No. 23-1122

IN THE

Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,

Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the Fifth Circuit erred in vacating a preliminary injunction of Texas House Bill 1181 by applying rational-basis review rather than strict scrutiny to provisions of the law that impose a content-based burden on adults' access to constitutionally protected speech.

PARTIES TO THE PROCEEDINGS

Petitioners 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., were plaintiffs-appellees in the court of appeals.

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

CORPORATE DISCLOSURE STATEMENT

Free Speech Coalition, Inc. has no parent corporation.

MG Premium Ltd and MG Freesites Ltd are wholly-owned subsidiaries of MG CY Holdings Ltd, which is a subsidiary, through affiliates,* of 1000498476 Ontario Inc.

WebGroup Czech Republic, a.s. has no parent corporation.

NKL Associates, s.r.o. has no parent corporation.

Sonesta Technologies, s.r.o. and Sonesta Media, s.r.o. are wholly-owned subsidiaries of United Communication Hldg II, a.s.

Yellow Production, s.r.o. has no parent corporation.

Paper Street Media, LLC and Neptune Media, LLC are wholly-owned subsidiaries of Paper Street Holdings, Inc. MediaME SRL has no parent corporation.

Midus Holdings, Inc. has no parent corporation.

No publicly held corporation owns 10 percent or more of any of the above-listed entities' stock.

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* Licensing IP International S.a.r.l.; MindGeek S.a.r.l.; ECP One Limited; ECP Three Limited; ECP Four Limited; ECP Alpha Holding Ltd; ECP Alpha LP; SIE Holdings Limited; ECP Capital Partners Ltd; and FMSM Holdings, Inc. (OBCA).

RELATED PROCEEDINGS

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

Free Speech Coalition, Inc. v. Colmenero, No. 1:23-cv-917 (Aug. 31, 2023) (granting preliminary injunction)

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

Free Speech Coalition, Inc. v. Paxton, No. 23-50627 (Mar. 7, 2024) (affirming in part and vacating in part)

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INTRODUCTION

Americans hold a wide range of views about sexual content online. Some view it as offensive or indecent; for others, it is artistic, informative, or even essential to important parts of career and life. Consistent with the bedrock First Amendment principle that "esthetic and moral judgments about art and literature … are for the individual to make, not for the Government to decree," this Court has long treated non-obscene sexual content as constitutionally protected for adults. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000). And while the Court has held that states may limit *minors'* access to sexual material reasonably found harmful to them, *Ginsberg v. New York*, 390 U.S. 629, 638-39 (1968), the Court has uniformly held that a content-based burden on *adults'* access to such protected speech "can stand only if it satisfies strict scrutiny," *Playboy*, 529 U.S. at 813; *see Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989).

Enacted in 2023, Texas House Bill (H.B.) 1181 imposes requirements on commercial websites "more than one-third of which" are "sexual material harmful to minors"—a term that includes all sexually suggestive content, as might be found in romance novels or R-rated movies. Tex. Civ. Prac. & Rem. Code § 129B.002(a). The law requires a covered website to verify the age of every user, typically via government-issued identification. *Id.* §§ 129B.002-003. Entities conducting such verification may not "retain" users' "identifying information," *id.* § 129B.002(b), but H.B. 1181 does not prohibit transfer of that information or impose any other protection against disclosure. And while Texas insists that forcing users to endure chilling online privacy and security

risks is necessary to protect minors from harmful sexual content, H.B. 1181 exempts the search engines and social-media platforms that are principal gateways for minors' access to that very content. *Id.* § 129B.005. Confirming Texas's real aims, H.B. 1181 also requires covered websites to post stigmatizing, unscientific "[w]arnings" that condemn their content as harmful to health. *Id.* § 129B.004.

The district court preliminarily enjoined H.B. 1181, finding that the law is subject to strict scrutiny and likely to fail it under this Court's governing precedent. In particular, the court explained that H.B. 1181's age-verification requirement is materially identical to the Child Online Protection Act (COPA), 47 U.S.C. § 231, which this Court in *Ashcroft* held was subject to strict scrutiny and likely unconstitutional. The Fifth Circuit agreed that H.B. 1181 is materially identical to COPA, but a divided panel held that it was not bound by *Ashcroft* because that decision contains what the majority termed "startling omissions." Pet. App. 17a. The majority concluded that the proper level of scrutiny is instead rational-basis review, as applied in *Ginsberg*. To justify its departure from *Ashcroft*, the majority reasoned that this Court there applied strict scrutiny to COPA only because Attorney General Ashcroft, represented by Solicitor General Olson, erroneously accepted strict scrutiny rather than urging mere rational-basis review in defense of the statute.

As recognized by Judge Higginbotham's dissent, the Fifth Circuit veered astray. This Court in *Ashcroft* did not apply strict scrutiny to COPA based on an oversight or concession. It did so because First Amendment principles and precedent firmly establish that strict scrutiny applies to content-based burdens on

constitutionally protected speech, specifically including sexual content that is not obscene for adults. Neither Texas's professed aim to protect minors nor *Ginsberg*'s holding—which applies only to the rights of minors—alters that analysis. The laws in *Ashcroft*, *Reno*, *Playboy*, and *Sable* all aimed to protect minors, and this Court applied strict scrutiny in each of those post-*Ginsberg* decisions. Strict scrutiny applies here too.

Under strict scrutiny, this is a straightforward case. As the district court found and the Fifth Circuit did not question, H.B. 1181 is both overinclusive and underinclusive, and it fails to pursue its objective with the means least restrictive of adults' protected speech. Indeed, Texas has disregarded the measure specifically identified in *Ashcroft* as both less restrictive and more effective than online age-verification: content-filtering software, which limits minors' access to sexual material inappropriate for them without burdening adults' access to speech they have a right to receive. That legislative oversight is especially striking because content-filtering technology has improved since *Ashcroft*. Meanwhile, online age-verification has grown easier to circumvent and threats of online identity theft, extortion, and data breaches have multiplied—heightening chills in the highly sensitive and personal context of accessing sexual material.

Restoring the preliminary injunction of H.B. 1181 by reversing the erroneous decision below would not undermine genuine efforts to limit minors' access to sexually inappropriate material. Petitioners agree that protecting minors is a compelling government interest and that—as this Court expressly stated in *Ashcroft*—a law narrowly tailored to that objective can survive strict scrutiny. 542 U.S. at 672-73. The Fifth Circuit's

application of rational-basis review is therefore as unnecessary as it is wrong. As in other recent cases, the Court should adhere to "settled principles about freedom of expression" that have "served the Nation well over many years" and reject the Fifth Circuit's jarring departure from First Amendment precedent. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2403 (2024).

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-87a) is reported at 95 F.4th 263. The opinion of the district court granting a preliminary injunction (Pet. App. 90a-161a) is reported at 689 F. Supp. 3d 373.

JURISDICTION

The Fifth Circuit entered its judgment on March 7, 2024. Petitioners timely petitioned for certiorari on April 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law … abridging the freedom of speech." H.B. 1181 is reproduced in an appendix to this brief.

STATEMENT

A. Legal And Factual Background

1. "The most basic" principle of free speech is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011) (citation omitted). Generally, when a law "imposes a restriction on the content of protected

speech, it is invalid unless … it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Id.* at 799. Otherwise, content-based speech restrictions are permitted only in limited "historic and traditional categories long familiar to the bar." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citation omitted).

One such category is obscenity, defined as material that "depicts or describes … sexual content" (specifically identified by statute), in a "patently offensive" way that "appeals to the prurient interest," and, taken as a whole, "lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (citation omitted). In *Ginsberg*, the Court upheld a state law that "adjusts the definition of obscenity" applicable to minors based on their different reaction to sexual content. *Id.* at 638 (citation omitted). As to adults, however, the Court has "made it perfectly clear that 'sexual expression which is … not obscene is protected by the First Amendment.'" *Reno*, 521 U.S. at 874 (brackets and citation omitted). And the Court has repeatedly held that laws imposing content-based burdens on adults' access to such constitutionally protected expression are subject to strict scrutiny, even if the laws permissibly aim to restrict minors' access to such material. *Id.*; *see Ashcroft*, 542 U.S. at 665-66; *Playboy,* 529 U.S. at 813; *Sable*, 492 U.S. at 126.

The Court's most recent decision in that line of cases is *Ashcroft*. There, the Court considered a challenge to COPA, which prohibited—absent age-verification measures—the online transmission of content that Congress deemed obscene for minors using a modified obscenity standard like the one at issue in *Ginsberg*. 542 U.S. at 661-62. Because COPA burdened adults'

access to speech constitutionally protected for them, the Court held that strict scrutiny applied for the same reasons as in analogous prior cases. *Id.* at 665-66 (citing *Reno*, 521 U.S. at 874); *see id.* at 670 (citing *Playboy*, 529 U.S. at 825-26). The Court then upheld a preliminary injunction of COPA, determining that the statute was likely unconstitutional because "less restrictive alternatives"—in particular, content-filtering software—"would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 665 (quoting *Reno*, 521 U.S. at 874); *see id.* at 665-66, 673.

2. Almost 20 years after *Ashcroft*, in June 2023, Texas enacted H.B. 1181. H.B. 1181 requires age verification by any commercial website "more than one-third of which is sexual material harmful to minors," Tex. Civ. Prac. & Rem. Code § 129B.002(a), defined using almost exactly the same modification of the adult obscenity standard that Congress adopted in COPA, *id.* § 129B.001(6).[1] Because this statutory definition applies to even the youngest minors, for whom almost

[1] Specifically, H.B. 1181 defines "[s]exual material harmful to minors" as including material that "(A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest; (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of: (i) a person's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." Tex. Civ. Prac. & Rem. Code § 129B.001(6).

any sexual content could qualify as obscene, H.B. 1181 covers "all salacious material," from sex-education content to simulated sex scenes in Oscar-winning films. Pet. App. 109a, 115a. And because H.B. 1181 applies to any website that devotes any more than one-third of its content to such sexual material, its restrictions apply to broad swaths of speech that are not sexual—much less obscene, even as to minors.

H.B. 1181 also contains several conspicuous exemptions. It expressly exempts search engines, Tex. Civ. Prac. & Rem. Code § 129B.005(b), even though they can provide access to the same sexual content as covered websites, *see* Pet. App. 112a. And the law de facto exempts social-media sites that contain less than one-third sexual material, even if those sites contain a larger total volume of sexual content (including the same content) as covered websites. Pet. App. 113a.

To comply with H.B. 1181's age-verification requirement, covered websites must "verify that an individual attempting to access the [site] is" at least 18 years old using "digital identification," "government-issued identification," or "a commercially reasonable method that relies on public or private transactional data." Tex. Civ. Prac. & Rem. Code §§ 129B.002(a), 129B.003. An entity conducting age verification "may not retain any identifying information of the individual," *id.* § 129B.002(b), but H.B. 1181 imposes no limits on transmitting that information to others. Nor does H.B. 1181 establish any data-security requirements or disclosure prohibitions for entities conducting age verification or others that receive identification information as part of the verification process.

H.B. 1181 also mandates that covered websites post scripted "sexual materials health warnings" on the

"landing page" of the website and "all advertisements," along with "helpline" numbers for "substance abuse and mental health." Tex. Civ. Prac. & Rem. Code § 129B.004 (capitalization altered). The purported warnings state that "[p]ornography is potentially biologically addictive" and "proven to harm human brain development." *Id.* § 129B.004(1); *see id.* ("Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses."). The statements are attributed to "TEXAS HEALTH AND HUMAN SERVICES," *id.*, even though that agency has not issued any such findings, Pet. App. 95a.

Noncompliant websites are subject to enforcement actions by the Texas Attorney General and face penalties ranging from injunctive relief to fines of up to $10,000 per day, plus enhancements of up to $250,000. Tex. Civ. Prac. & Rem. Code § 129B.006.

3. Online age-verification mandated by H.B. 1181 poses severe risks to Internet users that do not arise during in-person identification checks. A "substantial chilling effect" results from demanding proof of individual identity online: Adults who submit, for example, a "government ID" over the Internet to "affirmatively identify themselves" understand that they are thereby exposing themselves to "inadvertent disclosures, leaks, or hacks." Pet. App. 125a-126a. The chilling effect is worse than ever now because Internet "[u]sers today are more cognizant of privacy concerns" and "data breaches have become more high-profile" and commonplace. Pet. App. 127a. Adults' reasonable concerns are compounded by H.B. 1181's failure to prohibit the transmission of adults' information to third

parties—including the government, creating the risk of "state monitoring" of "what kind of websites they visit." Pet. App. 125a-126a. And H.B. 1181's deterrent effect on adults' "access to sexual material" is "particularly acute" because it "can reveal intimate desires and preferences." Pet. App. 125a. Correspondingly, such information is "more likely to be targeted" by identity thieves and extortionists because "users may be more willing to pay to keep that information private." Pet. App. 127a.

B. Procedural History

1. District Court Proceedings

Petitioners challenged H.B. 1181 soon after it was signed. Pet. App. 90a. After an evidentiary hearing, the district court issued an order preliminarily enjoining enforcement of H.B. 1181 before it became effective, accompanied by a lengthy decision explaining the factual findings and legal reasoning underlying the order. Pet. App. 90a-161a.

a. The district court held that petitioners are likely to succeed on the merits. Under *Reno* and *Ashcroft*, the court explained, H.B. 1181 is subject to strict scrutiny because it is a content-based burden on adults' access to protected speech. Pet. App. 107a-111a. While crediting Texas's compelling interest in protecting minors from harmful content, the court held that H.B. 1181's age-verification mandate likely does not withstand strict scrutiny because it is an underinclusive and overly restrictive means of pursuing that interest, particularly given the availability of more effective, less restrictive alternatives. Pet. App. 111a-136a.

The district court first explained that H.B. 1181's exemptions of search engines and social media render it

"severely underinclusive." Pet. App. 112a-114a. The court found that minors can easily locate "sexually explicit or pornographic" content on search engines through "visual search"—*i.e.*, a search for images or videos. Pet. App. 112a. The court also found that social-media platforms like Instagram and Facebook contain "material which is sexually explicit for minors," and sites like Reddit "maintain entire communities and forums" devoted "to posting online pornography." Pet. App. 113a. Because such outlets are the most frequent sources for minors to access sexual content, yet none is regulated by H.B. 1181, the court found that the law "fails to reduce the online pornography that is most readily available to minors." Pet. App. 113a.

The district court similarly found that H.B. 1181's age-verification requirement is overly restrictive because it "sweeps far beyond obscene material and includes all content offensive to minors, while failing to exempt material that has cultural, scientific, or educational value to adults only." Pet. App. 122a. The court added that the Texas legislature did not "even consider[] the law's tailoring or ma[ke] any effort whatsoever to choose the least-restrictive measure." Pet. App. 135a. Indeed, the court found that Texas's own evidence—along with petitioners'—identified less restrictive and more effective alternatives. In particular, the legislature paid no heed to updated and improved forms of the content-filtering software that this Court found superior to online age-verification in *Ashcroft*. Pet. App. 128a-135a. While Texas contended that changes in technology should alter the judicial analysis—positing age verification as "more secure and convenient" and content filtering as obsolete—the court found that Texas's argument "simply does not match the evidence." Pet. App. 127a.

b. The district court also held that H.B. 1181's mandated health warnings are likely unconstitutionally compelled speech. Pet. App. 136a-150a. Under *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018) (*NIFLA*), the court held that the speech mandate is subject to strict scrutiny, which it likely cannot survive. Pet. App. 137a-143a. The court emphasized that, as a result of the age verification required by H.B. 1181, the warnings would be seen predominantly by *adults*, contrary to H.B. 1181's stated purpose of protecting minors. Pet. App. 142a. And even if the warnings are treated as a commercial-speech mandate subject to lesser scrutiny, the court held they cannot survive because they are not "purely factual and uncontroversial." Pet. App. 145a (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)).

c. Finally, the district court held that a preliminary injunction is justified because H.B. 1181, if enforced, will cause irreparable harm to petitioners and adult Texans by chilling access to protected sexual expression and compelling speech. Pet. App. 156a. In enjoining H.B. 1181, the court noted that "nothing in th[e court's] order prevents the state from pursuing" the other "viable and constitutional means" available "to achieve Texas's goal" of protecting minors. Pet. App. 160a.

2. Court Of Appeals Proceedings

a. Texas appealed and sought a stay pending appeal from the Fifth Circuit. *See* Pet. App. 167a-168a. The motions panel entered an administrative stay without any stated reasons, lasting nearly two months, during which time the parties briefed and argued the appeal. Pet. App. 167a-168a. The merits panel then issued an unexplained stay pending appeal by a 2-1 vote, which lasted roughly another four months. Pet. App. 166a &

n.1 (noting Judge Higginbotham's dissenting vote). During this period, Texas began enforcement actions. *See* C.A. Dkt. #131.

b. On March 7, 2024, the Fifth Circuit merits panel upheld the preliminary injunction unanimously as to the health-warning provision, Pet. App. 27a-38a, but held by a 2-1 vote that petitioners were unlikely to succeed in challenging the age-verification provision, Pet. App. 8a-27a. The panel accordingly vacated the preliminary injunction as to the age-verification provision over Judge Higginbotham's dissent. Pet. App. 44a.

The panel majority acknowledged that H.B. 1181's age-verification requirement is "very similar" to the COPA provisions addressed by this Court in *Ashcroft*, rejecting Texas's purported distinctions of the two statutes. Pet. App. 16a. Nevertheless, the majority held that rational-basis review is the applicable standard of scrutiny given *Ginsberg*. Pet. App. 17a, 26a. The majority acknowledged that its holding departs from *Ashcroft*, but it declined to follow this Court's decision in that case. Pet. App. 16a-19a. It deemed the *Ashcroft* Court's lack of "discussion of rational-basis review under *Ginsberg*" a "startling omission[]" that could "only" be explained by the failure of the United States to argue for the application of rational-basis review—a non-jurisdictional error that the Court purportedly "did not have to correct" on its own. Pet. App. 17a-18a.

The panel majority similarly declined to apply other precedents holding that strict scrutiny applies to content-based burdens on adults' access to constitutionally protected sexual expression. Pet. App. 13a-16a, 20a-26a (discussing *Reno*, *Playboy*, and *Sable*). The majority contended that none of these cases could

"surmount the rock that is *Ginsberg*." Pet. App. 20a. The majority then held that H.B. 1181's age-verification provision "easily" survives rational-basis review. Pet. App. 26a.

Judge Higginbotham dissented, relying on *Sable*, *Reno*, *Playboy*, and *Ashcroft*. Pet. App. 45a-87a. H.B. 1181 "must face strict scrutiny review," he explained, "because it limits adults' access to protected speech using a content-based distinction." Pet. App. 47a-48a. He added that *Ginsberg* "has no purchase" in addressing "a challenge to an adult's ability to access constitutionally protected materials" online, because *Ginsberg* held "that minors have more limited First Amendment rights than adults." Pet. App. 56a-57a. Finding no clear error in the district court's findings, he would have affirmed the preliminary injunction in full. Pet. App. 68a-78a.

SUMMARY OF ARGUMENT

H.B. 1181's age-verification requirement is unconstitutional under a straightforward application of First Amendment principles and precedent. The preliminary injunction should accordingly be restored.

A. When speech is protected by the First Amendment, a content-based burden on that speech triggers strict scrutiny. H.B. 1181's age-verification requirement fits squarely within that rule. The age-verification requirement is triggered by speech that Texas has deemed inappropriate for minors but that is constitutionally protected for adults. It is facially content-based, applying only to specified sexual material. And it imposes a clear burden, forcing adult users to incur severe privacy and security risks—which

the statute leaves largely unaddressed—before they can access constitutionally protected speech.

Basic principles of free speech thus call for strict scrutiny. And this Court's precedent removes all doubt. In an unbroken line of cases dating back decades, the Court has uniformly applied strict scrutiny to laws that do what H.B. 1181 does—burden adults' access to non-obscene sexual content, which is constitutionally protected for them, while attempting to restrict minors' access to that content. That line of cases culminated in *Ashcroft*, in which eight Justices applied strict scrutiny to a law materially indistinguishable from H.B. 1181.

Without attempting to distinguish *Ashcroft*, the Fifth Circuit dismissed it by speculating that this Court did not really mean that strict scrutiny applies to laws like COPA and H.B. 1181. That position is as remarkable as it is mistaken. Lower federal courts may not disregard this Court's decisions, even if they (mis)perceive "omissions" in the Court's reasoning. Pet. App. 17a. Regardless, *Ashcroft* evidences no omission. The *Ashcroft* Court subjected COPA to strict scrutiny because that is what the First Amendment requires, as the United States recognized in defending the statute. The Court did not adopt the rational-basis review standard of *Ginsberg*, because that standard applies to the definition of obscenity for minors—not the imposition of burdens on adults, as this Court's post-*Ginsberg* decisions in *Reno*, *Playboy*, and *Sable* confirm.

B. Under the proper standard of strict scrutiny, this case is readily resolved. As the district court found and the Fifth Circuit did not refute, H.B. 1181's age-verification requirement is triply flawed: it is

overinclusive, underinclusive, and not the least restrictive means of pursuing the state's interest in protecting minors. It is overinclusive because—through its application to entire websites that have more than one-third content inappropriate for minors—it restricts adults' access to speech that is not even sexual and not even arguably obscene for minors. It is underinclusive because it exempts search engines and social-media sites that make available to minors huge quantities of the same content that the statute restricts on petitioners' websites. And it fails to adopt less restrictive and more effective alternatives to burdensome online age-verification, such as the content-filtering software that this Court identified in *Ashcroft*. Each of those defects is independently fatal; together, they underscore that H.B. 1181 is designed foremost to target disfavored speakers—whom the law brands with self-condemning "health warnings"—rather than to meet the state's purported objective. Such speaker-based discrimination affords yet another reason why petitioners' challenge will likely succeed.

C. Petitioners satisfy the remaining requirements for a preliminary injunction. They, along with Texas adults, are irreparably harmed by the loss of their First Amendment freedoms and the prospect of crippling enforcement proceedings and unrecoverable compliance costs. Moreover, the equities and public interest strongly favor enjoining enforcement of the statute until the litigation is complete—just as was true for the comparable laws in *Reno* and *Ashcroft*.

ARGUMENT

THE PRELIMINARY INJUNCTION OF THE AGE-VERIFICATION REQUIREMENT IN H.B. 1181 SHOULD BE RESTORED

A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, as in most First Amendment cases, the principal question is whether petitioners have "demonstrated that they are likely to succeed on the merits." *Ashcroft*, 542 U.S. at 666. As the district court correctly concluded, they have. Because petitioners also satisfy the relevant equitable factors, the preliminary injunction should be restored. *See* Pet. App. 45a-87a (Higginbotham, J., dissenting).

A. The Age-Verification Requirement In H.B. 1181 Is Subject To Strict Scrutiny

1. Strict Scrutiny Applies To Content-Based Burdens On Protected Speech

a. "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech." *NIFLA*, 585 U.S. at 766. It is a "fundamental principle" of the First Amendment that states typically cannot restrict protected speech "because of its message, its ideas, its subject matter, or its content." *NIFLA*, 585 U.S. at 766 (quoting *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972)). Such restrictions "are presumptively unconstitutional" and generally may be justified only if they overcome the "stringent standard" of strict scrutiny. *Id.* The Court

has applied that principle to speech of many different forms, from outdoor signs to violent video games to depictions of animal cruelty to sexually suggestive content on television and the Internet—just to name a few examples from recent years. *See Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015); *Brown*, 564 U.S. at 799; *Stevens*, 559 U.S. at 468-69; *Playboy*, 529 U.S. at 813-14; *Reno*, 521 U.S. at 874; *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618-19 (2020) (plurality opinion) (applying strict scrutiny to restrictions on robocalls); *id.* at 650 (Gorsuch, J., concurring in the judgment in part and dissenting in part) (same). In short, the First Amendment generally "bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

The First Amendment confers that broad protection not because any "one idea is as good as any other"; the "Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view." *Playboy*, 529 U.S. at 818. The First Amendment broadly protects speech because "it is difficult to distinguish" high-value speech from low-value speech and "dangerous" for the government "to try." *Brown*, 564 U.S. at 790. "What is one man's amusement, teaches another's doctrine." *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)). The First Amendment "exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed." *Playboy*, 529 U.S. at 818. And, with few exceptions, those "judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Id.*

b. The Court has long applied these principles to speech involving sex. Although obscenity is historically unprotected, "sex and obscenity are not synonymous," and the non-obscene "portrayal of sex … in art, literature, and scientific works" has never been regarded as "sufficient reason to deny material the constitutional protection of freedom of speech and press." *Roth v. United States*, 354 U.S. 476, 487 (1957). To the contrary, sex has been "a subject of absorbing interest to mankind through the ages" and remains "one of the vital problems of human interest and public concern." *Id.*; *see, e.g.*, *Reno*, 521 U.S. at 877-78 (collecting examples of sexual material "with serious educational or other value"); *see also Free Speech Coal.*, 535 U.S. at 246-48 (2002) (discussing the theme of sex in art and literature dating back to Shakespeare).

"Sexual expression and imagery were common, widespread, legal, and quite explicit" before and during the Founding era. Geoffrey R. Stone, *Sex and the First Amendment*, 17 First Amend. L. Rev. 134, 135 (2022). American colonial bookstores "carried an extraordinary array of erotica," *id.*, and prominent figures "like Benjamin Franklin and Thomas Jefferson collected many [such] works," Geoffrey R. Stone, *Sex and the Constitution* 83 (2017). Jefferson's library, for example, contained numerous publications that "portrayed vivid scenes of sexuality, lust, and sexual scandal." *Id.*; *see* 4 *Catalogue of the Library of Thomas Jefferson* 433-36, 447, 456, 553-54 (E. Millicent Sowerby ed., 1955). And many Americans "read sex manuals" such as *Aristotle's Masterpiece*—an "erotic" anthology understood to have medical value. Vern L. Bullough, *An Early American Sex Manual, Or, Aristotle Who?*, 7 Early Am. Literature 236, 236, 241 (1973); *see* John D'Amelio & Estelle B. Freedman, *Intimate Matters: A History of*

Sexuality in America 19 (1988) (describing that "highly popular" work as "a compendium of reproductive lore"). Objections to such non-obscene sexual publications on religious, moral, aesthetic, and other grounds were generally pursued through private restrictions, not public laws; "the distribution, exhibition, and possession of pornographic material was simply not thought to be any of the state's business." *Sex and the First Amendment*, *supra*, at 135.

In keeping with that history and understanding, this Court has exercised "[c]easeless vigilance" to protect adults' access to sexual material that does not fall within the definition of obscenity, *Roth*, 354 U.S. at 488, even though some may "find [it] shabby, offensive, or even ugly," *Playboy*, 529 U.S. at 826. That is consistent with the "bedrock principle underlying the First Amendment … that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); *see Free Speech Coal.*, 535 U.S. at 245 ("[S]peech may not be prohibited because it concerns subjects offending our sensibilities."). Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder*, 562 U.S. at 458 (citation omitted); *see 303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023) ("A commitment to speech for only *some* messages and *some* persons is no commitment at all.").

c. The distinction between unprotected obscenity and protected speech about sex applies to people of all ages. In *Ginsberg*, however, this Court held that the line can be drawn in a different place with respect to

minors. 390 U.S. at 638. The Court in *Ginsberg* upheld a New York law that prohibited the knowing sale to minors of sexual material "defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." *Id.* at 631. Rejecting a challenge asserted on behalf of minors, the Court determined that the law permissibly "adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests'" of minors, which differ from those of adults. *Id.* at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)). Because the line drawn by the state has a "rational relation to the objective of safeguarding such minors from harm," the Court held, the law did not violate minors' First Amendment rights. *Id.* at 643.

The Court's decision in *Ginsberg* marks an exception to the general principle that minors and adults enjoy the same First Amendment protections, and the Court has declined to extend *Ginsberg* beyond the narrow context in which it was decided. *See Brown*, 564 U.S. at 793-95 (rejecting California's reliance on *Ginsberg* to prohibit the sale of violent video games to minors). Most critically for present purposes, however, *Ginsberg*'s tolerance of a more restrictive obscenity definition for *minors* does not in any way diminish the constitutional protection of non-obscene sexual expression for *adults*. The law at issue in *Ginsberg* did not place any restriction on adults' access to sexual materials; it did not, for example, require sellers to conduct age verification of adult customers. *See* 390 U.S. at 634. To the contrary, the *Ginsberg* Court expressly distinguished New York's restriction on *minors'* access to sexual content from a Michigan law that barred the sale to *adults and minors* of content deemed harmful to minors, *id.*—a law the Court unanimously invalidated as

violating the First Amendment. *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (refusing to "reduce the adult population of Michigan to reading only what is fit for children," which would impermissibly "burn the house to roast the pig").

The Court has since reaffirmed in an unbroken line of ensuing decisions that a burden on adults' access to sexual material constitutionally protected for them is subject to strict scrutiny *even if* that burden arises from a law aimed at restricting minors' access to sexual material that is *not* constitutionally protected for *them*. *See, e.g.*, *Reno*, 521 U.S. at 975 ("[T]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

In *Sable*, for example, the Court considered a federal law prohibiting "dial-a-porn" telephone services containing content that was constitutionally protected for adults but inappropriate for minors. 492 U.S. at 117, 126. Given the burden on adults, the Court subjected the law to strict scrutiny. *Id.* at 126. And while the Court accepted the government's "compelling interest in protecting the physical and psychological well-being of minors," the Court invalidated the law because it "was not sufficiently narrowly drawn … to serve those interests without unnecessarily interfering with [the] First Amendment freedoms" of adults. *Id.*

The Court followed the same approach in *Playboy*. There, a federal law required cable-television operators offering channels "primarily dedicated to" programming that was "sexually-oriented" but not obscene for adults to either block their channels or broadcast them only late at night, when children were not likely to be watching. 529 U.S. at 806. The Court

again acknowledged the government's interest in stopping "unwanted, indecent speech" from entering "the home without parental consent," but emphasized that, because the law burdened adults' access to sexual expression that is constitutionally protected for them, the "standard the Government must meet" to restrict that speech "should be clear: The standard is strict scrutiny." *Id.* at 814. The Court rejected the argument that a lower level of scrutiny should apply because adults could still watch the programming late at night; the Court explained that "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.* at 812. After finding that effective, less restrictive alternatives existed—for example, "a regime in which viewers could order signal blocking on a household-by-household basis"—the Court invalidated the law. *Id.* at 807, 826-27.

In *Reno*, the Court extended those principles to sexual content specifically on the Internet. The Court affirmed a preliminary injunction of a federal law that "prohibit[ed] the knowing transmission of obscene or indecent messages" online "to any recipient under 18 years of age," unless certain age-verification measures were employed. *Reno*, 521 U.S. at 859-61. While recognizing *Ginsberg*'s holding that the "scope of the constitutional freedom of expression secured to a citizen" to access sexually explicit material may "depend on whether the citizen is an adult or a minor," the *Reno* Court followed *Playboy* and *Sable* by applying strict scrutiny to the statute because it burdened adults' access to speech that was constitutionally protected for them. *Id.* at 864-65, 874-77. The Court affirmed the preliminary injunction, noting the government had failed "to explain why a less restrictive" measure such

as content "tagg[ing]," a nascent form of content filtering, would not similarly protect minors. *Id.* at 879.

Most recently, the Court applied the same principles to COPA in *Ashcroft*. As noted above, COPA prohibited the online transmission of content deemed obscene for minors—using *Miller*'s adult-obscenity standard from the perspective of a minor—unless age-verification measures were employed. *See* pp. 5-6, *supra*. As in *Reno*, *Playboy*, and *Sable*, the *Ashcroft* Court applied strict scrutiny based on the law's burden on adults' access to protected speech. 542 U.S. at 665-66. The Court then affirmed a preliminary injunction of COPA. It explained that the use of "blocking and filtering software" would be an effective and less restrictive means of restricting minors' access to online sexual content inappropriate for them, while still allowing adults to access the "speech they have a right to see without having to identify themselves" and thereby incur "the potential chilling effect" of age verification. *Id.* at 666-67.[2]

Taken together, the teaching of those cases is unmistakable: Strict scrutiny applies to laws that burden adults' right to access sexual expression that is constitutionally protected for them, even if those laws are aimed at preventing minors' exposure to that content. Indeed, prior to the majority decision below, every court of appeals that encountered a similar law reviewed it under strict scrutiny. *See Mukasey*, 534 F.3d at 190; *PSInet v. Chapman*, 362 F.3d 227, 229, 233-34

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[2] Following remand, the district court permanently enjoined COPA, the Third Circuit affirmed under strict scrutiny, and this Court denied review. *See ACLU v. Mukasey*, 534 F.3d 181, 190, 207 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

(4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99-102 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1152, 1155-58 (10th Cir. 1999).

2. H.B. 1181's Age-Verification Requirement Is A Content-Based Burden On Protected Speech Subject To Strict Scrutiny

Like the laws in *Ashcroft*, *Playboy*, *Reno*, and *Sable*, H.B. 1181's age-verification requirement applies to speech that is constitutionally protected for adults and imposes a content-based burden on adults' access to that speech. It is therefore subject to strict scrutiny.

a. The speech covered by H.B. 1181's age-verification requirement is constitutionally protected for adults. Like COPA, H.B. 1181 applies to speech that satisfies the *Miller* adult-obscenity test modified to cover sexual material that is deemed harmful from the perspective of a minor. Tex. Civ. Prac. & Rem. Code § 129B.001(6); *see Ashcroft*, 542 U.S. at 661-62. H.B. 1181, moreover, applies to minors generally—with no distinction between, *e.g.*, a 17-year-old and a 5-year-old—so content that would be harmful to even the youngest minor is covered by the statute. "Because most sexual content is offensive to young minors, the law covers virtually all salacious material," Pet App. 109a, from nude modeling to romance novels to R-rated movies or television shows for mature audiences, *id.* at 51a-52a (Higginbotham, J., dissenting). That material is all undisputedly protected for adults.

Nor is H.B. 1181 directed at speech that is obscene for adults. Texas separately criminalizes such obscenity, leaving no need to subject it to age verification. Tex. Penal Code §§ 43.21-43.23. As such, adult obscenity is not part of the constitutional analysis. *See Free Speech*

Coal., 535 U.S. at 240 (not considering obscene speech in the constitutional analysis because the statute at issue "is not directed at speech that is obscene" and "Congress has proscribed those materials through a separate statute"); *Reno*, 521 U.S. at 878 n.44 (similar). The point is so plain that Texas conceded it at oral argument below. Asked whether "the state take[s] the position that the adults should be able to access all of th[e] material" covered by H.B. 1181, or instead "that some of th[e covered material] is obscene," the state responded: "adults should still be able to access every bit of the materials." Official Recording at 13:35-14:00, https://bit.ly/4c5B42K.

b. It is equally clear that H.B. 1181's age-verification requirement is content-based. The requirement applies only to websites that provide "sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code §§ 129B.001(6), 129B.002(a). This definition is content-based on its face and indistinguishable from the one that triggered strict scrutiny in *Ashcroft*; it is likewise of a piece with the restrictions that triggered strict scrutiny in *Reno*, *Playboy*, and *Sable*. What is more, H.B. 1181's content-based definition is especially broad: it sweeps in all of a website's non-sexual content just because more than one-third of the website contains the targeted sexual content. Tex. Civ. Prac. & Rem. Code § 129B.002(a).[3]

c. Nor can there be any serious dispute that H.B. 1181's age-verification requirement imposes a burden. Covered websites must require adults to provide their

[3] The "health-warnings" mandate likewise applies based on the content of websites' speech and further compels the utterance of particular words. Tex. Civ. Prac. & Rem. Code § 129B.004.

personally identifying information whenever they wish to access constitutionally protected sexual speech. As is clear from the district court's unchallenged findings—along with common sense and experience—many adults will understandably be reluctant to do so. Pet. App. 124a-127a. Submitting identifying information online entails risks of "inadvertent disclosures, leaks, or hacks," all of which are heightened because the disclosure of personal information here could "reveal intimate desires and preferences." Pet. App. 125a-126a; *see* Electronic Frontier Found. (EFF) Cert. Amicus Br. 6 (elaborating security risks).

H.B. 1181 does little to assuage these concerns. While requiring that age-verification providers "may not retain any identifying information," Tex. Civ. Prac. & Rem. Code § 129B.002(b), H.B. 1181 does not prohibit the *transmission* of such information to third parties, including to criminals or the state. It is "dubious," moreover, that adults will "trust that companies will actually delete it." Pet. App. 126a. Beyond creating risks of potentially devastating identify theft and extortion, the law ushers in the chilling prospect that "the state government can log and track adults' access to sexual material." Pet. App. 75a (Higginbotham, J., dissenting). And even if those worst-case scenarios are not realized, their specter will have a significant (and ostensibly designed) deterrent effect. Pet. App. 126a; *see, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (crediting such risks in the context of adults' access to sexual content).[4]

[4] The "health-warnings mandate," which demands that websites stigmatize and condemn adult users by "warning" them away, confirms that such deterrence is by design.

For many adults, moreover, H.B. 1181 "operates as a de facto ban." Found. for Individual Rights and Expression (FIRE) Cert. Amicus Br. 8. "Texans who do not possess government identification or whose age or identity are not reliably confirmed by commercial age-verification systems will be functionally prohibited from visiting sites" subject to the law. *Id.* This is not hypothetical: "[a]bout 15 million adult citizens do not have a driver's license, while about 2.6 million do not have any form of government-issued photo ID." EFF Cert. Amicus Br. 10.

In sum, H.B. 1181's age-verification requirement imposes a content-based burden on the right of adults to access speech that is constitutionally protected for them. Under this Court's consistent precedent, H.B. 1181 is therefore subject to strict scrutiny. *See* p. 24, *supra*; *see also* Pet. App. 47a-48a (Higginbotham, J., dissenting); Pet. App. 108a.

3. The Fifth Circuit Erred In Applying Rational-Basis Review To H.B. 1181's Age-Verification Requirement

The Fifth Circuit declined to follow this Court's well-established precedent, applying rational-basis review rather than strict scrutiny. Although the court provided several justifications for its position, none has merit.

a. As a threshold matter, the Fifth Circuit squarely defied this Court's decision in *Ashcroft*, which the panel majority acknowledged applied strict scrutiny to a materially indistinguishable law. Pet. App. 4a, 16a. The majority's stated basis for doing so was that *Ashcroft*'s failure to apply rational-basis review under *Ginsberg* was a "startling omission[]" that could be explained only by the United States' failure to argue that rational-basis

review applied to COPA; on that view, the majority deemed itself free to adopt a different approach and to credit Texas's proposal for applying rational-basis review here. Pet. App. 17a, 26a. That was not the correct treatment of this Court's precedent.

To begin, lower federal courts are bound by the reasoning and result of this Court's decisions under the principle of "vertical *stare decisis*." *Ramos v. Louisiana*, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring in part); *see, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). As such, the Fifth Circuit was not free to disregard *Ashcroft* or any other decision of this Court based on perceived weaknesses in the Court's analysis. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

In any event, the Fifth Circuit's reading of *Ashcroft* is wrong. The United States' brief in *Ashcroft* makes clear that the reason the government declined to argue for rational-basis review was not an oversight but instead a recognition that this Court had clearly and repeatedly held that strict scrutiny applies to laws like COPA. *See* U.S. Br. 18, *Ashcroft*, *supra* (No. 03-218) ("[B]ecause [COPA] regulates on the basis of content, [it] 'must be narrowly tailored to promote a compelling government interest' in order to be constitutional under the First Amendment." (quoting *Playboy*, 529 U.S. at 813)). The Court's decision in *Ashcroft* reflects that same understanding. Eight Justices in *Ashcroft* applied strict scrutiny: the five Justices in the majority and three of the dissenters, who would have upheld COPA under strict scrutiny. 542 U.S. at 670; *see id.* at 677 (Breyer, J., dissenting, joined by Rehnquist, C.J., and

O'Connor, J.). Only Justice Scalia's dissent would have subjected COPA to less than strict scrutiny, contending that the covered speech was unprotected and thus presumably subject to rational-basis review. *Id.* at 676. That Justice Scalia advocated that position while eight Justices concluded otherwise refutes the Fifth Circuit's account of a "startling omission[]." Pet. App. 17a.

Furthermore, it is implausible that this Court would have felt itself constrained to apply the wrong tier of constitutional scrutiny simply because the parties purportedly invoked the wrong legal standard. Parties cannot "stipulate or bind [a court] to the application of an incorrect legal standard." *NetChoice*, 144 S. Ct. at 2429 (Alito, J., concurring in the judgment) (citations omitted). At a minimum, it is highly unlikely that the Court would have adopted such a position in a major constitutional case without explaining that it was doing so only because of the parties' arguments—especially when the precise issue was squarely raised by the dissent. *Cf. Haaland v. Brackeen*, 599 U.S. 255, 279-80 (2023) (explaining that the Court was deferring to the parties' presentation of the arguments); *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (stating that the Court would "assume, without deciding, that" a particular "level of scrutiny" applied).

b. In addition to misreading *Ashcroft*, the Fifth Circuit also misread *Ginsberg*. The panel majority drastically reduced the applicable standard from strict scrutiny to rational-basis review on the theory that such a result was necessary to afford continuing vitality to *Ginsberg*. *See* Pet. App. 19a-20a. But no such straining is necessary to give meaning to *Ginsberg*.

Properly understood, *Ginsberg* stands for the important but limited proposition that states can define

obscenity more broadly for minors than for adults, and thus can restrict minors' access to a broader range of sexual content than they can permissibly restrict for adults. 390 U.S. at 638; *see Brown*, 564 U.S. at 793-94 (describing *Ginsberg* in those terms); Pet. App. 55a, 68a (Higginbotham, J., dissenting) (same). That holding reflects the government's "somewhat broader authority to regulate the activities of children," *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) (citing *Ginsberg*, 390 U.S. at 629), but it does not affect the state's authority to regulate access by adults to content that is constitutionally protected for them.

The Fifth Circuit's contrary reading does not find adequate roots in *Ginsberg*. As explained above, *Ginsberg* did not involve a law that burdened the speech rights of adults while restricting access for minors. *See* pp. 20-21, *supra*. The law barred only "knowing[]" sales to minors and did not prescribe age verification in any form, let alone across all transactions, or otherwise restrict adults' access. *Ginsberg*, 390 U.S. at 633-34. So long as a vendor did not sell to someone appearing to be a minor, the law had nothing to say. *See id.* at 643-44. That is why the vendor in *Ginsberg* appealed his conviction by invoking the rights of minors, not adults. *See id.* at 636 ("[H]is contention is … that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor."); *see* Appellant Br., *Ginsberg*, *supra* (No. 47, O.T. 1967), 1967 WL 113634, at *7 ("The appellant's position is that the restriction on the distribution of literature based on age classification is censorship, pure and simple."). The Court rejected the argument on those terms, holding that "the concept of obscenity … may vary according to the group to whom

the questionable material is directed or from whom it is quarantined." 390 U.S. at 636 (citation omitted). To be sure, if the challenge in this case rested on the proposition that minors have rights to view sexual content covered by H.B. 1181, *Ginsberg* might be relevant. Recognizing *Ginsberg*'s continued vitality in such a circumstance gives that precedent the force it is due, no more and no less.

The Fifth Circuit's position, by contrast, contravenes the decades of precedents after *Ginsberg* that applied strict scrutiny to laws restricting the speech rights of adults alongside minors. *See* pp. 20-24, *supra*. Indeed, no other court in the 20 years since *Ashcroft* or the 56 years since *Ginsberg* has even suggested anything like the position adopted by the Fifth Circuit here. And the only case addressing such a law after the Fifth Circuit's decision relies on *Ashcroft* and Judge Higginbotham's dissent rather than the Fifth Circuit majority opinion. *Free Speech Coal., Inc. v. Rokita*, __ F. Supp. 3d __, 2024 WL 3228197, at *7-16 (S.D. Ind. June 28, 2024). Reviewing a nearly identical age-verification provision, the district court in that case held that the "case is not close" and that the law is a "dead ringer" for the statute addressed by this Court in *Ashcroft*. *Id.* at *18. The court rejected the state's attempts to evade strict scrutiny, which the court held is dictated by "each of" this Court's cases addressing statutes that burden adults in the course of "seeking to protect minors from indecent wire communications." *Id.* at *13.[5]

[5] On appeal, the Seventh Circuit stayed the resulting preliminary injunction without "considering the standards appropriate to a stay pending appeal on the merits," on the theory

c. The Fifth Circuit briefly suggested that strict scrutiny does not apply for the additional reason that H.B. 1181's age-verification requirement constitutes only a speech burden rather than a speech ban. Pet. App. 16a n.23. But this Court has never required that a content-based law actually *ban* speech to trigger strict scrutiny. To the contrary, the Court has confirmed many times—including in the context of laws restricting adults' access to constitutionally protected sexual expression—that "[t]he Government's content-based *burdens* must satisfy the same rigorous scrutiny as its content-based *bans*." *Playboy*, 529 U.S. at 812 (emphases added); *see, e.g.*, *Reed*, 576 U.S. at 171-72 (applying strict scrutiny not to a ban on speech but to a regulation governing the size of political signs); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011) ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.").

d. Finally, the Fifth Circuit suggested it was impelled towards applying rational-basis review for fear that states otherwise would lack means of protecting children from harmful sexual content. Pet. App. 22a-23a. But in applying strict scrutiny in *Sable*, *Playboy*, *Reno*, and *Ashcroft*, the Court noted less

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simply that the Indiana and Texas statutes should be treated the same (*i.e.*, not subject to an injunction) pending the Court's decision in this case. *Free Speech Coal., Inc. v. Rokita*, 2024 WL 3861733, at *1-2 (7th Cir. Aug. 16, 2024) (Rovner, J., concurring in part, dissenting in part).

restrictive options each time. Strict scrutiny is not "a death knell in and of itself." Pet. App. 22a. The Court has upheld laws under strict First Amendment scrutiny. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444, 457 (2015); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010); *cf. Citizens United v. FEC*, 558 U.S. 310, 366-67, 371-72 (2010) (upholding disclaimer and disclosure provisions of campaign-finance law because they survived "exacting scrutiny"). The Court in *Ashcroft* expressly stated that a narrowly tailored "regulation of the Internet designed to prevent minors from gaining access to harmful materials" would pass muster, and pointed to less restrictive options. 542 U.S. at 666-70, 672. And the district court in this case likewise acknowledged that there "are viable and constitutional means to achieve Texas's goal" of protecting minors from sexual content online without unduly limiting adults' rights. Pet. App. 160a. Adhering to strict scrutiny, in sum, would not render states powerless to protect minors. It would merely require them to do so through a carefully tailored law.

Accepting the Fifth Circuit's position, by contrast, could invite even more troubling restrictions on speech, reaching beyond petitioners' websites to include "bookstores, libraries, publishers, authors and[] mainstream websites," among others. Am. Booksellers Cert. Amicus Br. 1. After all, if a state seeking to protect minors from harmful sexual content needs only a rational basis to restrict adults' access to protected speech, states might attempt to ban the publication of sexual content more generally—a seemingly rational mechanism to shield minors from sexual content that could harm them. *But see Butler*, 352 U.S. at 383-84. Nor would the implications of affirmance necessarily be limited to sexual content in the eyes of lower courts.

Several states have recently enacted laws requiring social-media websites to perform age verification before allowing access to their platforms. *See, e.g.*, Ark. Code § 4-88-1402; Ga. Code §§ 39-6-2, 3 (effective July 1, 2025). Other states have pursued content-based restrictions on library books or instructional materials under the auspices of protecting minors from purportedly harmful speech more broadly. *See, e.g.*, Iowa Code § 256.11; Tenn. Code § 49-6-1019. Even if the Fifth Circuit's reasoning would not apply directly to such laws, any suggestion that they could be subject to mere rational-basis review would lead down a troubling road. *Cf. Stern v. Marshall*, 564 U.S. 462, 503 (2011) ("Slight encroachments create new boundaries from which legions of power can seek new territory to capture." (citation omitted)).

4. H.B. 1181's Age-Verification Provision Is Also Subject To Strict Scrutiny Because It Embodies Speaker-Based Discrimination

H.B. 1181 is subject to struct scrutiny on a separate ground: it discriminates against particular speakers in ways that suggest the state's disapproval of the content of their speech.

a. "Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Playboy*, 529 U.S. at 812. Such "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.'" *NIFLA*, 585 U.S. at 778 (citation omitted). Unless the challenged law can survive strict scrutiny, the First Amendment "does not permit [the government] to impose special prohibitions on those speakers who

express views on disfavored subjects." *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

H.B. 1181 squarely implicates those concerns. It discriminates based on speaker by targeting the online pornography industry while leaving unregulated identical sexual content on social-media websites, on search engines, and on websites that limit their sexual content to no more than one-third of their total content, Tex. Civ. Prac. & Rem. Code §§ 129B.002, 005. In substance, the legislature has singled out the pornography industry while allowing those outside the industry to purvey the same content without any such restrictions. *See Rokita*, 2024 WL 3228197, at *16 (explaining that materially identical Indiana law "discriminates amongst speakers in the marketplace").

Far from disguising its true design, Texas practically trumpets its censorial intent. *See* Br. in Opp. 1, 4 (boasting of success in limiting the speech of "the pornography industry" and describing petitioners' protected speech as "inexhaustible amounts of [] smut"); Resp. C.A. Br. 1, 23 (describing H.B. 1181's target as "commercial purveyors of online pornography" and castigating petitioners as "Big Porn"). The law's imposition of compelled "health warnings" make this conclusion inescapable, branding, as they do, all petitioners' adult patrons as unwell and needing psychiatric treatment. *See* Tex. Civ. Prac. & Rem. Code § 129B.004 (capitalization altered); p. 8, *supra*.

b. In concluding otherwise, the panel majority stated that H.B. 1181's exemptions of search engines and social media were driven by "a reasonable policy choice to avoid the legal concerns that accompany … regulat[ing] the 'entire universe of cyberspace.'" Pet. App. 25a (citing *Reno*, 521 U.S. at

868). But Texas has shown no compunction about regulating the entities that it left out of this law. *See NetChoice*, 144 S. Ct. at 2408. More fundamentally, exempting social-media websites and search engines cannot explain speaker-based discrimination where, as here, it defeats the law's avowed purpose. As the district court found, H.B. 1181's exemptions allow minors to access, without any restrictions, endless volumes of the same kinds of content that appear on petitioners' sites. Pet. App. 113a-114a. Indeed, "[Texas's] own expert suggests that exposure to online pornography often begins with 'misspelled searches,'" Pet. App. 112a, and "[Texas's] own study … points out[that] pop-up ads, not pornographic websites, are the most common forms of sexual material encountered by adolescents," Pet. App. 131a. Such "differential treatment, unless justified by some special characteristic of the" online pornography industry—which the state has not identified—"suggests that the goal of the regulation is not unrelated to suppression of expression." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

The Fifth Circuit also misread *R.A.V.*, reasoning that the speaker-based "[s]electivity" prohibited by that decision applied to "different sorts of messages, not different mediums." Pet. App. 25a (citation omitted). But *R.A.V.* never cabined its holding in that way, nor did it suggest that different rules would govern a speaker-based restriction on another medium. *See* 505 U.S. at 394. Indeed, this Court has held that an "ink and paper tax" that "singles out the press" cannot stand for that very reason. *Minneapolis Star*, 460 U.S. at 591-92; *see Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979) (invalidating state law that restricted speech in newspapers but not on radio). In any event, the search

engines and social-media platforms that H.B. 1181 exempts are part of the same medium—the Internet—as the websites H.B. 1181 targets. Such a divergent approach to regulating the same medium further evinces speaker-based discrimination, which independently warrants strict scrutiny.

B. Petitioners Are Likely To Succeed On The Merits Of Their Challenge To The Age-Verification Requirement In H.B. 1181

When H.B. 1181's age-verification provision is properly subjected to strict scrutiny, petitioners satisfy the principal requirement for a preliminary injunction because "they are likely to succeed on the merits." *Ashcroft*, 542 U.S. at 666.

1. To survive strict scrutiny, H.B. 1181 must be "narrowly tailored to promote a compelling [g]overnment interest" and employ the least speech-restrictive means of protecting minors. *Playboy*, 529 U.S. at 813; *see Ashcroft*, 542 U.S. at 665-66. As the district court's undisturbed factual findings make clear, Texas cannot come close to satisfying that test. Particularly given this Court's instruction to "uphold the injunction" if "the underlying constitutional question is close," *id.* at 664, Texas has no viable path to meeting its heavy burden at this preliminary stage. Indeed, this is if anything an *a fortiori* case from *Ashcroft*, because H.B. 1181 materially replicates COPA while applying to an even *wider* swath of speech, including *fewer* privacy and security protections, and *exempting* channels through which minors can continue to access the same sexual content.

a. To start, H.B. 1181 is "vastly overinclusive" by design, restricting through its very structure far more

speech than necessary to accomplish its purported aim. *Brown*, 564 U.S. at 804. Because the Act's requirements apply to an *entire* website when any more than *one-third* of the website's content falls within the statutory definition of sexual material harmful to minors, the Act burdens substantial amounts of speech that do not relate to its stated purpose. For example, a website that contains 65% core political speech and 35% sexually suggestive content would be 100% subject to H.B. 1181's restrictions. That is paradigmatic overinclusivity. As the district court aptly described, H.B. 1181 is akin to a restriction on movie theaters requiring them to "catalog all movies that they show, and if at least one-third of those movies are R-rated, … screen everyone at the main entrance for their 18+ identification, regardless of what movie they wanted to see." Pet. App. 111a n.5.

b. At the same time, H.B. 1181 is "wildly underinclusive when judged against its asserted justification," which "is alone enough to defeat it." *Brown*, 564 U.S. at 802. Search engines are explicitly exempted from the Act's age-verification requirement, even though a minor can conduct an image or video search to yield "sexually explicit or pornographic" results "extracted from [adult] websites regardless of age verification." Pet. App. 112a. Likewise, social-media platforms like Reddit "maintain entire communities and forums" devoted "to posting online pornography." Pet. App. 113a. Instagram and Facebook similarly contain "material which is sexually explicit for minors." Pet. App. 113a. And a website containing massive amounts of sexual material obscene as to minors can remain unregulated just by adding twice as much non-sexual material. All of these loopholes allow minors to access the very material

Texas purportedly wants to protect them from—indeed, the "material most likely to serve as a gateway to pornography use." Pet. App. 114a.

Such significant gaps are "not how one addresses a serious social problem," and they render H.B. 1181 no less underinclusive than other laws that this Court has invalidated under the First Amendment. *Brown*, 564 U.S. at 802; *see, e.g.*, *id.* at 805 (striking down a statute barring the sale of violent video games to minors because it excluded other portrayals of similar violence); *Denver Area*, 518 U.S. at 753, 757, 760 (striking down a ban on sexual content "on leased channels" but "not on other channels" because such content was "broadcast over both kinds of channels" and "the record before Congress … provides no convincing explanation" for differential treatment); *Daily Mail*, 443 U.S. at 104-05 (striking down law that prohibited newspaper publication of youthful offenders' names while permitting publication by "electronic media").

c. Finally, like the federal government in *Ashcroft* and *Reno*, Texas fails to show that H.B. 1181 employs the least restrictive means of pursuing its compelling end. *Ashcroft*, 542 U.S. at 666 (citing *Reno*, 521 U.S. at 874). The district court's factual findings make clear that less restrictive and more effective alternatives are readily available, chief among them the modern variant of the content-filtering software that this Court recognized as a less restrictive alternative to the age-verification regime in *Ashcroft*. *Id.* at 666-73; *see* Pet. App. 133a-135a. Content-filtering software is installed "at the receiving end"—*e.g.*, on individual devices such as laptops or smart phones—and prevents those devices from displaying material from selected websites or applications. *Ashcroft*, 542 U.S. at 667; *see* Pet. App.

132a, 134a; J.A. 59. Such software is commonly used by employers and other institutions (likely including federal courts) to limit access to websites deemed inappropriate. *See* J.A. 280.

As explained in *Ashcroft*, content-filtering software is less restrictive of speech than "universal restrictions at the source" such as mandatory age-verification because it can restrict minors' access to inappropriate content while preserving adults' "access to speech they have a right to see without having to identify themselves or provide" sensitive personal information. 542 U.S. at 667. Likewise, content-filtering software empowers parents to control the kinds of material their children are able to view, which by definition provides better tailoring than a blunt governmental mandate. *Id.* at 667-68; *cf. Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 201-02 (2021) (Alito, J., concurring) ("[P]arents, not the State, have the primary authority and duty to raise, educate, and form the character of their children."); *Playboy*, 529 U.S. at 824-25 (emphasizing the goal of providing options for parents in restricting minors' access to sexual content). And content-filtering software is more effective than age verification, which is notoriously "subject to evasion and circumvention"—and which can drive minors to dangerous parts of the dark web that content filters would block. *Ashcroft*, 542 U.S. at 667-68; *see* Int'l Centre for Missing and Exploited Children (ICMEC) Cert. Amicus Br. 3, 14-16.

As the district court found, all those reasons to prefer filtering software ring even truer today. While "[t]he risks of compelled digital verification are just as large, if not greater" than in 2004, filtering software has only improved and "can more precisely screen out sexual content for minors without limiting access to

other speech." Pet. App. 127a, 132a. Moreover, minors have only grown savvier with technology, such as Virtual Private Networks (VPNs), that bypass online age verification with ease. Pet. App. 134a; *see* ICMEC Cert. Amicus Br. 10-13. Yet despite this Court's instruction in *Ashcroft* that governments "undoubtedly may act to encourage the use of filters" or "take steps to promote their development by industry," 542 U.S. at 669, Texas has taken no such steps—or even, as far as the legislative record reflects, considered such less restrictive alternatives, *see* Pet. App. 85a (Higginbotham, J., dissenting); Pet. App. 135a-136a.[6]

2. Texas has suggested that, even if H.B. 1181 fails strict scrutiny, it is nevertheless immune from facial invalidation because it permissibly applies to obscene speech that is constitutionally unprotected for adults. Br. in Opp. 22; *see NetChoice, LLC*, 144 S. Ct. at 2397 (explaining that a First Amendment facial challenge requires showing that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (citation omitted)). But as explained above—and as the state conceded in the Fifth Circuit—Texas separately criminalizes obscenity for adults, so the whole point of

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[6] It would also be less restrictive to pair preinstalled filtering technology on devices with device-level age-verification measures, meaning that the device would block sexually explicit content by default until an adult user verifies his or her age on the device. Pet. App. 128a; *see* ICMEC Cert. Amicus Br. 17-19. Alternatively, Internet service providers could by default block sexually explicit content until adults opt out of the blocking regime. Pet. App. 128a; *cf. Playboy*, 529 U.S. at 823 (noting that a "well-promoted voluntary blocking provision" could be a less restrictive means of preventing minors' access to sexual content); *Denver Area*, 518 U.S. at 759 (similar).

H.B. 1181 is to impose age verification and other burdens on sexual material that is *obscene for minors* but *not for adults*. *See* pp. 25-26, *supra*. H.B. 1181 is thus no more immune to a facial challenge than the similarly structured laws in *Reno* and *Ashcroft*, both of which were challenged facially and subject to preliminary injunctions that this Court affirmed. *See Reno*, 521 U.S. at 883, 885; *Ashcroft*, 542 U.S. at 664, 672.

Nor is H.B. 1181 susceptible to the analysis that led the Court in *NetChoice* to question the facial challenges at issue. There, the Court remanded for the lower courts to "ask[], as to every covered platform or function, whether there is an intrusion on protected editorial discretion." 144 S. Ct. at 2398. The Court added that "it is not hard to see how the answers might differ" depending on the nature of the platform. *Id.* No such reasoning applies here, because there are no distinctions among covered websites that entitle some to greater constitutional protection than others. "It is the structure of the law, and not its application to any particular [website], that renders it unconstitutional." Pet. App. 122a n.10; *see Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 618 (2021) (similarly finding that a law that exhibits *categorically* improper tailoring is facially invalid under the First Amendment). If anything, Texas's defense of H.B. 1181 *focuses* on its application to these challengers, which comprise the targeted industry; upon advancing to *other* applications, Texas's defense becomes that much *weaker* and the likely unconstitutionality that much *clearer*. In other words, the basis for facial unconstitutionality follows *a fortiori* from the success of an as-applied challenge here. *See* Order Den. Mot. for Stay Pending Appeal at 4-13, *Free Speech Coal. v. Rokita*, No. 1:24-cv-00980-RLY-

MG (S.D. Ind. July 25, 2024), ECF No. 50 (rejecting a similar *NetChoice*-based facial challenge argument).

C. Petitioners Satisfy The Remaining Preliminary Injunction Factors

Beyond likelihood of success on the merits, petitioners satisfy the other requirements for a preliminary injunction. They are "likely to suffer irreparable harm in the absence of preliminary relief" and "the balance of equities" and "the public interest" weigh heavily in their favor. *Winter*, 555 U.S. at 20.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). With Texas actively filing enforcement actions under H.B. 1181's age-verification provision, the chill inflicted on petitioners' protected speech is ongoing and palpable—thus supplying a paradigmatic basis for a preliminary injunction.

Petitioners also face the additional irreparable harm of bearing the unrecoverable costs of complying with an unconstitutional law. Indeed, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring). Given Texas's sovereign immunity from claims for money damages, *see* Pet. App. 157a, petitioners face mounting financial burdens of complying with the law (either by implementing costly measures or by abandoning operations) if the preliminary injunction is not restored.

As for the equities, they merge with the public interest, *see Nken v. Holder*, 556 U.S. 418, 435 (2009), and strongly favor petitioners. States have no interest

in enforcing unconstitutional laws, particularly laws that are as ineffective and ill-suited to their avowed purpose as H.B. 1181 is. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest.").

Finally, as in *Ashcroft*, restoring the preliminary injunction will not end this case. *See* 542 U.S. at 672-73. To the extent a factual dispute remains as to H.B. 1181's tailoring and the least restrictive means, both sides may benefit from a more fulsome factual record. *See* Pet. App. 85a (Higginbotham, J., dissenting). In this respect, too, proper resolution of this case follows from *Reno* and *Ashcroft*, which affirmed preliminary injunctions of like laws while "allow[ing] the parties to update and supplement the factual record to reflect current technological realities." *Ashcroft*, 542 U.S. at 672.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 16, 2024

APPENDIX

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

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

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

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

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

(4) "News-gathering organization" includes:

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

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

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

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

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

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

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

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

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

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

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

Sec. 129B.002. PUBLICATION OF MATERIAL HARMFUL TO MINORS.

(a) A commercial entity that knowingly and intentionally publishes or distributes material on an

Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 129B.003 to verify that an individual attempting to access the material is 18 years of age or older.

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

Sec. 129B.003. REASONABLE AGE VERIFICATION METHODS.

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

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

Sec. 129B.003. REASONABLE AGE VERIFICATION METHODS.

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

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

(1) provide digital identification; or

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

(A) government-issued identification; or

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

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

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

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

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

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

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

"U.S. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION HELPLINE:

1-800-662-HELP (4357)

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

Sec. 129B.005. APPLICABILITY OF CHAPTER.

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

(b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider may not be held to have violated this chapter solely for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network not under that provider's control, including transmission,

downloading, intermediate storage, access software, or other services to the extent the provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors.

Sec. 129B.006. CIVIL PENALTY; INJUNCTION.

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

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

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

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

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

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

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

(2) the history of previous violations;

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

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

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

(6) any other matter that justice may require.

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

SECTION 2. This Act takes effect September 1, 2023.