No. 23A925

In the Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,
Applicants,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

RESPONSE IN OPPOSITION

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PARTIES TO THE PROCEEDING

Applicants, plaintiffs-appellees below, are Free Speech Coalition, Inc., MG Premium Ltd, MG Freesites Ltd, 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, LLC, Neptune Media, LLC, Jane Doe, Mediame, SRL, and Midus Holdings, Inc.

Respondent Ken Paxton, in his official capacity as Attorney General of Texas, was defendant-appellant below.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

Free Speech Coalition, Inc. v. Colmenero, No. 1:23-CV-917-DAE (Aug. 31, 2023).

United States Court of Appeals (5th Cir.):

Free Speech Coalition, Inc. v. Paxton, No. 23-50627 (Mar. 7, 2024).

INTRODUCTION

For decades, this Court has recognized that all "50 States" bar minors from "purchas[ing] pornographic materials." *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988). Texas is no exception. *E.g.*, Tex. Penal Code §43.24(b). Texas' methods of enforcing those age restrictions has evolved, however, because it must. Through smartphones and other devices, children have omnipresent and instantaneous access to virtually unlimited amounts of pornography, and "approximately one in five youth experience unwanted online exposure to sexually explicit material." House Comm. on Judiciary & Civ. Juris., Bill Analysis at 1, Tex. C.S.H.B. 1181, 88th Leg., R.S. (2023). That material includes content orders of magnitude more graphic, violent, and degrading than any so-called "girlie" magazine of yesteryear. *See, e.g.*, ROA.538.[1] This unprecedented explosion of access to hardcore pornography by kids "is creating a public health crisis."[2] Texas has responded to that crisis by enacting House Bill 1181. This statute does not prohibit the performance, production, or even sale of pornography but, more modestly, simply requires the pornography industry that make billions of dollars from peddling smut to take commercially reasonable steps to ensure that those who access the material are adults. There is nothing unconstitutional about it.

Nonetheless, Plaintiffs—who include a trade organization representing some of the world's largest internet pornographers (collectively, "Applicants")—urge the Court to en-

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[1] "ROA" refers to the record on appeal in *Free Speech Coalition v. Paxton*, No. 23-50627 (5th Cir.).

[2] Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat*, POLITICO (Aug. 8, 2023), https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148.

join enforcement of H.B. 1181's age-verification requirement pending this Court's evaluation of their certiorari petition. "[I]t is a wise rule," however, "that a litigant whose claim of urgency is belied by its own conduct should not expect discretionary emergency relief from a court." *West Virginia v. B. P. J. ex rel. Jackson*, 143 S.Ct. 889, 889 (2023) (Alito, J., dissenting from denial of application to vacate injunction). Applicants have disregarded this rule. Texas's requirement that pornographers take commercially reasonable steps to ensure that their users are adults has been enforceable since the Fifth Circuit issued an administrative stay of the district court's preliminary injunction last *September* and a merits panel issued a stay pending appeal last *November.* By itself, Applicants' months-long delay in asking this Court for relief is more than "somewhat inconsistent with the urgency they now assert." *Brown v. Gilmore*, 533 U.S. 1301, 1305 (2001) (Rehnquist, C.J., in chambers); *see also United States v. Texas*, 144 S.Ct. 797, 799 (2024). This is particularly true because Applicants additionally waited more than six weeks after the Fifth Circuit merits panel issued its opinion before coming to this Court.

Whether styled as a stay or an injunction pending appeal, the relief Applicants seek "is an equitable remedy." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). "The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers). This Court should not indulge such unexplained tardiness by providing them relief that the court of appeals refused nearly six months ago. *See, e.g.*, *Brown*, 533 U.S. at 1305 (denying relief sought well after the court of appeals denied an injunction pending appeal).

It would be particularly inequitable to issue an injunction at this juncture because this Court is unlikely to grant review, and Applicants are unlikely to prevail even if the Court were to do so. Applicants can only claim (at 14) "hallowed First Amendment ground," by wrongly "equat[ing] the free and robust exchange of ideas and political debate with commercial exploitation of obscene material." *Miller v. California*, 413 U.S. 15, 34 (1973). But it "has been categorically settled by the Court, that obscene material is unprotected by the First Amendment," *id.* at 23, and even Applicants admit (*e.g.*, at 5) that States may prohibit the dissemination of pornography *to children*. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793-94 (2011); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Ginsberg v. New York*, 390 U.S. 629, 634, 637, 642-43 (1968). A necessary corollary of this Court's precedent is that States must be able to set and check the age of those accessing pornography—or require Applicants to do so. That is all the challenged provision does.[3]

STATEMENT OF THE CASE

I. Factual background

A. Childhood exposure to pornography

1. "Most of today's pornography does not reflect consensual, loving, healthy relationships. Instead, pornography teaches dominance, aggression, disrespect, and objectification." Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography,* 45 VT. L. REV. 43, 43 (2020) (emphasis omitted).

[3] The Act of May 25, 2023, Ch. 676, § 1, 88th Leg., R.S., commonly referred to as H.B. 1181, had other provisions. Because only its age-verification requirement—Texas Civil Practice and Remedies Code sections 129B.002 and 129B.003—is at issue here, references to "H.B. 1181" are to this subsection unless otherwise specified. This is to promote clarity in this highly expedited proceeding and should not be interpreted as a concession that these provisions cannot be severed from the remainder of the statute.

Today, websites like Applicant Xnxx host more than 250,000 free videos of "teen bondage gangbang[s]," including one in which a young woman is restrained, gagged, strangled, and slapped while having sexual intercourse with multiple men for 36 minutes. ROA.538.

As of the preliminary-injunction hearing, that video alone had 671,000 views, ROA 538-39. Nor is it an outlier. One Applicant's site contained 306,230 videos of "perfect girl porn," 579,497 videos of "teen hardcore" porn, and 328,273 videos of "young petite porn." ROA.399. Another's included over 200,000 videos in the "*Un Consesual* [sic]" category, and 198,000 videos in the "*Non Consesual* [sic] Porn Porn videos"—deliberate misspellings to conceal visual depictions of rape. ROA.368 (emphases added). A third popular category is hentai, which is the "pornified" version of cartoons, often featuring "a grotesque creature penetrating a girl with an enormous phallus or tentacle." ROA.368. In 97% of these videos, women are the targets of aggression, including "[s]panking, gagging, slapping, hair pulling, and choking." ROA.367-68. The dramatic rise in what Applicants euphemistically call "choking" is particularly concerning given that it is "defined by medical science as 'nonfatal strangulation'" and "poses grave neurological harms to victims, including unconsciousness, brain injury, seizure, motor and speech disorders, memory loss," and PTSD. ROA.368. And, not by coincidence, children mirror such conduct. *See, e.g.*, Peggy Orenstein, *The Troubling Trend in Teenage Sex*, N.Y. TIMES, , https://tinyurl.com/2mp4z4j2 (Apr. 12, 2024) (tying the spike of "sexual strangulation" of girls "between the ages of 12 and 17" to online pornography, where such behavior has become a "staple").

2. Today's digital environment offers inexhaustible amounts of this smut. For example, Applicants complain (at 3) that in February, Texas Attorney General Ken Paxton instituted an enforcement action against Aylo, the parent company of Applicant Pornhub. In

2019, Pornhub alone transferred 6,597 petabytes of data. Romney, *supra*, at 50. That represents "1.36 million hours (169 years) of new content [that] were uploaded to the site," *id.*—or nearly 90,000 times the data that was in the Library of Congress in 2009, Matt Raymond, *How 'Big' is the Library of Congress*, LIBRARY OF CONGRESS BLOGS (Feb. 11, 2009), https://blogs.loc.gov/loc/2009/02/how-big-is-the-library-of-congress. Indeed, Pornhub bragged that if one "started watching 2019's new videos in 1850, you'd still be watching today." ROA.343.

With this staggering amount of pornography available, it is no surprise that kids on average are first exposed to pornography when they are just 11 years old. Khadijah B. Watkins, *Impact of Pornography on Youth*, 57 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 89 (2018). One study based on data collected in 2006 reported that participants were as young as eight when they first viewed online pornography, and 72.8% had done so by 18. Chiara Sabina, et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 CYBERPSYCHOLOGY & BEHAVIOR 691, 691-92 (2008). That same study found that over a third of male participants reported viewing "[s]exual activity involving bondage"; almost a third, "[s]exual activity between people and animals"; over a fifth, "[s]exual activity involving urine or feces"; and almost that many, "[r]ape or sexual violence." *Id.* at 693. And all of that was *before* the explosion of smartphone use among children since the iPhone was introduced in 2007. *See, e.g.*, Amanda Giordano, *What to Know About Adolescent Pornography Exposure*, PSYCHOLOGY TODAY (Feb. 27, 2022), https://tinyurl.com/GiordanoPsych ("[U]sing smartphones to access free pornography online is the most common means of viewing pornographic material."). According to British regulators, hentai—again, pornographic cartoons—is particularly popular with "children aged 6-12." ROA.369

3. Other studies show that children who habitually view pornography exhibit "a host of mental health afflictions," including depression, disassociation, and other behavioral problems such as emulating sexual strangulation, dating violence, and sexual coercion. ROA.369-70. A British study found that "42% of 15-16-year-olds expressed the desire to mirror pornography—and more than half of all boys believe that online porn depicts realistic sexuality." ROA.370. "Research also shows that minors who view porn are at a higher risk of adult perpetration of child sexual abuse." ROA.370. Although the risk is more acute with young girls, any child exposed to pornography is "more likely to display hypersexualization and to develop paraphilias (*e.g.*, exhibitionism, voyeurism)." ROA.370.

And the dangers from early exposure to pornography are not limited to sexual proclivities. Although medical ethics (not to mention common decency) limit the ability of researchers to perform experiments on children, recent studies suggest that pornography exposure can lead to a higher tendency toward use of tobacco, alcohol, and illegal drugs, ROA.371, symptoms of "irritability, poor social functioning, impulsiveness, and social anxiety," and "dysfunctional stress responses and poor executive function," ROA. 371. As a result, children exposed to pornography may suffer "impairments to judgment, memory, and emotional regulation." ROA.371. And it "may trigger adolescent depression and psychosomatic symptoms" such as "headache, irritability, [and] trouble sleeping." ROA.371.

B. The operation of pornographic websites

Among the leading causes of this crisis, Applicants' business models generally fall into two broad categories: advertisement-based and subscription-based. The first category generates revenue from "advertising placements on its website and through referral fees generated from certain advertisements placed by third party content creators." ROA.249. The

second generates revenue from subscriptions, which permit customers (many of whom have provided credit-card information) to view adult content uploaded by studios from around the world. ROA.250-51. *Contra* Application 2 (suggesting that it is H.B. 1181 that creates the risk of data breaches).

Today, many pornographic websites already employ some form of age verification. For example, several Applicants use the age-verification provider Yoti. ROA.403-04. And many also have terms and conditions that recognize the need to limit access to pornography to adults. ROA.252. "Individuals attempting to access" such services are "first barred by a pop-up requiring them to certify that they are at least eighteen years old." ROA.252.

As Texas's expert explained, the age-verification process occurs on the site's landing page, where the user must complete the verification before proceeding further. ROA.1836. Age-verification technology comes in three general types: *First*, government-issued-document verification matches a selfie with a picture of a document through the device's camera or digital wallet. ROA.1836. *Second*, age-estimation algorithms can use up to 126 biometric markers on the face—without retaining the actual image of the face—to estimate how old the user is based on facial structure. ROA.1839. *Third*, software can use the existence of some other fact to infer the age of the person seeking to access the website—for example, someone who is a commercial airline pilot must be over 18 years old. ROA.1840. Regardless of the method used, this age-verification process is almost exclusively completed by third parties, who provide Applicants only "the answer to the question, 'Is this person over 18? Yes or No.'" ROA.1837.

II. H.B. 1181

To combat the spread of pornography to minors, the Texas Legislature enacted H.B. 1181. It applies to commercial entities 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." Tex. Civ. Prac. & Rem. Code §129B.002(a). H.B. 1181's definition of sexual material harmful to minors tracks traditional obscenity law and speaks in terms of what is "patently offensive" under "contemporary community standards," "appeal[s] to or pander[s] to the prurient interest," and "lacks serious literary, artistic, political, or scientific value for minors." *Id.* §129B.001(6).

Once triggered, H.B. 1181 requires a website to do two things, only one of which is relevant here. *First*, it must "use reasonable age verification methods" to verify that the user "is 18 years of age or older." *Id.* §129B.002(a). To comply, the pornographer must require the potential user to (1) "provide digital identification" or (2) "comply with a commercial age verification system that verifies age using" a "government-issued identification," or "commercially reasonable method that relies on public or private transactional data to verify the age of an individual." *Id.* §129B.003(b). To ensure user privacy, the age verifier "may not retain any identifying information of the individual." *Id.* §129B.002(b). This is the requirement Applicants ask the Court to enjoin pending potential certiorari review.

Second, in the portion of H.B. 1181 that remains currently enjoined by the orders of the district court and court of appeals, pornographers were also required to display two health warnings on their landing pages and advertisements. *Id.* §129B.004. These warnings would have been expressly on behalf of the Texas Health and Human Services Commission and were to include statements that pornography "is potentially biologically addictive," can

"harm human brain development," and has been "associated with low self-esteem" and an increase in "demand for prostitution" and "child exploitation." *Id.* §129B.004(1). Covered entities were also to alert users of the availability of a national hotline for those "facing mental health or substance use disorders." *Id.* §129B.004(2).

H.B. 1181 empowers the Texas Attorney General to bring civil-enforcement actions in state court, in which injunction and civil penalties are available. *Id.* §129B.006(a), (d).

III. Legal Proceedings

1. Applicants include: (1) Free Speech Coalition Inc., an association of pornographic actors, producers, distributors, and retailers; (2) domestic producers, sellers, and licensers of pornography; (3) foreign producers, sellers, and licensers of pornography; and (4) Jane Doe, a pornographic performer whose performances are featured on various websites but who chose to proceed in this action pseudonymously. ROA.19-24. Applicants all allege that H.B. 1181 violates the First Amendment, ROA.42-43, and the Due Process and Equal Protection Clause of the Fourteenth Amendment, ROA.43. A subset of Applicants also allege that H.B. 1181 is preempted by 47 U.S.C. §230, ROA.43-44, and violates their Eighth Amendment rights, ROA.44. Applicants moved for a preliminary injunction under 42 U.S.C. §1983. ROA.54.

On August 23, 2023, the district court held a hearing on the preliminary-injunction motion—just 16 days after the complaint was served. At the hearing, there was little dispute that much of the content on these websites is obscene. Further, expert testimony showed that age-verification technology is "not new" for pornographic websites, which already "use it elsewhere in the world." ROA.1854; *see* ROA.402-03. Despite refusing to view even a sample of the graphic content available on the relevant websites, ROA.1881, the district court

insisted that mainstream movies containing partial nudity and simulated lovemaking like films available on Netflix are "as raw as any pornography," ROA.1877-78. *But see, e.g.*, ROA.538 (describing how Xnxx.com has at least six categories of bondage).

On August 31, the district court issued a pre-enforcement preliminary injunction on the grounds that H.B. 1181 facially violates the First Amendment, ROA.1770, and that certain Applicants are likely to succeed on their Section 230 claims, ROA.1762. Texas asked the district court to stay its injunction, ROA.1793, but that request was denied, ROA. 1828.

2. The Attorney General immediately filed a notice of appeal, and after the district court declined to stay the injunction, an emergency motion for stay in the court of appeals. Because the timeline of what happened next is directly relevant to the Application, it is set forth here in detail:

- **August 31, 2023**: The district court enjoins enforcement of H.B. 1181. ROA.1770.
- **September 1, 2023**: The Attorney General files his notice of appeal and moves the district court for a stay pending appeal. ROA.1771, 1793-811.
- **September 6, 2023**: The district court denies the stay motion. ROA.1826-28.
- **September 7, 2023**: The Attorney General seeks emergency relief from the Fifth Circuit. ECF 12.[4]
- **September 19, 2023**: The Fifth Circuit issues an administrative stay and accelerates the case to the next available argument sitting. ECF 66.

[4] "ECF" refers to the Fifth Circuit docket number in *Free Speech Coalition v. Paxton*, No. 23-50627 (5th Cir.).

- **September 20, 2023**: In light of the Fifth Circuit's decision to expedite oral argument, the Attorney General agrees not to enforce H.B. 1181 during the pendency of the administrative stay. Supp.App.11a.
- **October 4, 2023**: The Fifth Circuit holds oral argument. ECF 117.
- **November 14, 2023**: The Fifth Circuit vacates the administrative stay and grants the motion to stay the injunction pending resolution of the appeal. ECF 125.
- **November 17, 2023**: The Attorney General reiterates that "Texas has a right to protect its children from the detrimental effects of pornographic content" and will "make every effort to defend those who are most vulnerable," and begins investigating potential violations of H.B. 1181. Supp.App.26a.
- **February 26, 2024**: Pursuant to the Fifth Circuit's stay pending appeal, Texas (through its Attorney General) files a state-court enforcement action against Aylo. *Texas v. Aylo*, No. D-1-GN-24-001275 (250th Dist. Ct., Travis County, Tex.).
- **February 28, 2024**: In their first communication since the Fifth Circuit issued a stay pending appeal three months earlier, Applicants acknowledge the effect of the Fifth Circuit's November 14, 2023 order but nonetheless demand that Texas cease further enforcement. Supp.App.18a. Texas declines within approximately 90 minutes. Supp.App.17a.
- **March 4, 2024**: Applicants alert the Fifth Circuit to the pendency of the enforcement action but seek no relief as to the stay. ECF 131.
- **March 7, 2024**: The Fifth Circuit issues its opinion vacating in part the district court's injunction and dissolving its own stay pending appeal. ECF 137.

- **March 8, 2024**: Applicants demand that Texas halt *any* enforcement of H.B. 1181 even though the Fifth Circuit had just one day earlier vacated any injunction against H.B. 1181's age-verification requirement. *See* Supp.App.16a.
- **March 12, 2024**: Texas agrees to continue not enforcing H.B. 1181's health-warning requirement, which remains subject to the district court's preliminary injunction, pending any request for further review. Supp.App.13a.
- **March 14, 2024**: Pornhub exits the Texas market entirely rather than even trying to verify that visitors to its site are not children.[5]
- **March 22, 2024**: Applicants demand that the Attorney General waive various procedural rights regarding, *inter alia*, a certiorari petition that they anticipated filing on April 10, 2024. Supp.App.23a-24a. The Attorney General agrees to the request in part but declines to make further concessions without seeing the petition. Supp.App.3a.
- **March 25, 2024**: Applicants move the Fifth Circuit to stay issuance of its mandate and to vacate the stay pending appeal issued on November 14, 2023. ECF 142.
- **March 28, 2024**: The Fifth Circuit denies the motion to stay the mandate, and the mandate issues. ECF 148-1, 149-2.
- **April 5, 2024**: Applicants again demand that the Attorney General waive various procedural rights relating to their forthcoming certiorari petition. Supp.App.2a. Again, he declines to take a position without first seeing the petition.

[5] William Melhado, *Pornhub suspends site in Texas due to state's age-verification law*, TEX. TRIBUNE (Mar. 14, 2024), https://perma.cc/N9K6-W7CL.

Supp.App.1a.

- **April 12, 2024**: Applicants file their Application and an accompanying petition for a writ of certiorari—two days *after* their proposed date of filing and more than two weeks *after* the Fifth Circuit issued the mandate.

As this timeline reflects, Applicants have had at minimum five months to protest to this Court that the Fifth Circuit failed to explain its reasoning for allowing H.B. 1181 to go into effect. *See* Application 4. Instead, they waited more than a month after the Fifth Circuit published a 50-page opinion explaining that the injunction was improper under this Court's binding precedent in *Ginsberg v. New York*, 390 U.S. 629 (1968), and vacating the district court's preliminary injunction with respect to H.B. 1181's age-verification requirement, App.8a-29a. The Fifth Circuit affirmed the district court's preliminary injunction regarding the health warnings, App.31a-45a, but recognized that Texas may ultimately be able to satisfy the standard under *Zauderer v. Off. of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), with additional factual development, App. 37a-43a (repeatedly emphasizing the limited record). The opinion reflected that, when effective, the court's judgment would—as with any such judgment—lift the stay pending appeal. App.51a. Applicants did not seek, and the Fifth Circuit did not order, immediate issuance of the mandate.

Applicants still did not seek further relief from this Court. Instead, weeks after the Fifth Circuit issued its opinion, they moved to stay the mandate. ECF 142. In that motion, they suggested, without authority, that the very Fifth Circuit opinion that vacated the district court's preliminary injunction in substantial part nonetheless also *sub silentio* reinstated that same injunction in full by dissolving the stay pending appeal. *Id.* at 19. Apparently recognizing, however, the self-contradiction in that position, Applicants also asked the

Fifth Circuit to lift the stay pending appeal it had issued on November 14, 2023—*i.e.*, the stay that allowed Texas to enforce H.B. 1181. *Id.* at 20-21. The Fifth Circuit denied Applications' motion, ECF 148-1, and issued the mandate, ECF 149-2.

Again, Applicants waited, allowing a further two weeks to pass before filing their Application and certiorari petition in this Court, asking this Court to "stay" a judgment that had already been issued weeks earlier and reinstate an injunction that has not been in effect for seven months. At the same time, they criticize the Attorney General (at 4) for not taking a position on whether it is appropriate to expedite briefing regarding a petition for certiorari that he had not yet had an opportunity to even review.

SUMMARY OF THE ARGUMENT

I. Whether labeled a request for a "stay" or recognized to be (as it is) a petition for a writ of injunction under the All Writs Act, *Brown*, 533 U.S. at 1303, the relief Applicants seek is an extraordinary remedy that is granted only in the exercise of the Court's equitable discretion, *e.g.*, Sup. Ct. R. 20.1. This Court has long recognized that a party seeking such interim equitable relief "must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (per curiam) (collecting cases); *see also, e.g.*, *S. Pac. Co. v. Bogert*, 250 U.S. 483, 500 (1919) ("[W]hen a party with full knowledge of the facts, acquiesces in a transaction, and sleeps upon his rights, equity will not aid him."). Applicants have not done so. They waited months while an administrative stay and then a stay pending appeal were in place. And even after Texas sued a pornographer in February 2024 pursuant to the Fifth Circuit's November 2023 stay pending appeal, Applicants did not seek emergency relief. In fact, even after the Fifth Circuit issued its opinion, they waited weeks before asking that court to stay its mandate and then waited an additional two weeks before coming to this

Court. This Court should not reward Applicants' delay by preventing Texas from continuing to protect children from pornography glamorizing strangulation, "teen bondage gangbangs," and rape while this litigation continues in the district court.

II. Applicants also are not entitled to the equitable relief they seek for other reasons. Although they assert the request in the alternative, the Application is properly construed as a petition for a writ of injunction. After all, it was the Fifth Circuit's judgment—made effective by the Fifth Circuit's mandate issued weeks ago—that had the effect of lifting the Fifth Circuit's stay pending appeal while also vacating the district court's preliminary injunction of H.B. 1181's age-verification requirement. Absent the Fifth Circuit's judgment (formally issued on March 28, 2024, itself weeks before this Application was filed), H.B. 1181 would be in effect *in its entirety* as it has been since November 2024. ECF 125. In other words, the only way Applicants will be able to again start providing pornography to website visitors without verifying that children are not the recipients is if this Court were to issue its own injunction. Perhaps the most difficult to obtain category of relief, however, a writ of injunction from this Court requires more than "attempting to predict" how the Court would rule if it ultimately agreed to hear the case: Applicants' right to relief must be "indisputable." *Brown*, 533 U.S. at 1304. Applicants cannot meet that standard.

III. Even assuming the Application could be deemed a request for a "stay" under 28 U.S.C. §2101(f), despite the fact that the Fifth Circuit has already issued its judgment (complete with issuance of the mandate) vacating the district court's preliminary injunction of H.B. 1181's age-verification requirement, Applicants still cannot meet the requirements for a stay. The Court is unlikely to grant certiorari because the Fifth Circuit's judgment regarding H.B. 1181's age-verification requirement does not conflict with precedent from this

Court or other courts of appeals. If the Court did grant review notwithstanding this lack of a split and this case's interlocutory posture, it is not likely to reverse the court of appeals' decision, because the Fifth Circuit faithfully applied this Court's precedent. Nor have Applicants shown they are likely to suffer irreparable harm. Regardless, the balance of the equities overwhelming favors Texas, which seeks to curb a public-health crisis by preventing children from being exposed to hardcore pornography.

IV. Finally, the Application asks the Court to expedite review of Applicants' certiorari petition. Applicants' own delay, however, created the alleged need for haste. Texas should not bear the burden of an expedited schedule just because Applicants did not move more quickly and apparently only recently decided that Texas's enforcement of H.B. 1181's age-verification requirement warrants this Court's consideration.

ARGUMENT

I. Applicants' Dilatory Conduct Precludes Any Form of Equitable Relief.

Whether styled in the form of a stay, or a request for injunctive relief, Applicants do not dispute that they seek equitable relief. *See, e.g.*, *Rose v. Raffensperger*, 143 S.Ct. 58, 59 (2022) (mem.) (reiterating that a motion for a stay pending appeal is "subject to sound equitable discretion"); *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 379 (2004) (finding a request timely under the All Writs Act where a petitioner took an "active litigation posture" that "was far from ... neglect or delay"). "From the earliest ages, Courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to

assert their claims." *Elmendorf v. Taylor*, 23 U.S. 152, 168 (1825).[6] For good reason: "A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify" such extraordinary interim relief. 11A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE §2948.1 (3d ed. 2023); *see also Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers) (noting, as an "additional factor[] militating against" a writ of injunction, that "the applicants delayed unnecessarily").

The Attorney General exercised diligence throughout this proceeding, filing a stay motion in the district court within 24 hours of H.B. 1181 being enjoined. ROA.1793. The Attorney General likewise sought immediate emergency relief from the Fifth Circuit within 24-hours of the district court denying a stay. ECF 12. As detailed above—and as Applicants do not appear to dispute—counsel for Texas has replied to any request promptly so as to allow Applicants to similarly protect their rights in equity should they wish to do so. *Supra* pp. 10-13.

By contrast, Applicants have failed to act with the diligence required for either an injunction or a stay pending resolution of their petition for a writ of certiorari. As the Application recognizes (at 10-11), the Fifth Circuit granted a temporary administrative stay in September 2023 and a stay pending appeal a few weeks later. The normal time to seek emergency relief would have been immediately following entry of the stay pending appeal. *See Texas*, 144 S.Ct. at 799; *Labrador v. Poe*, No. 23A763, 2024 WL 1625724, at *7 (Apr. 15,

[6] *See also, e.g.*, *Benisek*, 585 U.S. at 159; *Barnette v. Wells Fargo Nev. Nat'l Bank of S.F.*, 270 U.S. 438, 444 (1926); *Chapman v. Cnty. of Douglas*, 107 U.S. 348, 355 (1883); *Sample v. Barnes*, 55 U.S. 70, 75 (1852).

2024) (Kavanaugh, J., concurring) (a party seeking a statewide preliminary injunction of a law "typically" seeks "emergency" relief in this Court after the court of appeals stays the district court's injunction); *cf.* Order, *Spectrum WT v. Wendler*, No. 23A820, 2024 WL 1123370 (Mar. 15, 2024) (mem.) (denying an injunction pending appeal where the movant waited months to seek relief from this Court). True, to ensure an orderly appellate process, Texas temporarily agreed not to enforce H.B. 1181 during the pendency of the *administrative* stay. Supp.App.9a, 11a. But the Fifth Circuit vacated that stay on November 13, 2023, when it issued a stay of the district court's injunction pending appeal, ECF 125, thus allowing Texas to enforce its law "during the [period] while the parties wait for a final merits ruling," *Labrador*, 2024 WL 1625724, at *7 (Kavanaugh, J., concurring). Applicants "could" and should "have made an immediate application to a Justice of this Court" immediately following that order. *Brown*, 533 U.S. at 1304. Instead, they waited more than three months to contact counsel for Texas regarding the status of the stay, and five months to seek relief from this Court. *Supra* pp. 11-13. Such foot dragging is more than "somewhat inconsistent with the urgency they now assert." *Brown*, 533 U.S. at 1305.

A stay or injunction would greatly prejudice the people of Texas. As this Court has repeatedly recognized, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))). Here, providing equitable relief to Applicants would be particularly prejudicial because it would put "the onus of expedition" entirely on the Attorney General, who "would have had a severely limited opportunity to respond to" their certiorari petition. *Morland v. Sprecher*,

443 U.S. 709, 710 (1979) (per curiam). Put simply, had Applicants not waited nearly six weeks to file their Application and certiorari petition from the date of the Fifth Circuit's opinion, there would have been no need for this Court to direct Texas to respond to the petition on a timetable that would allow the Court to consider the petition "before the summer recess." Application 4. That would have happened in the ordinary course. Having chosen not to do so, Applicants now ask this Court to save them from an emergency of their own creation. That alone is enough to deny the Application. *See Brown*, 533 U.S. at 1305.

II. Relief Under the All Writs Act Is Unwarranted.

Even if this Court excused that delay (and it should not), the only the relief that would permit Applicants the real-world outcome they seek—the right to peddle what they euphemistically describe as "sexual expression" even if it means children will be able to watch "gangbang" videos—is an injunction pending appeal issued by this Court under the All Writs Act, 28 U.S.C. §1651. Applicants hardly even try to meet the "demanding standard for the extraordinary relief they seek." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012); *see also Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (per curiam).

A. To obtain relief, Applicants must meet this Court's standard for a petition for a writ of injunction.

Although superficially they can appear to result in the same outcome, petitions for writs of injunction and motions for stays should not be conflated because they "serve different purposes," *Nken v. Holder*, 556 U.S. 418, 428 (2009), and rest on different sources of power, *Hobby Lobby*, 568 U.S. at 1403

As this Court has repeatedly explained, a stay is a device that a court uses to "suspend judicial alteration of the status quo." *Respect Me. PAC*, 131 S.Ct. at 445 (quoting *Ohio Cit-*

izens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). Like the "power to stay proceedings," the power to stay a judgment "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Texas*, 144 S.Ct. at 798 n.1 (Barrett, J., concurring). A stay "operates upon the judicial proceeding itself," "either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Nken*, 556 U.S. at 428.

By contrast, an interim injunction is at bottom "a means by which a court tells someone" *outside* the judiciary "what to do or not to do." *Id.* It is an extraordinary remedy that "directs the conduct of [that] party, and does so with the backing of [a federal court's] full coercive powers." *Id.* Accordingly, an injunction pending appeal "grants judicial intervention" with respect the activities of non-judicial actors "that has been withheld by the lower courts.'" *Respect Me. PAC*, 562 U.S. at 996 (quoting *Ohio Citizens*, 479 U.S. at 1313); *see also, e.g.*, *Lux v. Rodriguez*, 561 U.S. 1306, 1307 (2010) (Roberts C.J., in chambers). "The only source of authority for this Court to issue an injunction is the All Writs Act, 28 U.S.C. §1651(a)." *Hobby Lobby*, 568 U.S. at 1403.

Applicants here seek an injunction, not a stay. If this were a stay, the Court could only "maintain the status quo." *Texas*, 144 S.Ct. at 799 n.2 (Barret, J., concurring). Applicants seem to think that because the Fifth Circuit's opinion said while vacating the district court's preliminary injunction with respect to age verification that the stay pending appeal was also vacated, the status quo somehow is the district court's preliminary injunction. *See* Application 13. Not so. A court's judgment is the legally binding document. *See, e.g.*, *Black v. Cutter*

Labs., 351 U.S. 292, 297 (1956); *Williams v. Norris*, 25 U.S. 117, 118 (1827) (Marshall, C.J.). Those judgments are typically not considered effective until the mandate issues. *See, e.g.*, *Bailey v. Henslee*, 309 F.2d 840, 843 (8th Cir. 1962) (per curiam). For this reason, Applicants misstate (at 13) Texas's view that the Fifth Circuit's stay pending appeal was somehow "re-store[d]" by any post-judgment motions practice in the Fifth Circuit. Until the mandate issued on March 28, the stay issued in November remained in place. Now that the mandate *has* issued, that stay is dissolved, but so is the relevant portion of the district court's preliminary injunction. Put differently, when Applicants filed this Application, no order from any court prevented Texas from enforcing H.B. 1181's age-verification requirement—which Texas has been able to do since at least November 2023. Accordingly, the status quo is (and can only be) that Texas is free enforce that requirement.

But even if that were not the case, and the judgment were effective upon issuance, a stay of that judgment merely preserves the status quo as it existed the *instant before that judgment.* Here, the moment before the Fifth Circuit issued its judgment, H.B. 1181 was enforceable in its entirety—as it had been since last September.[7] A stay thus would do nothing to stop any harm that Applicants are allegedly suffering from the enforceability of H.B. 1181's age-verification requirement.

[7] Indeed, Applicant Free Speech Coalition has recognized as much on its own website the day after the Fifth "converted the short term 'administrative' stay to a 'merits,'" explaining that "[n]othing change[d] materially" because "Texas is still free to begin filing suit against sites without adequate age-verification" as it was able to do from the date the administrative stay was granted. *Update Regarding Our Injunction in Texas*, FREE SPEECH COALITION (Nov. 15, 2023), https://perma.cc/5HW2-BEHV.

In short, the remedy Applicants seek is an in injunction pending resolution of their petition for a writ of certiorari. *See* Application 28-29. That is, they do not ask this Court to prevent the enforceability of the Fifth Circuit's judgment, which did not create the ability for Texas to enforce H.B. 1181's age-verification requirement (after all, Texas has been free to enforce that requirement since at least November 2023) and which, regardless, is already enforceable because the Fifth Circuit issued the mandate more than six weeks ago. Instead, they ask this Court to command the Attorney General "what to do or not to do." *Nken*, 556 U.S. at 428. By any measure, that is an injunction, not a stay.

B. The Application comes nowhere near to meeting that high burden.

Due to its extraordinary nature, to obtain a writ of injunction directly from this Court, Applicants must present a "'significantly higher justification' than a request for a stay.'" *Respect Me.*, 562 U.S. at 996 (quoting *Ohio Citizens*, 479 U.S. at 1313); *see also, e.g.*, *Lux*, 561 U.S. at 1307. Such a justification requires Applicants to show *both* that an injunction pending appeal is necessary and appropriate in aid of this Court's jurisdiction *and* that their legal rights are indisputably clear. *Hobby Lobby*, 568 U.S. at 1403. They can show neither.

1. A writ of injunction is neither necessary nor appropriate in aid of this Court's jurisdiction.

Applicants have not even attempted to show why a writ of injunction is necessary or appropriate in aid of this Court's jurisdiction. Even without an injunction, they may continue to press their challenge to H.B. 1181 in the lower courts, and "[f]ollowing a final judgment, they may, if necessary, file a petition for a writ of certiorari in this Court." *Hobby Lobby*, 568 U.S. at 1404. The fact that Texas is currently enforcing H.B. 1181—which it has had every right to do for months—does not change this basic point because the implementation of a challenged law does not prevent this Court from having appellate jurisdiction to

ultimately decide the merits of the challenge. *See, e.g.*, *Labrador*, 2024 WL 1625724, at *7 (Kavanaugh, J., concurring); *see also Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993). To the contrary, "[t]his Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 49 (2021). Instead, the ordinary way for this Court to review the constitutionally of a state statute is following final judgment in an enforcement action. *Id.* at 49-50; *see also, e.g.*, *Kansas v. Garcia*, 589 U.S. 191 (2020); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008). Pre-enforcement review is the exception to that rule, even in cases presenting constitutional issues. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011). The interlocutory nature of this case counsels even further against the exercise of this Court's jurisdiction. *See, e.g.*, *Wash. State Grange*, 552 U.S. at 450 (explaining that courts should exercise judicial restraint when facing pre-enforcement facial challenges).

2. Applicants' right to relief is anything but "indisputable."

The Court should also deny the requested injunction because "whatever the ultimate merits of [Applicants'] claims," they cannot show that their entitlement to relief is ... 'indisputably clear.'" *Hobby Lobby*, 568 U.S. at 1403 (quoting *Lux*, 561 U.S. at 1307). To determine whether this second condition for a writ of injunction is met, the Court considers whether its own authority resolves debate about the legal question. *Lux*, 561 U.S. at 1307-08.

An indication of what the Court *may* hold in a future case does not suffice to show that an issue beyond debate. *Id.* at 1308. In *Hobby Lobby*, for example, Justice Sotomayor declined to halt implementation of the Affordable Care Act's contraceptive mandate because the Court had not yet addressed whether the First Amendment or the Religious Freedom Restoration Act protected for-profit corporations' religious exercise. 568 U.S. at 1402-04.

And in *Turner Broadcasting*, Chief Justice Rehnquist refused to enjoin a law requiring cable television systems to carry most local broadcast television channels because the Court had not yet "decided whether the activities of cable operators are more akin to that of newspapers," which enjoy heightened First Amendment protection, "or wireless broadcasters," which enjoy less. 507 U.S. at 1303-04; *see also Fishman*, 429 U.S. at 1328 (denying application after noting "there is little precedent dealing specifically" with the question).

Again, Applicants have not attempted to show that their rights are indisputably clear. At most, they argue (at 26-29) that the Fifth Circuit applied the incorrect legal standard. But the Fifth Circuit applied this Court's decision in *Ginsberg*. App.8a-29a. Where there is on-point precedent, rules of stare decisis preclude the entry of an injunction pending appeal, even when the lower court relied upon authority that arguably "has been undermined by [this Court's] more recent decisions." *Lux*, 561 U.S. at 1307. And even if (as Applicants maintain) there are arguments against applying *Ginsberg* here, it is at least a debatable question—which by itself defeats the Application. And putting those points aside, such arguments relate only to the legal standard. For the reasons Texas explained to the Fifth Circuit, whatever the standard, H.B. 1181 clears it. It is hard to imagine many interests more weighty or legitimate than Texas's interest in protecting minors from hardcore "strangulation" pornography, nor a better way to enforce that prohibition than by requiring such content's purveyors to ensure children are not watching, particularly when websites can verify age with facial-verification technology that does not retain facial images.

Nor do Applicants establish an indisputable right to relief by making vague references (at 11) to H.B. 1181's lack of a specific severability clause. "Severability is of course a matter of state law," *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam). All three members

of the Fifth Circuit panel are experienced, Texas-licensed lawyers who know that "[i]n a statute that does not contain a provision for severability or nonseverability, … the provisions of the statute are severable." Tex. Gov't Code §311.032.[8]

III. A Stay Is Unwarranted.

Even if the Court were to overlook Applicants' unexplained delay in seeking relief *and* deem their request subject to the ordinary standard for a stay rather than for an injunction, the Court should still deny the Application. The Court will not grant a stay pending certiorari unless there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Even if a showing is made under those factors, "in appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). Although easier to obtain than an injunction pending appeal, "[a] stay is not a matter of right, even if irreparable injury might otherwise result," but is "instead an exercise of judicial discretion," "dependent upon the circumstances of the par-

[8] To the extent that Applicants suggest (at 11) that because severability was not raised at the preliminary-injunction phase, it was forfeited, that is also wrong. Not only did the Fifth Circuit exercise its discretion to reach this (obvious) issue, but severability is a question of remedy, which is properly adjudicated at the remedy stage once the scope of the constitutional infirmity has been determined. *See, e.g.*, *Murphy v. NCAA*, 584 U.S. 453, 482-84 (2018) (deciding severability after determining constitutionality of statute).

ticular case." *Nken*, 556 U.S. at 433 (quotation marks omitted). Even apart from their extraordinary delay in seeking relief, Applicants fail to carry their "burden of showing that the circumstances justify an exercise of that discretion" for at least three reasons. *Id.* at 433-34.

A. The Court is unlikely to grant certiorari.

To start, the Court is unlikely to grant review because the Fifth Circuit's decision conflicts with neither (1) this Court's precedent, nor (2) the decisions of another court of appeals. Sup. Ct. R. 10(a), (c). Moreover, the interlocutory posture of this litigation makes this case a particularly poor vehicle to address what is an admittedly important question: Whether States can act to protect children from the public-health dangers of online porn by requiring commercial pornographers to check the age of their users.

1. The Fifth Circuit opinion does not conflict with this Court's precedent.

Applicants argue (at 16) that the Fifth Circuit's application of rational-basis review to a statute protecting minors from obscenity conflicts with three separate decisions of this Court. They are mistaken.

First, they dispute (at 12) the court of appeals' reliance on *Ginsberg*. In *Ginsberg*, this Court examined a statute prohibiting the sale of materials harmful to minors, defined as

> any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

390 U.S. at 646. H.B. 1181 uses materially the same standard. *See* Tex. Civ. Prac. & Rem. Code § 129B.001(6) (H.B. 1181's definition of "[s]exual material harmful to minors"). *Ginsberg* upheld the commonsense provision under rational-basis review based on the State's interests in the well-being of children and their parents. 390 U.S. at 637, 639-43.

As the Fifth Circuit explained below, "*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 [lower courts] today." App.10a. Had *Ginsberg* been overruled, this Court would not have needed to distinguish its rationale relating to sexual content from the proscription against violent materials in *Entertainment Merchants Association*, 564 U.S. 786. App.10a. Moreover, this Court and its Justices have repeatedly cited *Ginsberg*—"albeit for different propositions," App.11a—multiple times in recent terms. *See Counterman v. Colorado*, 600 U.S. 66, 111 (2023) (Barrett, J., dissenting); *Iancu v. Brunetti*, 588 U.S. 388, 408 (2019) (Breyer, J., concurring in part); *Elonis v. United States*, 575 U.S. 723, 741 (2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

In their efforts to brush off *Ginsberg*, the Application cites (at 17) *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975), for the proposition that a law—there a local ordinance—can violate the First Amendment if it infringes on the rights of both minors and adults. Yet the Court disapproved of the challenged ordinance *not* because adults were denied access to materials inappropriate for minors, but because "[t]he ordinance [was] not directed against sexually explicit nudity, nor [was] it otherwise limited." *Id.* at 213. Instead, the ordinance "sweepingly forb[ade] display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness." *Id.* The ordinance thus would prohibit the displaying of things as mundane as "a film containing a picture of a baby's buttocks, the

nude body of a war victim, or scenes from a culture in which nudity is indigenous." *Id.* Far from holding that adults cannot be required to prove their age to access material that is obscene for minors (such as hardcore videos in the "*Un Consesual*" category, *see supra* p. 4), the case turned on the fact that "[c]learly, all nudity cannot be deemed obscene even as to minors." *Id.* "Rather, to be obscene 'such expression must be, in some significant way, erotic.'" *Id.* at 213 n.10 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)). Because *Erznoznik* did not overrule *Ginsberg*, *Ginsberg* remains good law, and the Fifth Circuit properly applied it to Texas's regulation of Applicants' indisputably "erotic" content.

Second, Applicants turn to *Reno v. ACLU*, 521 U.S. 844 (1997). The district court broadly stated that *Reno* "found [*Ginsberg*] inapplicable to digital regulations." ROA.1710. Not so. *Reno* distinguished the Communications Decency Act ("CDA") from the law in *Ginsberg* based on the combined effect of four differences, namely, the CDA (1) did not permit parental consent, (2) applied to more than just commercial transactions, (3) failed to cabin its definition of harmful material to minors or provide for material with serious social value, and (4) defined "minor" as under 18 rather than 17. *Reno*, 521 U.S. at 865-67. Except for the fact that H.B. 1181 defines minors to include 17-year-olds, those distinctions are absent: H.B. 1181 applies only to commercial entities and requires age verification by the person accessing their websites. *See* Tex. Civ. Prac. & Rem. Code §§129B.001(1), .002, .003. Nothing prevents parents from logging on to the sites on behalf of their children.[9] And H.B.

[9] For this reason, Applicants' suggestion (at 2, 9) that content-filtering software installed on home computers is a preferrable solution to H.B. 1181 because it protects a parent's right to control their children's upbringing is a red herring. It also ignores that in 1997, children could go online only at home or in a crowded public venue such as a classroom

1181 excludes at every turn any material with serious social value from the statute's definition of "sexual material harmful to minors." *Id.* §129B.001(6). Indeed, H.B. 1181 targets hardcore pornography, including "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act" that "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." *Id.* The Fifth Circuit did not conflict with *Reno* by invoking the more on-point *Ginsberg.*

Third, the Application repeatedly relies on *Ashcroft v. ACLU*, 542 U.S. 656 (2004), for the same proposition. But far from "disregard[ing] *Ashcroft's* application of strict scrutiny," Application 2, the Fifth Circuit acknowledged that *Ashcroft* is Applicants' "best ammunition," App.18a. The Fifth Circuit, however, also observed that, though this Court applied strict scrutiny in *Ashcroft*, 542 U.S. at 670, it did so without considering what level of scrutiny was appropriate, *see* App.20a-21a. Faced with that fact, which Applicants do not seem to challenge, the Fifth Circuit correctly applied the well-established rule that "in both civil and criminal cases, in the first instance and on appeal," courts must "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). And "as a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument[s] entitling them to relief.'" *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (first alteration in original) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003)

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or public library. Today, internet access is ubiquitous thanks to smartphones, smart watches, and smart TVs—not to mention any other wifi-enabled devices that can be cheaply purchased on Amazon.

(Scalia, J., concurring in part and concurring in the judgment)). Because no party challenged the standard in *Ashcroft*, it was not for the Court to *sua sponte* raise the issue. Thus, any distinction that may be drawn between *Ginsberg*'s and *Ashcroft*'s approaches is not dispositive.[10]

Moreover, both *Ashcroft* and *Reno* are plainly distinguishable. As explained above, in *Reno*, the Court considered a challenge to a provision of the CDA that criminalized sending or displaying a lewd message in a way that is available to a minor. 521 U.S. at 859. Especially relevant here, the Court held the law unconstitutionally overbroad because it omitted *Miller*'s element that obscenity must relate to "sexual conduct." *Id.* at 870, 873. H.B. 1181, however, neither criminalizes pornography nor omits this crucial element; it instead merely requires reasonable steps to distinguish between adults and children, *see* Tex. Civ. Prac. & Rem. Code §129B.001(6), so that longstanding limitations on the distribution of pornography to children can be applied in today's digital age. As a result, H.B. 1181 does not "suppress[]" anything, let alone "a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno*, 521 U.S. at 874.

Ashcroft is similarly distinguishable, notwithstanding superficial similarities between H.B. 1181 and the federal Child Online Protection Act ("COPA") at issue there. To start,

[10] To the extent that Applicants are asserting that *Ashcroft* nonetheless implicitly overruled *Ginsberg* by applying strict scrutiny, that is also wrong. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also, e.g.*, *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

COPA and H.B. 1181 function very differently: COPA *criminalized* the "posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" *Ashcroft*, 542 U.S. at 661. By contrast, H.B. 1181 is not "enforced by severe criminal penalties." *Id.* at 660. As far as H.B. 1181 is concerned, pornographers can create, post, and sell as much obscenity as the market will tolerate. Thus, *Ashcroft*'s premise—that the challenged law "suppresse[d] a large amount of speech," *id.* at 665—does not apply to H.B. 1181. Similarly, age verification is the requirement in H.B. 1181, not an affirmative defense as in COPA, alleviating the risk that "speakers may self-censor rather than risk the perils of trial." *Id.* at 670-71. That is, if commercial pornography websites require age verification, they will not violate H.B. 1181 regardless of what content they offer or who accesses it. *See* Tex. Civ. Prac. & Rem. Code §§129B.002(a), 129B.004. Because of technological advances, it is also both far easier and less invasive to age verify; in fact, it can be done via software that does not retain facial images. ROA.411-12. And finally, COPA was a federal law. Pre-enforcement facial challenges to state laws like H.B. 1181 raise significant federalism concerns, given that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Notably, the Court has recently rejected a similar effort to facially enjoin a state law. *See Labrador*, 2024 WL 1625724, at *1.

Perhaps more fundamentally, *Entertainment Merchants Association* reaffirmed after *Ashcroft* that States may protect minors from content that is obscene as to minors even if adults have a First Amendment right to view such materials. *See* 564 U.S. at 793-94. That rule "necessarily" allows States to create reasonable regulations about how to distinguish between minors and adults. *Cf. Glossip v. Gross*, 576 U.S. 863, 869 (2015) ("Because it is

settled that capital punishment is constitutional, it necessarily follows that there must be a constitutional means of carrying it out.") (cleaned up). That is precisely where H.B. 1181 steps in. Although Applicants contend there is a point where such age-verification measures cross the line and infringe upon the rights of the adults, *Entertainment Merchants Association* makes clear that neither *Reno* nor *Ashcroft* hold where that line is. Thus, there is no conflict between the decision below and this Court's precedent that requires review.

2. The Fifth Circuit opinion does not create a circuit split.

Applicants argue (at 22-23) that the panel created a circuit split with the Second, Third, Fourth, and Tenth Circuits. That is also wrong.

There is no split with the Second or Third Circuit for the reasons just discussed. After all, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), was effectively *Ashcroft II* and addressed issues regarding COPA that were left open by this Court. *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), addressed a Vermont *criminal* statute that was like COPA, and so is distinguishable for those reasons. Regardless, *American Booksellers* came with its own expiration date. The Court explained that no one there "challenged the district court's finding that the technology available to prevent minors from accessing websites and discussion groups has not developed significantly since the Supreme Court decided *Reno*." *Id.* at 101. Much has changed about the internet in the decades since *American Booksellers* was decided.

Nor does the decision below conflict with either the Fourth Circuit's decision in *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), or the Tenth Circuit's ruling in *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). To start, the challenged law in *PSINet* "bann[ed] the display of all 'electronic file[s] or message[s],' containing 'harmful' words,

images or sound recordings, that juveniles may 'examine and peruse.'" 362 F.3d at 239 (alterations in original). Virginia conceded that the law ran afoul of *Ashcroft* because (unlike H.B. 1181), it was *not* remotely tailored to the interest of limiting the availability of sexual materials to minors. *Id.* at 234. It also violated *Ashcroft* because (unlike H.B. 1181) it established age verification as an affirmative defense rather than an element of a prima facie violation. *Compare id.*, *with Ashcroft*, 542 U.S. at 670-71. Perhaps more relevant here, the laws in both *PSINet*, 362 F.3d at 235 n.2, and *Johnson*, 194 F.3d at 1152, relied on PIN numbers from credit cards to distinguish between children and adults. Consistent with this Court's specific statements in *Reno*, 521 U.S. at 881-82, the Tenth Circuit explained that such technologies were so poor in "permit[ting] *effective* prevention of access" by minors that any connection between the law and the State's interest was "illusory," *Johnson*, 194 F.3d at 1158-59. But the world has changed in the twenty years since these cases were decided, and the record includes evidence that age-verification software is now sophisticated and widespread and can accurately verify age without receiving (much less retaining) identifying information. ROA.1834-41, 1854.

Taken separately or together, none of these cases addresses the question left open in *Ashcroft* and addressed by the Fifth Circuit: Because a State undoubtably has the authority to restrict minors' access to prurient materials to which adults have a constitutional right, can the State require websites in the business of peddling such materials to use effective, non-invasive, commercially available software to determine whether potential users are adults? Because the court below appears to be the first to have addressed *that* question, there is no circuit split meriting this Court's review.

3. Prudential concerns further counsel against review.

In addition to not presenting a cert-worthy issue, prudential considerations demonstrate that this Court is unlikely to grant review. Most prominently, for more than a century, it has been this Court's "normal practice [to] deny[] interlocutory review" even of cases from lower federal courts, where no jurisdictional requirement of finality exists, and even when they present significant statutory or constitutional questions. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting) (criticizing deviation from that rule to address novel Eighth Amendment claims as "inexplicable"); *see also* Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 4-19 (11th ed. 2019) (collecting cases).

The Chief Justice articulated this Court's general presumption against review of interlocutory decisions in *Abbott v. Veasey*, 580 U.S. 1104 (2017) (*Veasey II*), where the en banc Fifth Circuit concluded that Texas's undisputed interest in protecting against voter fraud did not justify requiring a voter to present an ID at the polls largely because the law did not apply to mail-in ballots where fraud is "far more prevalent." *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) (*Veasey I*). The Fifth Circuit remanded, however, "for further proceedings on an appropriate remedy." *Veasey II*, 580 U.S. at 1104 (Roberts, C.J., respecting the denial of certiorari). This Court denied immediate review despite the undisputed national importance of the question because "[t]he issues will be better suited for certiorari review" "after entry of final judgment." *Id.*

Similarly, *Wrotten v. New York* involved a question about the use of video testimony at a criminal trial in a way that implicated the Confrontation Clause. 560 U.S. 959, 959 (2010) (Sotomayor, J., respecting the denial of certiorari). *Wrotten* raised an "important" question in a "strikingly different context" from this Court's closest precedent. *Id.* Nonetheless, the

Court denied review because the New York Court of Appeals remanded "for further review, including of factual questions." *Id.* As Justice Sotomayor explained, denial of review was warranted because "procedural difficulties" may arise "from the interlocutory posture." *Id.*

Veasey and *Wrotten* are far from unique. *See, e.g.*, *Nat'l Football League v. Ninth Inning, Inc.*, 141 S.Ct. 56, 56-57 (2020) (Kavanaugh, J.) (citing *Veasey II*); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J.); *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1107 (2006) (Stevens, J.); *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). Indeed, lack of finality "alone [can] furnish[] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

This rule reflects the reality that litigation is unpredictable, and later developments may change the character of—or entirely obviate the need to address—the question presented. *See* William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1982). Again, this can be seen in *Veasey II*. That case never returned to the Court because "[d]uring the remand, the Texas Legislature passed a law designed to cure all the flaws" identified by the plaintiffs. *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018) (*Veasey III*). Because "[t]he legislature succeeded in its goal," *id.*, this Court did not need to address questions about whether the superseded statute complied with federal law. Although there is no indication that the Legislature intends to revisit H.B. 1181 at the present time, there is a significant possibility that additional facts *about* H.B. 1181 will develop, which may affect this Court's analysis. After all, the case was in the district court for less than a month before the court issued its injunction. ROA.8, 14.

Nor does this case present one of the "very rare[]" situations in which interlocutory review is appropriate. *Am. Constr. Co. v. Jacksonville T. & K.W. Ry.*, 148 U.S. 372, 385 (1893); *see Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostoock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (concluding that case was "not yet ripe for review by this Court"). Although Applicants cry wolf (at 1, 2, 15, 26, 27) about the supposed chilling effect that will be caused if they must verify the ages of their users, they have shut down their websites in States with similar laws without apparent complaint.[11] This suggests that the real concern motivating Applicants is the loss of unfettered access to Texas's market. Such a potential *economic* loss hardly justifies this Court's abandonment of ordinary litigation procedures. Furthermore, Applicants did nothing for months after the Fifth Circuit decided in November 2023 that Texas is free to enforce H.B. 1181 pending resolution of this litigation, and they did not seek relief from this Court for more than six weeks after the Fifth Circuit issued it opinion. These facts suggest that even Applicants' economic concerns are overstated.

B. Even if the Court did grant certiorari, Applicants have not shown they are likely to prevail.

Even if the Court were to grant review, the court of appeals was right that H.B. 1181's age-verification requirement is constitutional. The First Amendment does not protect obscenity, much less protect obscenity where children are concerned. And even if Applicants'

[11] *Compare, e.g.*, Dean Mirshahi, *Pornhub Blocks Access in Virginia Over New Age Verification Law*, ABC 8 NEWS (June 29, 2023 8:04 PM EDT), https://tinyurl.com/VAPornhub; Ayesha Rascoe & Saige Miller, *A New Utah Law Led Pornhub to Ban Access to its Site for Everyone in the State*, NPR (May 7, 2023, 8:00 AM ET), https://tinyurl.com/UTPornhub, *with* Application (omitting any reference to cases in the pipeline from the Fourth or Ninth Circuits).

content is not obscene as to adults, the court of appeals appropriately reviewed H.B. 1181's age-verification requirement and held that the requirement is likely constitutional. App.8a-31a.

1. Not even adults have a First Amendment right to access a substantial amount of Applicants' content.

Although a notoriously unclear area of law, "[t]his much has been categorically settled": Obscenity "is unprotected by the First Amendment" and can be regulated. *Miller*, 413 U.S. at 23. That is just what H.B. 1181 does. It applies only to sites that host "sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code §129B.002(a); *see id.* §129B.004. And its definition of "[s]exual material harmful to minors" tracks this Court's test in *Miller*. *Compare id.* §129B.001(6), *with Miller*, 413 U.S. at 24. Moreover, although much of the content on Applicants' sites is too graphic to describe to this Court, it fits the Court's "plain examples" of obscenity. *Compare Miller*, 413 U.S. at 25, *with* ROA.506-08, 538-39.

That H.B. 1181's definition "adds the phrases 'with respect to minors' and 'for minors'" to *Miller*'s language, ROA.67, does not entitle Applicants to a preliminary injunction on a pre-enforcement, facial challenge. *First*, this Court has repeatedly recognized that a legislature may pass laws that protect minors from material that is "obscene *as to youths*." *Erznoznik*, 422 U.S. at 213 (emphasis added); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also Thompson*, 487 U.S. at 824 (explaining that all 50 States already regulate minors' ability to purchase pornography). This rule recognizes that courts must "adjust[t] the definition of obscenity to social realities," including that material acceptable for adults sometimes is simply not appropriate for children. *Ent. Merchs. Ass'n*, 564 U.S. at 793-94 (quoting *Ginsberg*, 390 U.S. at 638). Because the States have power to protect

children from obscenity, there must be a way for them to exercise that power. *See Glossip*, 576 U.S. at 869. *Second*, regardless, a great deal of the content on Applicants' sites that satisfies H.B. 1181's definition of "sexual material harmful to minors" also meets this Court's standard for adult obscenity. *See* ROA.538-39. As Applicants have not alleged—let alone shown—that they have separate pages and advertisements for their obscene and non-obscene content, an injunction is improper. *See Miller*, 413 U.S. at 26; *cf. United States v. Hansen*, 599 U.S. 762, 770 (2023) (rejecting facial invalidation).

2. Because H.B. 1181 is aimed at restricting access to minors, its age-verification requirement survives rational-basis review under *Ginsberg*.

a. Apart from the fact that Applicants never have a constitutionally protected right to profit from sale of obscenity, the Fifth Circuit was correct to follow *Ginsberg* in applying rational-basis review to a First Amendment challenge to a statute prohibiting the sale of materials that are harmful to minors. 390 U.S. at 646; *see* Tex. Civ. Prac. & Rem. Code §129B.001(6). There is no reason why Texas's law should be subject to more searching review just because it applies to modern websites instead of magazines. Indeed, H.B. 1181 is even further away from the constitutional line than the law in *Ginsberg*. Unlike the law in *Ginsberg*, H.B. 1181 is purely civil, which *lessens* First Amendment concerns. *Ashcroft*, 542 U.S. at 660. To sure, H.B. 1181 speaks in terms of "serious ... value for minors," Tex. Civ. Prac. & Rem. Code §129B.001(6), rather than "utterly without redeeming social importance," *Ginsberg*, 390 U.S. at 646. But such a definitional difference is not material and, if anything, merely reflects the *greater* leeway that First Amendment jurisprudence gives States to regulate obscenity post-*Miller*. *See* William W. Van Alstyne & Kurt T. Lash, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY 885 (5th ed. 2014).

b. H.B. 1181 easily satisfies rational-basis review. "It is uncontested that pornography is generally inappropriate for children, and the state may regulate a minor's access to pornography." ROA.1714; *Ginsberg*, 390 U.S. at 640. Indeed, Applicants have conceded that the State's interest here is compelling. ROA.1714. They had to. *See Sable Commc'ns*, 492 U.S. at 126 (recognizing a "compelling" interest).

And H.B. 1181 is reasonably related to Texas's interest in protecting children. *Cf. Ginsberg*, 390 U.S. at 643. Indeed, Applicants do not seriously argue that they can overcome the "strong presumption of validity" associated with this standard of review. *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 314 (1993). For good reason: Since there is a legitimate state interest in preventing children from accessing pornography on the internet, it is entirely reasonable to require Applicants to check their users' ages before they access the websites. Because rational-basis review does not require the government to "draw the perfect line nor even to draw a line superior to some other line it might have drawn," H.B. 1181 passes constitutional muster. *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012).

Furthermore, it is not enough for Applicants to show (which they cannot) that the Fifth Circuit applied the wrong standard of scrutiny. They must go further and show that this Court would reverse the Fifth Circuit's *judgment*. *See, e.g.*, *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*."). Yet under any standard, H.B. 1181's age-verification requirement is permissible. H.B. 1181 serves a critical state interest, *see, e.g.*, *Sable Commc'ns*, 492 U.S. at 126; is not overinclusive because, far from prohibiting a substantial amount of protected speech, it does not prohibit speech at all but rather only requires pornographers to check the ages of their users; is not underinclusive (which is not fatal anyway,

see, e.g., *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015)), because it targets entities whose business essentially is to provide access to pornography; and is narrowly tailored to the realities of today's increasingly digital world where the dangers of unmonitored and surreptitious internet access by children is omnipresent, *see, e.g.*, *supra* n.9. The Court also must account for the technological fact that there are now commercially viable methods of age verification "that do not require [users] to disclose personal and sensitive information," ROA.428, including age-estimate software that does not retain images, ROA.1839-40.

C. The equities favor Texas's efforts to protect children.

The equities heavily favor Texas. When the Court "assess[es] the lower courts' exercise of equitable discretion, [it] bring[s] to bear an equitable judgment." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam) (quoting *Nken*, 556 U.S. at 433). Before issuing or vacating a stay, the Court must "balance the equities" and "explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). The balance of the equities and the public interest "merge when the [State] is the opposing party." *Nken*, 556 U.S. at 435.

1. Applicants' main protest (at 25-26) is that, because Texas is "free to enforce, and has already moved to enforce" H.B. 1181, they will suffer irreparable harm absent this Court's intervention. This argument misses the mark for many reasons. Most importantly, Applicants fail to grapple with the fact that it is the State and its citizens who will suffer irreparable harm if H.B. 1181 is not permitted to remain in effect. Indeed, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (quoting *Orrin W.*

Fox Co., 434 U.S. at 1351). This is particularly true here because H.B. 1181 is targeted at an ongoing public-health crisis. No government must stand by while millions of children whose minds and sense of self are maturing are exposed to content so prurient and lecherous it would make a Roman emperor blush.

Applicants, in comparison, will suffer little (if any) irreparable harm if they choose to comply with H.B. 1181's age-verification requirements. Commercially available platforms such as Yoti "[b]alance user privacy with executive and reliable age assurance," and are becoming increasingly popular ways to "ensure that minors are not able to view, upload[,] or monetize content" that is age inappropriate. *How OnlyFans became the first UK subscription-based platform to protect children and create age-appropriate experiences*, YOTI (June 16, 2023), https://tinyurl.com/57wsw275. Indeed, just this morning Texas settled an existing enforcement action against Multi Media LLC, which operates Chaturbate and has been able to bring itself into compliance with H.B. 1181's modest age-verification requirement. [12]

Moreover, the Applicants' curious argument (at 26-27) that they will suffer irreparable harm because the Fifth Circuit agreed that H.B. 1181 is unenforceable in part is misplaced. The Attorney General has already ceased seeking to enforce the health-warnings requirement that is currently subject to the district court's preliminary injunction. *See*

[12] Press Release, Office of the Texas Attorney General, *Texas Secures Settlement with Operator of Major Pornography Website, Ensuring Compliance with Texas Law* (Apr. 26, 2024), available at https://www.texasattorneygeneral.gov/news/releases.

Supp.App.13a. From Applicants' perspective, it is hard to see how being subject to less regulation is an injury.[13]

2. The public interest and balance of equities equally favor Texas. As the Fifth Circuit recognized, "[t]he record is replete with examples of the sort of damage that access to pornography does to children." App.26a. Early use and exposure to pornography is "correlated with an increased likelihood of engagement 'with deviant pornography (bestiality or child).'" *Id.* "[F]requent use of online pornography" by children, moreover, correlates with (among other things) body insecurity, depression, and aggression. *Id.* Never before has any culture exposed kids to such extraordinary volumes and varieties of obscenity. Indeed, "[f]or the first time in the history of humanity, children can easily be exposed to the most extreme, misogynistic sex acts imaginable, thanks to the phenomenon of Internet porn." David Horsey, *Our Social Experiment: Kids with Access to Hard-Core Porn*, L.A. TIMES (Sept. 3, 2013, 5:00 AM PT), https://perma.cc/9DGH-NZBN. It is high time that pornographic sites require age verification to protect Texas children from such dangerous content.

IV. Expedited Review is Unwarranted.

Finally, Applicants ask (at 29) this Court to "direct Texas to respond to applicants' certiorari petition on a schedule that would allow for consideration of the petition before the Court recesses for the summer," in order to "provide needed clarity for applicants and other parties." As explained above, this race to the finish line before the Court's summer

[13] To the extent this argument references their earlier position that absent the health-warnings requirement, H.B. 1181 is not "the statute the Legislature enacted," Application 4, it ignores Texas's statutory presumption in favor of severability, *supra* p. 25.

recess is a problem of Applicants' own creation. "The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm." *Beame*, 434 U.S. at 1313.

Applicants' assurance (at 29) that the schedule is not overly demanding because it permits "more time than the merits briefing below" also shows considerable chutzpah. Although the Texas Legislature passed H.B. 1181 on May 25, 2023, and Governor Abbott signed it into law on June 12, Act of May 25, 2023, 88th Leg., R.S., ch. 676, §1, Applicants waited to file suit until August 4, ROA.30—less than a month before H.B. 1181's effective date of September 1. *Applicants'* delay led to a scramble in the lower courts, including the extremely expedited appellate briefing schedule to which the Application refers (at 4). That the Attorney General was able to meet the deadlines caused by Applicants' delay through the herculean efforts of his staff is no reason to again reward Applicants' choice to wait to seek relief, especially when doing so puts "the onus of expedition" entirely on the Attorney General, who "would have had a severely limited opportunity to respond to petitioners' [certiorari petition]." *Morland*, 443 U.S. at 710.

Because Applicants have taken more than five months since the court of appeals granted a stay pending appeal to prepare their arguments and to seek relief from this Court, they have forfeited "any right to expedition that the Constitution might otherwise have afforded them." *Id.* at 711. And they are not entitled to such special treatment regardless. There is no reason for this Court to depart from its ordinary process for reviewing certiorari petitions—or to require the Attorney General to depart from Texas's ordinary process for responding to such petitions—merely because Applicants would like to know before the Court's summer recess whether the Court will grant certiorari.

CONCLUSION

The Court should deny the Application.

Respectfully submitted.

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April 2024

Supplemental Appendix

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From:	Derek Shaffer
To:	Lanora Pettit; Kyle Highful; John Ramsey; Coy Westbrook; Jeff.Sandman@webbdaniel.law; James Lloyd; Ernest Garcia; Aaron Nielson
Cc:	Michael T Zeller; Scott Cole; Arian Koochesfahani
Subject:	RE: Free Speech Coalition, et al. v. Paxton - CA5 Order
Date:	Friday, April 5, 2024 2:29:51 PM

Given that we're at a different stage and that you in fact did not oppose a stay of the mandate, I didn't want to take any liberties or presume anything about how your prior positions map over to what's upcoming. Even now, I want to be clear and precise. Unless you tell me otherwise, I take your response as confirming: that the Defendant (a) refuses to agree to any expedition surrounding the certiorari process and (b) opposes our forthcoming stay request.

Rest assured that the loveliness of my weekend is not at risk, and I hope it will be matched (or even exceeded) by the loveliness of yours.

Derek

From: Lanora Pettit <Lanora.Pettit@oag.texas.gov>
Sent: Friday, April 5, 2024 3:25 PM
To: Derek Shaffer <derekshaffer@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>; Jeff.Sandman@webbdaniel.law; James Lloyd <James.Lloyd@oag.texas.gov>; Ernest Garcia <Ernest.Garcia@oag.texas.gov>; Aaron Nielson <Aaron.Nielson@oag.texas.gov>
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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

Our position has not changed from what I stated two weeks ago. Have a lovely weekend.

Best,
Lanora

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From: Derek Shaffer <derekshaffer@quinnemanuel.com>
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Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

We want to update you by reporting that we still envision filing our certiorari petition next week, so that, if your side responds on a timetable consistent with your expedited approach to the Fifth Circuit proceedings, the Supreme Court can decide whether to grant review in advance of the summer recess. Relatedly, we will also be requesting that the Supreme Court grant a stay so as to reinstate the district court's preliminary injunction during the pendency of cert. We assume that the Defendant (a) refuses to agree to any expedition surrounding the certiorari process and (b) opposes our forthcoming stay request, but wanted to check with you in order to make sure. As always, we're at your disposal if you want to discuss anything. Thanks, and best,

Derek

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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

We have conferred, and I am sure that you won't be surprised to hear that we don't agree with much of what is in your letter. If you choose to move to stay the mandate, that is your prerogative, and we would not oppose such a request. It is our position, however, that because the Court's mandate is what would have effectuated the portion of the opinion lifting the existing stay, the result of any stay of the mandate would be that the injunction remains on hold in its entirety pending resolution of your forthcoming cert petition. We would oppose any request to lift that stay, which has now been the status quo for months. I can't commit to filing a response to your cert petition (beyond a waiver), let alone by a particular date until we see what it says. We also reserve our right to use the full allotted time to file any cross-petition.

Have a lovely weekend.
Best,
Lanora

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Received. I will get back to you.

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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Lanora: Please find attached here the letter that I just sent Mr. Garcia and others on a separate email thread. We'll be at your disposal and looking forward to your prompt response.

Derek

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Sent: Tuesday, March 12, 2024 2:19 PM
To: Derek Shaffer derekshaffer@quinnemanuel.com; Kyle Highful Kyle.Highful@oag.texas.gov; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>; Jeff.Sandman@webbdaniel.law; James Lloyd <James.Lloyd@oag.texas.gov>; Ernest Garcia <Ernest.Garcia@oag.texas.gov>
Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

Good afternoon Derek—

I have. We are still discussing whether we will seek additional review of the warnings issue, but pending such review, we don't intend to proceed on that particular issue at the present time. I am copying Ernest into this email chain as he is the better point of contact for more details on how that will work logistically.

Best,
Lanora

Lanora C. Pettit
Office of the Texas Attorney General
(512) 463-2127
Lanora.Pettit@oag.texas.gov

From: Derek Shaffer <derekshaffer@quinnemanuel.com>
Sent: Tuesday, March 12, 2024 12:14 PM
To: Lanora Pettit <Lanora.Pettit@oag.texas.gov>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>; Jeff.Sandman@webbdaniel.law
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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Hi Lanora: Just checking to see whether you've been able to confer with your client. We continue to hope that we can continue to stand still, and are glad to discuss an expeditious path forward. Thanks,

Derek

From: Lanora Pettit <Lanora.Pettit@oag.texas.gov>
Sent: Friday, March 8, 2024 2:44 PM
To: Derek Shaffer <derekshaffer@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>; Jeff.Sandman@webbdaniel.law
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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

I will confer with my client and get back to you.

Lanora C. Pettit
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Sent: Friday, March 8, 2024 1:42 PM
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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Lanora,

Understanding your prior clarification, I wonder if we might revisit the state of play at this juncture, consistent with what we believe to be the best interests of the parties and the courts. In light of the panel's now-issued opinion, we now confront circumstances akin to those that led to a stand-still amidst the administrative stay. Although the mandate won't issue for another three weeks at least, it's now common ground among all the judges rendering decisions to date that the statute under challenge is likely unconstitutional, at least in part. And it will come as no surprise to you that my clients are likely to seek further review, likely on an expedited basis. We'd hope that further proceedings could unfold quickly without need for further skirmishing over enforcement actions or stays. Please let us know if your office would consider another short-term pause on enforcement during this interval, while the parties consider options for further relief and review. If so, we'd be glad to engage with you about specifics and to proceed on a schedule that you find agreeable. Thanks for considering, and please let me know if a call would be helpful.

Thanks, and best,

Derek

Derek Shaffer
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202.538.8000 Main Office Number
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derekshaffer@quinnemanuel.com
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From: Lanora Pettit <Lanora.Pettit@oag.texas.gov>
Sent: Wednesday, February 28, 2024 1:26 PM
To: Derek Shaffer <derekshaffer@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>; Jeff.Sandman@webbdaniel.law
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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

Good afternoon Derek—

I was in DC working on other matters, so I cannot speak to anything about the lawsuit you mention below. I take your representation that one of your clients is listed as a defendant, but I refer you to trial counsel in that matter for inquiries about it as I simply have no information.

As to our previous agreement about "interim skirmishes," you asked whether we would "be initiating enforcement actions against [y]our clients during the brief period of the motion panel's administrative stay." We agreed that would not be a good use of anyone's resources, and we did not, in fact, seek to enforce the law during that brief window (or for some period of time thereafter). As you recognize in your email below, however, the posture is now different. The Court has issued a stay pending appeal after full merits briefing and argument. I don't recall you reaching out after that order issued to discuss its implications, and I don't see any records of such a communication. Our view, however, is that when the Court issued its stay, the law took effect and became enforceable, including against your clients.

Best,
Lanora

Lanora C. Pettit
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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Lanora et al.: We write to check in with you in light of the news that Texas has sued Aylo (previously "MindGeek," now renamed) under HB 1181. As you know, the relevant Aylo entities are plaintiffs in the federal action. Is it in fact Texas's intention to pursue parallel litigation in state court before the federal appellate proceedings—including potential certiorari proceedings—are resolved? We had understood from our previous dialogue (below) that interim skirmishes would not be an efficient use of time or resources. As this action comes to us without any heads up, we would appreciate any clarity you may offer. While recognizing that the preliminary injunction has been stayed pending appeal, we find pursuit of an enforcement action in the current posture quite problematic from a First Amendment perspective and otherwise.

We are available to discuss by phone if helpful.

Thanks, and best,

Derek

Derek Shaffer
Partner,
Quinn Emanuel Urquhart & Sullivan, LLP

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Washington, D.C. 20005
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202.538.8000 Main Office Number
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derekshaffer@quinnemanuel.com
www.quinnemanuel.com

From: Lanora Pettit <Lanora.Pettit@oag.texas.gov>
Sent: Wednesday, September 20, 2023 9:49 AM
To: Derek Shaffer <derekshaffer@quinnemanuel.com>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

Thank you. I can't confirm anything right now other than what I said below and that I will forward this email thread to the people who would make the call to bring an enforcement action in the first instance. But I too hope to avoid interim skirmishes. Whether the case is argued in a week or a month, that is not the best use of anyone's time.

Best,
Lanora

Lanora C. Pettit
Office of the Texas Attorney General
(512) 463-2127
Lanora.Pettit@oag.texas.gov

From: Derek Shaffer <derekshaffer@quinnemanuel.com>
Sent: Wednesday, September 20, 2023 8:32 AM
To: Lanora Pettit <Lanora.Pettit@oag.texas.gov>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Good morning, Lanora: We appreciate your quick response and explanation as to how you envision the Court proceeding at this point. Rest assured that we know you and your colleagues have a lot going on, and that we don't want to add to your load. Indeed, we're hoping that this exchange will obviate any need for interim skirmishing – and possible emergency submissions -- over the

import of the administrative stay. Please understand that coming into compliance would be no small feat for our clients: without belaboring prior submissions and findings, I'll simply note that the costs are steep and that burdens and chills will extend well beyond the parties. Given that the Court's stay is, by its terms, administrative, and that we're all envisioning expeditious treatment and resolution of the appeal, it suffices for us to have a good-faith understanding that you and your colleagues don't presently envision initiating an enforcement action during this interim period. All we'd ask is that you please come back to us if that changes, so that we can revisit this dialogue and, if necessary, seek appropriate relief. Please let us know whether that understanding works for you or if you'd like to jump on a call so we can discuss. Thanks again, and best,

Derek

Derek Shaffer
Partner,
Quinn Emanuel Urquhart & Sullivan, LLP

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From: Lanora Pettit <Lanora.Pettit@oag.texas.gov>
Sent: Wednesday, September 20, 2023 9:17 AM
To: Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Derek Shaffer <derekshaffer@quinnemanuel.com>; Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

With apologies, it has come to my attention that a couple words inadvertently got deleted from my email below, which may make it a bit unclear. I have added them back in red.

Lanora C. Pettit
Office of the Texas Attorney General
(512) 463-2127
Lanora.Pettit@oag.texas.gov

From: Lanora Pettit
Sent: Wednesday, September 20, 2023 5:05 AM
To: Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Derek Shaffer <derekshaffer@quinnemanuel.com>; Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Good morning—

Given that the October sitting starts in a little over a week, I am not sure whether the Court will deem that to be the "next available" sitting. After all, that would place an enormous burden on the Court, and it may well decide to set the case in November or at a special sitting somewhere in between. Regardless, there is no need for us to negotiate a briefing schedule based on a guess of when the hearing will be. The order that sets the hearing date will also set a briefing schedule. That could happen today, but based on similar circumstances I have seen, it may be tomorrow or Friday.

As for enforcement, I can confirm that we consider the law to be in effect and that when I told others in the office of the stay, no one mentioned an enforcement action to me. Based on communications we have had with our counterparts in States with similar laws, I believe the expectation is that your clients can and will comply with it. If by your email you intend to represent that to be untrue, I can certainly go back and ask. That may take a couple of days as well. As I am sure you are aware, our office has a lot going on right now.

Best regards,
Lanora

Lanora C. Pettit
Office of the Texas Attorney General
(512) 463-2127
Lanora.Pettit@oag.texas.gov

From: Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>
Sent: Tuesday, September 19, 2023 10:17 PM
To: Lanora Pettit <Lanora.Pettit@oag.texas.gov>; Kyle Highful

<Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Derek Shaffer <derekshaffer@quinnemanuel.com>; Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: Free Speech Coalition, et al. v. Colmenero - CA5 Order
Importance: High

Counsel,

We trust you have seen the motion panel's order (Dkt. # 66 & attached) issuing an administrative stay and expediting the appeal (including the motion for a stay pending appeal) to the next available oral argument panel, which is presumably one of the panels sitting in the first week of October. We write to confirm that your office will not be initiating enforcement actions against our clients during the brief period of the motion panel's administrative stay, until the panel rules on the stay pending appeal. In this regard, we also write to propose that the parties agree to an expedited briefing schedule for the preliminary injunction appeal.

We can also be available to meet and confer by zoom or phone.

Best,
Arian Koochesfahani
Associate
Quinn Emanuel Urquhart & Sullivan, LLP
865 S. Figueroa Street, 10th Floor
Los Angeles, CA 90017
Direct
213-443-3000 Main Office Number
213-443-3100 Fax
ariankoochesfahani@quinnemanuel.com
www.quinnemanuel.com

From:	Derek Shaffer
To:	Ernest Garcia; Lanora Pettit; John Ramsey; James Lloyd; Coy Westbrook; Jerry Bergman; Clayton Watkins; Kyle Highful
Cc:	Michael T Zeller; Scott Cole; Arian Koochesfahani; Jeff.Sandman@webbdaniel.law
Subject:	RE: Case No. D-1-GN-24-001275 State of Texas v. AYLO Global Entertainment, Inc. and AYLO USA Incorporated (pending before the 250th Judicial District Court of Travis County, Texas)
Date:	Friday, March 22, 2024 8:31:22 AM
Attachments:	image001.png Letter to AG re Cert (14797849_1).pdf

Please find attached correspondence specifically in connection with *Free Speech Coalition, et al. v. Paxton* and also relevant to this matter. We appreciate your consideration and look forward to your prompt response.

Derek Shaffer
Partner,
Quinn Emanuel Urquhart & Sullivan, LLP

1300 I Street, NW, Suite 900
Washington, D.C. 20005
202-538-8123 Direct
202.538.8000 Main Office Number
202.538.8100 FAX
derekshaffer@quinnemanuel.com
www.quinnemanuel.com

From: Ernest Garcia <Ernest.Garcia@oag.texas.gov>
Sent: Wednesday, March 13, 2024 11:56 AM
To: Derek Shaffer <derekshaffer@quinnemanuel.com>
Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Lanora Pettit <Lanora.Pettit@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; James Lloyd <James.Lloyd@oag.texas.gov>; Jeff.Sandman@webbdaniel.law; Coy Westbrook <Coy.Westbrook@oag.texas.gov>; Kyle Highful <Kyle.Highful@oag.texas.gov>; Clayton Watkins <Clayton.Watkins@oag.texas.gov>; Jerry Bergman <Jerry.Bergman@oag.texas.gov>
Subject: Case No. D-1-GN-24-001275 State of Texas v. AYLO Global Entertainment, Inc. and AYLO USA Incorporated (pending before the 250th Judicial District Court of Travis County, Texas)

Mr. Shaffer:
Our division intends to enforce the age verification requirement, through the state court litigation process.
Very respectfully,

Ernest C. Garcia
Chief, Administrative Law Division
Office of the Attorney General
Office (512) 936-0804
Mobile (512) 954-1416

From: Derek Shaffer <derekshaffer@quinnemanuel.com>
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To: Lanora Pettit <Lanora.Pettit@oag.texas.gov>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>; Jeff.Sandman@webbdaniel.law; James Lloyd <James.Lloyd@oag.texas.gov>; Ernest Garcia <Ernest.Garcia@oag.texas.gov>
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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Thanks for the update, Lanora, and glad to have Ernest in the loop. I take you to be differentiating the health warnings from the age verification requirement, and would ask that you all please consider a larger stand-still until the appeal finally concludes. Your side may seek further review on the health warnings while ours may seek further review on age verification, with the ultimate result TBD. But it's thus far been agreed among all judges that the law is unconstitutional, at least in part, and Texas had never argued for any provision potentially to be severed and only the remainder enforced. Assuming your office would reserve rights one day to argue that's an available result, I'm hoping we don't need to cross that bridge before ink dries on the appeal. Standing still during this interim period would spare the parties and the courts unnecessary work and possible fire drills around stay requests. Please let us know if you disagree or want to discuss. Thanks again,

Derek

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Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>
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I have. We are still discussing whether we will seek additional review of the warnings issue, but pending such review, we don't intend to proceed on that particular issue at the present time. I am copying Ernest into this email chain as he is the better point of contact for more details on how that will work logistically.

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Hi Lanora: Just checking to see whether you've been able to confer with your client. We continue to hope that we can continue to stand still, and are glad to discuss an expeditious path forward. Thanks,

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Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

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Lanora,

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Thanks, and best,

Derek

Derek Shaffer
Partner,
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including against your clients.

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Lanora

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Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Lanora et al.: We write to check in with you in light of the news that Texas has sued Aylo (previously "MindGeek," now renamed) under HB 1181. As you know, the relevant Aylo entities are plaintiffs in the federal action. Is it in fact Texas's intention to pursue parallel litigation in state court before the federal appellate proceedings—including potential certiorari proceedings—are resolved? We had understood from our previous dialogue (below) that interim skirmishes would not be an efficient use of time or resources. As this action comes to us without any heads up, we would appreciate any clarity you may offer. While recognizing that the preliminary injunction has been stayed pending appeal, we find pursuit of an enforcement action in the current posture quite problematic from a First Amendment perspective and otherwise.

We are available to discuss by phone if helpful.

Thanks, and best,

Derek

Derek Shaffer
Partner,
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From: Lanora Pettit <Lanora.Pettit@oag.texas.gov>
Sent: Wednesday, September 20, 2023 9:49 AM
To: Derek Shaffer <derekshaffer@quinnemanuel.com>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

Thank you. I can't confirm anything right now other than what I said below and that I will forward this email thread to the people who would make the call to bring an enforcement action in the first instance. But I too hope to avoid interim skirmishes. Whether the case is argued in a week or a month, that is not the best use of anyone's time.

Best,
Lanora

Lanora C. Pettit
Office of the Texas Attorney General
(512) 463-2127
Lanora.Pettit@oag.texas.gov

From: Derek Shaffer <derekshaffer@quinnemanuel.com>
Sent: Wednesday, September 20, 2023 8:32 AM
To: Lanora Pettit <Lanora.Pettit@oag.texas.gov>; Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Good morning, Lanora: We appreciate your quick response and explanation as to how you envision the Court proceeding at this point. Rest assured that we know you and your colleagues have a lot going on, and that we don't want to add to your load. Indeed, we're hoping that this exchange will obviate any need for interim skirmishing – and possible emergency submissions -- over the import of the administrative stay. Please understand that coming into compliance would be no small feat for our clients: without belaboring prior submissions and findings, I'll simply note that the costs are steep and that burdens and chills will extend well beyond the parties. Given that the Court's stay is, by its terms, administrative, and that we're all envisioning expeditious treatment and resolution of the appeal, it suffices for us to have a good-faith understanding that you and your colleagues don't presently envision initiating an enforcement action during this interim period. All we'd ask is that you please come back to us if that changes, so that we can revisit this dialogue and, if necessary, seek appropriate relief. Please let us know whether that understanding works for you or if you'd like to jump on a call so we can discuss. Thanks again, and best,

Derek

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From: Lanora Pettit <Lanora.Pettit@oag.texas.gov>
Sent: Wednesday, September 20, 2023 9:17 AM
To: Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful

<Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Derek Shaffer <derekshaffer@quinnemanuel.com>; Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

[EXTERNAL EMAIL from lanora.pettit@oag.texas.gov]

With apologies, it has come to my attention that a couple words inadvertently got deleted from my email below, which may make it a bit unclear. I have added them back in red.

Lanora C. Pettit
Office of the Texas Attorney General
(512) 463-2127
Lanora.Pettit@oag.texas.gov

From: Lanora Pettit
Sent: Wednesday, September 20, 2023 5:05 AM
To: Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Derek Shaffer <derekshaffer@quinnemanuel.com>; Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: RE: Free Speech Coalition, et al. v. Paxton - CA5 Order

Good morning—

Given that the October sitting starts in a little over a week, I am not sure whether the Court will deem that to be the "next available" sitting. After all, that would place an enormous burden on the Court, and it may well decide to set the case in November or at a special sitting somewhere in between. Regardless, there is no need for us to negotiate a briefing schedule based on a guess of when the hearing will be. The order that sets the hearing date will also set a briefing schedule. That could happen today, but based on similar circumstances I have seen, it may be tomorrow or Friday.

As for enforcement, I can confirm that we consider the law to be in effect and that when I told others in the office of the stay, no one mentioned an enforcement action to me. Based on communications we have had with our counterparts in States with similar laws, I believe the expectation is that your clients can and will comply with it. If by your email you intend to represent that to be untrue, I can certainly go back and ask. That may take a couple of days as well. As I am sure you are aware, our office has a lot going on right now.

Best regards,
Lanora

Lanora C. Pettit

Office of the Texas Attorney General
(512) 463-2127
Lanora.Pettit@oag.texas.gov

From: Arian Koochesfahani <ariankoochesfahani@quinnemanuel.com>
Sent: Tuesday, September 19, 2023 10:17 PM
To: Lanora Pettit <Lanora.Pettit@oag.texas.gov>; Kyle Highful <Kyle.Highful@oag.texas.gov>; John Ramsey <John.Ramsey@oag.texas.gov>; Coy Westbrook <Coy.Westbrook@oag.texas.gov>
Cc: Derek Shaffer <derekshaffer@quinnemanuel.com>; Michael T Zeller <michaelzeller@quinnemanuel.com>; Scott Cole <scottcole@quinnemanuel.com>; Jeff.Sandman@webbdaniel.law
Subject: Free Speech Coalition, et al. v. Colmenero - CA5 Order
Importance: High

Counsel,

We trust you have seen the motion panel's order (Dkt. # 66 & attached) issuing an administrative stay and expediting the appeal (including the motion for a stay pending appeal) to the next available oral argument panel, which is presumably one of the panels sitting in the first week of October. We write to confirm that your office will not be initiating enforcement actions against our clients during the brief period of the motion panel's administrative stay, until the panel rules on the stay pending appeal. In this regard, we also write to propose that the parties agree to an expedited briefing schedule for the preliminary injunction appeal.

We can also be available to meet and confer by zoom or phone.

Best,
Arian Koochesfahani
Associate
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WRITER'S EMAIL ADDRESS
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March 22, 2024

VIA EMAIL

Mr. Ernest C. Garcia
Chief, Administrative Law Division
Office Of The Attorney General Of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 936-0804
Ernest.Garcia@oag.texas.gov

Re: *Free Speech Coalition et al. v. Paxton*, No. 23-50627 (argued Oct. 4, 2023, before Smith, Higginbotham, & Elrod, JJ.)

Dear Mr. Garcia,

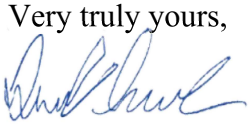
I write on behalf of Plaintiffs in the above-referenced matter. Understanding that your office has declined our request to stand still on Texas H.B. 1181 (and in fact initiated new enforcement actions this week), my clients will need to seek interim relief as they expeditiously seek review of the Fifth Circuit panel's decision in this case. In particular, my clients will be respectfully asking in short order that the Fifth Circuit stay its mandate and dissolve any remaining stay of the preliminary injunction pending resolution of a petition for certiorari review by the Supreme Court. In doing so, my clients are committing to file such a petition with the Supreme Court no later than April 10, 2024 and asking that the Texas Attorney General commit to filing a response no later than May 20, 2024, so that the Supreme Court can decide whether to grant review before recessing for the summer. We ask that you please advise as to your position on our planned Fifth Circuit motion at your earliest convenience. Absent contrary word, we will assume and report that your office opposes the requested relief (consistent with your refusal to stand still).

For present purposes, it bears noting that every judge who has reviewed H.B. 1181 (the district court and all three judges on the panel) has agreed that it is likely unconstitutional, at least in substantial part. It also bears noting that Texas has never previously argued that provisions of the Act are severable, or that Texas could be enforcing age-verification requirements (which the majority held likely constitutional, contrary to the district court and the dissent) on a stand-alone basis. Finally, it bears noting that the district court and dissent have made a strong case that the

Act's age-verifications requirements are likely unconstitutional under controlling Supreme Court precedent, while the majority has effectively acknowledged room for doubt on this point. Under these circumstances, we believe that the preliminary injunction should be restored for the limited period that remains between now and expected disposition of our forthcoming cert petition. And we hope that Texas will join us in sparing the parties and the courts the burdens that will otherwise result from further skirmishing over stays during the next three months, before the Supreme Court can render a decision on the cert petition in June.

We appreciate your kind and prompt consideration and are at your disposal if you wish to discuss our proposal. In all events, however, please be on notice that we will this Monday be asking the Fifth Circuit to stay issuance of the mandate and to dissolve any existing stay pending disposition of our forthcoming cert petition, then filing an expedited petition for certiorari by April 10, and asking that Texas make sure to respond by May 20. Considering that Texas was able to seek its own stay and then brief the merits of its appeal to the Fifth Circuit within a span of three weeks, no good reason is apparent why it would now need, want, or try to delay or elongate further appellate review. I therefore trust that we can work together to enable the Supreme Court to decide whether to grant cert before it recesses for the summer.

Very truly yours,



Derek L. Shaffer
Counsel for Plaintiffs Free Speech Coalition et al.

cc: Counsel of Record

November 17, 2023 | Press Release

Attorney General Ken Paxton Wins Major Victory Protecting Children from Obscene Materials

Texas Attorney General Ken Paxton secured a significant win in the U.S. 5th Circuit Court of Appeals against pornography distributors suing to stop Texas from implementing a new law requiring pornography sites to verify whether a user is 18 years or older. The ruling stayed a district court's injunction against the law, allowing the Office of the Attorney General ("OAG") to enforce it and protect Texas children.

After the Texas Legislature passed House Bill 1181 earlier this year, pornography companies, including the owners or operators of Pornhub, XVideos, and XNXX, filed a lawsuit attempting to prevent the law from going into effect. The legislation requires websites hosting adult content to verify a user's age and include a warning describing the harmful medical and societal side effects of pornography consumption.

The OAG appealed the district court's injunction and the Fifth Circuit's stay of that injunction means that any company found to have violated the age verification requirement will be subject to fines of up to $10,000 per day, an additional $10,000 per day if the

corporation illegally retains identifying information, and $250,000 if a child is exposed to pornographic content due to not properly verifying a user's age.

"Texas has a right to protect its children from the detrimental effects of pornographic content," Attorney General Paxton said. "As new technology makes harmful content more accessible than ever, we must make every effort to defend those who are most vulnerable."

To read the order, click here (/sites/default/files/images/press/HB1181%20-%20Stay%20Order%20Final%20Stamped.pdf).

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