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

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES, REGULATIONS, & CODES

RULES

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates nationwide on behalf of Americans' most fundamental constitutional rights. Among these is the right to free speech protected by the First Amendment.

Although much of the briefing in this case has naturally focused on this Court's precedent about the First Amendment protection for sexually explicit material, *Amicus* is concerned that the ruling below is rooted in a more fundamental misunderstanding of this Court's First Amendment doctrine. As explained in more detail in this brief, that misunderstanding stems from the Fifth Circuit's apparent belief that the appropriate standard of review turns on the government interest underlying Texas's age-verification law.

This type of error—selecting the standard of review based on the government's professed motive rather than by examining the actual conduct subject to regulation under the law—is a growing problem in lower federal courts and affects speakers of all sorts. *Amicus* thus believes that this case provides an opportunity for this Court to reaffirm important First Amendment precedent holding that the government's benign or even laudable motive does not insulate laws from strict scrutiny when those laws are triggered by protected speech of a particular content.

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[1] No counsel for a party authored this amicus brief in whole or in part. No person other than *Amicus* has made any monetary contributions intended to fund the preparation or submission of this brief. See Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

Reading the opinion below, one gets the impression that the Petitioners and the Fifth Circuit are, in some sense, talking past one another.

As framed by Petitioners, the question here is "[w]hether 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." Pet'rs' Br. at i.

In the Fifth Circuit's view, this burden on adults' access to protected speech is no different from the burden adults faced following this Court's ruling in *Ginsberg v. New York*, 390 U.S. 629 (1968), which applied rational-basis scrutiny to a New York law prohibiting the sale of "girlie magazines" to minors. After all, the court reasoned, under New York's law, "adults would presumably have to identify themselves to buy girlie magazines." Pet. App. 23a. If the state's interest in protecting minors is the same in both cases, and the burden on adults seeking access to the material is similar in both cases, why should the outcome be different?

Yet even if one granted the Fifth Circuit's assumption that the burdens adult *consumers* faced following *Ginsberg* were similar to those Texas's law imposes here—an assumption whose dubiousness is apparent to any adult who has reached an age at which bartenders no longer request to see their ID—there is another, more obvious difference between the two cases. That difference relates not to the burdens Texas's law

imposes on *consumers* of adult material, but to the burdens it imposes on the groups directly regulated under Texas's age-verification law: The publishers of adult material who will be liable if they violate the law. And because the Fifth Circuit largely ignored the publishers whom the government directly regulates, it failed to consider perhaps the most fundamental questions in any First Amendment case: What are these publishers doing that makes them subject to the challenged law and is that activity protected by the First Amendment?

Had the Fifth Circuit asked those questions, the difference between this case and *Ginsberg* would have been immediately clear. In *Ginsberg*, retailers were subject to New York's law if they sold sexually explicit material to minors—conduct that is not protected by the First Amendment. In this case, publishers are subject to Texas's law if they merely publish sexually explicit material that would be harmful *if* consumed by minors. But the publishing of non-obscene sexually explicit material *is* protected by the First Amendment, even if distributing that material to minors is not, and Texas has singled out the publication of this content for disfavored treatment. Thus, Texas's law is subject to strict scrutiny regardless of the government's motive and regardless of whether the ultimate burden on consumers is similar to the burden they would face if Texas's law regulated only unprotected speech or conduct.

Unfortunately, the Fifth Circuit's error is not an isolated one. Despite the pains this Court has taken in recent years to clarify the standards for distinguishing between laws that do or do not regulate protected speech based on its protected content, lower

federal courts routinely ignore those standards and, like the Fifth Circuit below, select the standard of scrutiny based on the government's supposed regulatory motive. This case thus provides an important opportunity for this Court to correct that dangerous trend.

ARGUMENT

In Section I, *Amicus* will explain why this Court's precedent establishes that laws triggered by the publication of fully protected speech of a particular content are subject to strict scrutiny. In Section II, *Amicus* will explain why the Fifth Circuit's and other circuits' government-interest-based approach to determining standard of review conflicts with this Court's precedent and threatens a wide array of speech far afield from the sexually explicit material at issue here.

I. Texas's Law Is Subject to Strict Scrutiny Regardless of Its Burden on Adult Access Because It Is Triggered by the Act of Publishing Speech with a Particular Content.

Nobody seriously disputes that Texas's law is content-based. On its face, Texas H.B. 1181 identifies a class of regulated speakers based on the material they publish. Any commercial entity that "knowingly and intentionally publishes or distributes material on an Internet website . . . more than one-third of which is sexual material harmful to minors" must verify the age of people accessing this material. Tex. Civ. Prac. & Rem. Code § 129B.002(a). Those who publish this material and fail to use "reasonable age verification methods" are subject to civil penalties. *Id.* § 129B.006.

The Fifth Circuit below confronted the problem of whether those facial content distinctions implicate the full protection of the First Amendment or some lower level of protection. Ordinarily, this would be an easy question. This Court's ruling in *Reed v. Town of Gilbert* confirms that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." 576 U.S. 155, 165 (2015) (cleaned up).

Yet the Fifth Circuit did not apply strict scrutiny. Instead, relying on this Court's ruling in *Ginsberg v. New York*, 390 U.S. 629 (1968), the Fifth Circuit held that Texas's law was to be reviewed with only rational-basis scrutiny. That is because, in the Fifth Circuit's view, H.B. 1181 was "restricted to material obscene *for minors*," and *Ginsberg* held "that regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review." Pet. App. 10a (emphasis in original).

In reaching this conclusion, the Fifth Circuit fell into a classic trap: It substituted the *government interest* behind Texas's law for the actual regulatory scope of that law. But as this Court has made clear, that is not how First Amendment analysis works. Rather than deciding the appropriate standard of scrutiny based on what the government wishes to achieve, this Court's precedents show that the first and most important questions to ask are: What are these publishers doing that makes them subject to the challenged law and is that activity protected by the First Amendment?

This Court's ruling in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), is particularly instructive. There, this Court confronted a similar dispute over the appropriate standard of review to apply in a First Amendment challenge to a federal law that prohibits the provision of "material support" to certain designated foreign terrorist groups. That law defined "material support" to include both the obvious things one might think of—things like currency, weapons, and explosives, 18 U.S.C. § 2339A(b)(1)—but also "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or other specialized knowledge." 561 U.S. at 12–13.

The parties in *Humanitarian Law Project* all agreed that "the Government's interest in combating terrorism [was] an urgent objective of the highest order." *Id.* at 28. The dispute between the parties was whether that prohibition could constitutionally be applied to "material support . . . in the form of speech." *Id.* The plaintiffs argued that, as applied to training and expert advice, the material-support prohibition was a content-based burden on speech subject to strict scrutiny. *Id.* at 24–39. The government, in contrast, argued that providing "material support" to terrorist groups—whether or not in the form of speech—was mere conduct and thus subject to a lower standard of review. *Id.* at 26–27.

This Court rejected the government's argument, holding that, as applied to the plaintiffs, the material-support prohibition was a content-based burden on speech subject to strict scrutiny. And in doing so, this

Court clarified that the determinative question was not the government's interest but what activity "trigger[ed] coverage under the statute." *Id.* at 28. Because the "conduct" the plaintiffs wished to engage in consisted of "communicating a message," the government's prohibition of that conduct had to be analyzed as a content-based restriction on speech. *Id.* at 27–28.

The same reasoning should apply in this case. Just as in *Humanitarian Law Project*, no one disputes that protecting minors from harmful online content is an important government interest. But the importance of that interest is a part of First Amendment analysis, not a substitute for it. One must first ask, as in *Humanitarian Law Project*, what "conduct" triggers application of Texas's law.

Here, Texas's law is triggered by the mere act of publishing or distributing sexual material that would be harmful to minors if viewed by them. Publishing or distributing non-obscene sexual material, in general, is fully protected by the First Amendment. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002). Such material is fully protected even if it would be harmful if viewed by minors. *See Butler v. Michigan*, 352 U.S. 380, 382–83 (1957) (reversing conviction of bookseller convicted of selling to a police officer "a book that the trial judge found to have a potentially deleterious influence upon youth"). Publication or distribution of sexual material loses protection only when that publication or distribution is made *to minors*.

That fact distinguishes this case from *Ginsberg*. Unlike here, New York's law was not triggered by the mere act of selling "girlie magazines." *Ginsberg*, 390

U.S. at 634–35 (observing that New York's law "does not bar the appellant from stocking the magazines and selling them to persons 17 years of age or older"). Rather, it was triggered by the act of selling those magazines "to minors under 17 years of age." *Id.* at 631. In other words, New York's law was triggered by activity not generally protected by the First Amendment.

Texas, however, took a different tack. Though it could have enacted a law that, like the law in *Ginsberg*, was triggered by the unprotected act of distributing sexual material to minors, Texas instead decided that approach was impractical and chose to regulate the protected act of publishing sexual material.[2]

Texas was, of course, free to make that judgment, but it is a judgment that comes with a price: To sustain its law, Texas must show that it satisfies the appropriate level of First Amendment scrutiny. And because Texas's law is triggered by publishing fully protected speech of particular content, Texas needed to show that its law is likely to satisfy strict scrutiny. *See Gonzales v. O Centro Espirita Benficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (holding that "the

[2] This is not to say that all laws triggered by the distribution of sexual content to minors would escape First Amendment scrutiny. In a variety of contexts, this Court has held that even laws targeted exclusively at unprotected speech must include safeguards to avoid chilling protected speech. *See, e.g.*, *Counterman v. Colorado*, 600 U.S. 66, 75–78 (2023) (discussing how *mens rea* requirements fulfill this purpose in cases involving unprotected categories of speech including defamation, incitement, true threats, and obscenity). But this Court need not address such questions here, where Texas has chosen to directly regulate fully protected speech.

burdens at the preliminary injunction stage track the burdens at trial").

The district court, in a carefully reasoned opinion, held that Texas had not met this burden. Pet. App. 107a–136a. The Fifth Circuit reversed, not because it disagreed with the district court's assessment, but because it believed that Texas's interest in protecting minors exempted the age-verification law from this scrutiny. That was error and this Court should reverse.

II. The Fifth Circuit's Government-Interest-Based Approach to Determining Standard of Scrutiny Would Endanger a Vast Array of Protected Speech.

This Court should repudiate the Fifth Circuit's approach to determining standard of scrutiny. Not only does that approach conflict with this Court's binding precedents, it also threatens a wide variety of non-pornographic speech and reintroduces confusion that plagued lower courts for decades before this Court brought clarity to the law.

Indeed, the Fifth Circuit's analysis resembles nothing so much as the flawed reasoning that predominated in lower courts following this Court's ruling in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). For 25 years, lower courts seized on that ruling to conclude that speech restrictions may escape strict scrutiny, even if they facially distinguish regulated speech based on its content, as long as those distinctions can be "*justified* without reference to the content of the regulated speech." *Reed*, 576 U.S. at 165 (emphasis added). The result was that laws

drawing obvious content-based distinctions often escaped First Amendment scrutiny.

This Court's ruling in *Reed* was intended to cut through this confusion and to reaffirm that all laws that draw facial content distinctions are content based—and thus subject to strict scrutiny—"regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* "[A] clear and firm rule governing content neutrality," this Court held, "is an essential means of protecting the freedom of speech, even if laws that might seem entirely reasonable will sometimes be struck down because of their content-based nature." *Id.* at 171 (cleaned up).

Members of this Court have cogently warned about the danger of retreating from *Reed*'s "bright-line rule for content-based restrictions." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 91 (2022) (Thomas, J., dissenting). And with good reason: It is easy for the government to come up with noncensorious reasons for burdening protected expression. *Cf. Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1308 (11th Cir. 2017) (citing Prof. Rodney Smolla's observation that "[n]o law abridging freedom of speech is ever promoted as a law abridging freedom of speech"). Indeed, it is the rare First Amendment case where the government loses because it fails to identify a sufficiently important interest. Much more often, the government loses because it fails to show that its law is the most narrowly tailored way to advance that interest.

The Fifth Circuit's approach below relieves the government of the need to show narrow tailoring

whenever the government alleges that it is regulating protected speech in service of reducing unprotected speech. That is even more dangerous than the approach to content-neutrality that was so widespread before this Court's ruling in *Reed*. In those pre-*Reed* cases, determining whether a law was content-based or content-neutral decided what *level* of First Amendment scrutiny applied, either strict or intermediate. The Fifth Circuit's approach, by contrast, allows the direct regulation of fully protected speech with no First Amendment scrutiny at all. If that ruling is allowed to stand, other courts might similarly allow the regulation of truthful statements to reduce defamatory falsehoods, or political advocacy to reduce criminal incitement.

This case is thus an important opportunity to remind lower courts that cases like *Humanitarian Law Project* and *Reed* meant what they said: Laws that are triggered by speech with a particular protected content are content-based and must be reviewed with strict scrutiny.

CONCLUSION

This Court should reverse the ruling below.

Respectfully submitted,

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