAPTER 129B. LIABILITY FOR ALLOWING MINORS TO ACCESS PORNOGRAPHIC MATERIAL

Sec. 129B.001. DEFINITIONS. In this chapter:

(1) "Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.

(2) "Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or disseminate by any means.

(3) "Minor" means an individual younger than 18 years of age.

(4) "News-gathering organization" includes:

(A) an employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, who is acting within the course and scope of that employment and can provide documentation of that employment with the newspaper, news publication, or news source; and

(B) an employee of a radio broadcast station, television broadcast station, cable television operator, or wire service who is acting within the course and scope of that employment and can provide documentation of that employment.

(5) "Publish" means to communicate or make information available to another person or entity on a publicly available Internet website.

(6) "Sexual material harmful to minors" includes any material that:

(A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;

(B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:

(i) a person's pubic hair, anus, or genitals or the nipple of the female breast;

(ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or

(iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) "Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. The term includes records from mortgage, education, and employment entities.

Added by Acts 2023, 88th Leg., R.S., Ch. 676 (H.B. 1181), Sec. 1, eff. September 1, 2023.

Sec. 129B.002. PUBLICATION OF MATERIAL HARMFUL TO MINORS. (a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 129B.003 to verify that an individual attempting to access the material is 18 years of age or older.

(b) A commercial entity that performs the age verification required by Subsection (a) or a third party that performs the age verification required by Subsection (a) may not retain any identifying information of the individual.

Added by Acts 2023, 88th Leg., R.S., Ch. 676 (H.B. 1181), Sec. 1, eff. September 1, 2023.

Sec. 129B.003. REASONABLE AGE VERIFICATION METHODS. (a) In this section, "digital identification" means information stored on a digital network that may be accessed by a commercial entity and that serves as proof of the identity of an individual.

(b) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to:

(1) provide digital identification; or

(2) comply with a commercial age verification system that verifies age using:

(A) government-issued identification; or

(B) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual.

Added by Acts 2023, 88th Leg., R.S., Ch. 676 (H.B. 1181), Sec. 1, eff. September 1, 2023.

Sec. 129B.004. SEXUAL MATERIALS HEALTH WARNINGS. A commercial entity required to use reasonable age verification methods under Section 129B.002(a) shall:

(1) display the following notices on the landing page of the Internet website on which sexual material harmful to minors is published or distributed and all advertisements for that Internet website in 14-point font or larger:

"TEXAS HEALTH AND HUMAN SERVICES WARNING: Pornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function."

"TEXAS HEALTH AND HUMAN SERVICES WARNING: Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses."

"TEXAS HEALTH AND HUMAN SERVICES WARNING: Pornography increases the demand for prostitution, child exploitation, and child pornography."; and

(2) display the following notice at the bottom of every page of the Internet website in 14-point font or larger:

"U.S. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES

ADMINISTRATION HELPLINE:

1-800-662-HELP (4357)

THIS HELPLINE IS A FREE, CONFIDENTIAL INFORMATION SERVICE (IN ENGLISH OR SPANISH) OPEN 24 HOURS PER DAY, FOR INDIVIDUALS AND FAMILY MEMBERS FACING MENTAL HEALTH OR SUBSTANCE USE DISORDERS. THE SERVICE PROVIDES REFERRAL TO LOCAL TREATMENT FACILITIES, SUPPORT GROUPS, AND COMMUNITY-BASED ORGANIZATIONS."

Added by Acts 2023, 88th Leg., R.S., Ch. 676 (H.B. 1181), Sec. 1, eff. September 1, 2023.

Sec. 129B.005. APPLICABILITY OF CHAPTER. (a) This chapter does not apply to a bona fide news or public interest broadcast, website video, report, or event and may not be construed to affect the rights of a news-gathering organization.

(b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider may not be held to have violated this chapter solely for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network not under that provider's control, including transmission, downloading, intermediate storage, access software, or other services to the extent the provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors.

Added by Acts 2023, 88th Leg., R.S., Ch. 676 (H.B. 1181), Sec. 1, eff. September 1, 2023.

Sec. 129B.006. CIVIL PENALTY; INJUNCTION. (a) If the attorney general believes that an entity is knowingly violating or has knowingly violated this chapter and the

action is in the public interest, the attorney general may bring an action in a Travis County district court or the district court in the county in which the principal place of business of the entity is located in this state to enjoin the violation, recover a civil penalty, and obtain other relief the court considers appropriate.

(b) A civil penalty imposed under this section for a violation of Section 129B.002 or 129B.003 may be in an amount equal to not more than the total, if applicable, of:

(1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this chapter;

(2) $10,000 per instance when the entity retains identifying information in violation of Section 129B.002(b); and

(3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

(c) The amount of a civil penalty under this section shall be based on:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) the economic effect of a penalty on the entity on whom the penalty will be imposed;

(5) the entity's knowledge that the act constituted a violation of this chapter; and

(6) any other matter that justice may require.

(d) The attorney general may recover reasonable and necessary attorney's fees and costs incurred in an action under this section.

Added by Acts 2023, 88th Leg., R.S., Ch. 676 (H.B. 1181), Sec. 1, eff. September 1, 2023.