

No. 23-1122

IN THE
Supreme Court of the United States

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

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF INTERNET LAW PROFESSORS
ZACHARY CATANZARO, ERIC GOLDMAN,
ROBERT HEVERLY, JANE KIRTLEY, MARK
LEMLEY, DAVID LEVINE, YVETTE JOY
LIEBESMAN AND JESS MIERS AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

RONAN P. DOHERTY

Counsel of Record

AMBER D. GREENAWAY

BONDURANT MIXSON & ELMORE, LLP

1201 West Peachtree Street, NW

Suite 3900

Atlanta, GA 30309

(404) 881-4100

doherty@bmelaw.com

Counsel for Amici Curiae

117119



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INTEREST OF AMICI CURIAE¹

The amici signatories are enumerated in the Appendix. Amici are professors of Internet law at universities throughout the United States. We have no personal stake in the outcome of this case, but as experts in Internet law and speech, amici have a strong intellectual interest in seeing that Internet law develops in ways that promote the interests of readers, publishers, and society generally, including the facilitation of constitutionally protected speech online.

INTRODUCTION AND SUMMARY OF ARGUMENT

Texas law H.B. 1181 requires websites that distribute adult content to implement age verification methods if the adult content comprises one-third of the site. In upholding this law, the Fifth Circuit concluded that these online age verification requirements were not categorically different and did not create more privacy concerns than the in-person age verification at issue in *Ginsberg v. State of New York*, 390 U.S. 629 (1968). *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 271 (5th Cir. 2024).²

1. Under Rule 37.6 of the Rules of this Court, amici states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No other person than amici or its counsel made a monetary contribution to its preparation or submission.

2. To be clear, the law at issue in *Ginsberg* did not mandate in-person age verification. Rather, the law gave “the defendant a defense of ‘honest mistake’ as to the age of the minor” if the defendant “proves that he made a ‘reasonable bona fide attempt

Amici write to explain why the Fifth Circuit’s analogy to *Ginsberg* is erroneous. Online age verification requirements like H.B. 1181 are more problematic than offline processes (like those at issue in *Ginsberg*) in at least three critical ways.

First, H.B. 1181 imposes a pre-transaction access barrier that is not present offline. Offline retailers, like bookstores or gas stations, typically verify age only at the end of a consumer’s visit, when the consumer has made the decision to purchase a restricted item like adult materials, alcohol, or cigarettes. In contrast, H.B. 1181 requires an online publisher to verify every reader before they enter the virtual premises, even if the reader has no intention to access a restricted item.

Imposing access barriers so early in the visitor’s experience will significantly disrupt readers’ ordinary everyday Internet usage and dramatically change how readers navigate the Internet. Studies show that readers view age verification screens as inconvenient and not worth the hassle to access the desired content. Thus, many readers rationally decide not to expend such effort, especially when they aren’t seeking to access restricted content or aren’t sure of the value of the content behind the verification screen. In this way, the online access

to ascertain the true age” of the minor at the time of the sale. *Ginsberg v. State of New York*, 390 U.S. 629, 644–45 (1968). So contrary to the Fifth Circuit’s implication, *Ginsberg* did not involve compelled age verification. But to avoid liability, retailers would feel compelled to age-verify any consumers who were not clearly adults or minors. And even assuming *Ginsberg* compelled age verification (it did not), as explained below, the Fifth Circuit’s conclusion is factually incorrect.

barriers prevent readers from accessing constitutionally protected material.

In the offline world, however, consumers can enter a retailer's premises, peruse their items, and assess the value of any restricted items to determine whether the item is worth overcoming the inconvenience of offline age verification. So unlike the law at issue in *Ginsberg*, H.B. 1181 necessarily creates barriers to online access that many readers are simply unwilling to overcome.

Second, H.B. 1181 negatively impacts online publishers' profitability significantly more than the in-person verification at issue in *Ginsberg*. An offline retailer who verifies a consumer's age at the point of purchase only has to verify the subset of buyers that purchase restricted items, not all shoppers. As a result, the retailer is unlikely to incur additional costs to conduct these age verifications because existing workers can simply add verification to the checkout process when required.

Conducting age verification to comply with H.B. 1181, however, is substantially more costly. Regulated publishers must either build, buy, or outsource the verification method and hire various vendors/employees to maintain and monitor the process. Courts have already recognized the significant costs associated with verifying users—with estimates indicating millions of dollars in costs per month. *See, e.g., Free Speech Coalition, Inc. v. Rokita*, No. 1:24-cv-00980, 2024 WL 3228197 (S.D. Ind. June 28, 2024).

Combined with the lost revenues from readers who refuse to verify their ages to access a publisher's

site, the age verification requirement also penalizes publishers for their constitutionally protected materials. This in turn, would cause many regulated publishers—especially smaller publishers or publishers whose sites only contain a small percentage of restricted content but must still incur the costs of verifying everyone—to exit the digital marketplace altogether, thereby making less constitutionally protected speech available to readers.

Third, unlike the offline world where verifications can be done manually, all online age verifications will be conducted using technology, which introduces significant privacy and security risks to readers that will ultimately dissuade many adults from accessing constitutionally protected material.

H.B. 1181 contemplates two primary methods of age verification: document review or face scans,³ both of which require readers to disclose—and the verifier to collect—highly sensitive personal information. This information will attract malefactors seeking to steal the data for improper purposes like identity theft, extortion, and financial fraud. In contrast, offline retailers may visually inspect consumers or their documents to verify age without collecting or storing any private information.

3. As the district court noted, “it is not clear that ‘transactional’ data includes biometric verification.” *Free Speech Coalition, Inc. v. Colmenero*, 689 F. Supp. 3d 373, 401 (W.D. Tex. 2023). This brief assumes face scans are an available verification option. If the only realistic verification option is document review, the barriers to access and penalties imposed on publishers will be even more extreme.

In recognition of this risk, H.B. 1181 requires verifiers to promptly delete the highly sensitive information generated by the age verification process. But as a practical matter, that data will not always be deleted. For example, if challenged, services will need to show the accuracy of their authentications and retain records evidencing this. There may be other legal obligations that require data retention, such as litigation holds and mandatory record retention laws. Other verifiers may inadvertently retain user data due to oversight. Some verifiers will intentionally (but illegally) retain the data because violations are hard to detect. And as part of the verification process, others may ask for express consent to retain and share the data for research purposes.

Nor does the bill's deletion obligation guard against malefactors seeking to intercept the data in real-time by exploiting vulnerabilities in the verification process. For example, smaller verifiers who may not have the resources to incorporate robust data protection security would be ideal targets for data hacking and mining. Scammers may build bogus verification services for the sole purpose of collecting and expropriating data. These risks associated with the potential storage and interception of age verification data do not accompany offline age verification methods.

In sum, compared to offline verifications, compelled online verification significantly burdens both the reader and verifier, and poses an increased risk to a reader's privacy and security. As such, H.B. 1181's age verification requirements are more pernicious to constitutionally protected speech than the in-person procedures at issue in *Ginsberg* and should be subject to more rigorous scrutiny.

ARGUMENT

Texas law H.B. 1181 requires websites to determine their readers' ages if one-third or more of their content databases consist of sexual material. Tex. Civ. Prac. & Rem. Code § 129B.002. These websites must use reasonable age verification methods, which can be outsourced to a third party, to confirm that a visitor attempting to access the website is at least 18 years old. *Id.* Options for age verification include: (1) government-issued identification, (2) facial appearance recognition, or (3) some other available public or private transactional data to infer the user's age. *Id.* § 129B.003.

In upholding this provision, the Fifth Circuit concluded that these age verification requirements are not “categorically different” and “have no more impact on privacy than [the] in-person age verification à la *Ginsberg*.” *Free Speech Coalition v. Paxton*, 95 F.4th 263, 270–71 (5th Cir. 2024).

The Fifth Circuit's conclusion is erroneous. Compared to offline verifications, compelled online verification significantly burdens both the reader and publisher, and poses an increased risk to a reader's privacy and security. These adverse consequences demonstrate why H.B. 1181's age verification requirements should be evaluated using more rigorous constitutional scrutiny than the Supreme Court used in *Ginsberg*.

I. ONLINE AGE VERIFICATION METHODS ARE MORE PROBLEMATIC FOR READERS AND ONLINE PUBLISHERS THAN OFFLINE METHODS.

Age verification regularly takes place offline. For example, retailers must verify the ages of buyers that purchase certain restricted items, like cigarettes and alcohol. Despite this offline prevalence, online age verification differs from the offline processes in at least three critical ways.

1. Pre-Transaction Access Barriers Burden Readers.

First, H.B. 1181 creates a pre-transaction access barrier that is not present offline. Offline retailers typically conduct age verification only at the end of a consumer's visit, when they are ready to transact for a restricted item. For example, consumers of all ages can freely enter a gas station, but they will have to verify their ages if they try to purchase a restricted item like alcohol or cigarettes.

In contrast, H.B. 1181's age verification requirement will force online publishers to verify every reader before they can enter the publisher's (virtual) premises, regardless of whether the reader will view a restricted item.⁴ This would be like a bookstore (which might sell a mix of age-restricted and unrestricted items) being compelled to verify every reader's age at the door before they could enter the store, regardless of the readers'

4. See *Rokita*, 2024 WL 3228197.

reasons for going to the bookstore. Or a movie theater “screen[ing] everyone at the main entrance for their 18+ identification, regardless of what movie they wanted to see.”⁵ When the age verification requirement takes place before readers can enter the premises, as opposed to when they are ready to transact, it creates a more significant access barrier than the law in *Ginsberg*.⁶

Compared to the offline verification procedures in *Ginsberg*, H.B. 1181 will significantly disrupt readers’ ordinary every-day Internet usage and dramatically change how readers browse the Internet. Today, Internet users already must navigate a barrage of intrusive cookie- and privacy-related disclosures when they access an Internet service for the first time—a fact that routinely annoys readers.⁷ However, readers typically can ignore or bypass the cookie- and privacy-related disclosures and continue towards their goals.⁸

5. See *Free Speech Coalition, Inc. v. Colmenero*, 689 F. Supp. 3d 373, 392 n.5 (W.D. Tex. 2023), *rev’d Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263 (5th Cir. Mar. 7, 2024), *cert. granted*, 2024 WL 3259690 (July 2, 2024).

6. *Id.*

7. *E.g.* Nurullah Demir et al, *A Large-Scale Study of Cookie Banner Interaction Tools and Their Impact on Users’ Privacy*, Proceedings on Privacy Enhancing Technologies 1–16 (2024), <https://petsymposium.org/popets/2024/popets-2024-0002.pdf>; Oksana Kulyk et al, *Has the GDPR Hype Affected Users’ Reaction to Cookie Disclaimers?*, 6 J. CYBERSECURITY (2020), <https://academic.oup.com/cybersecurity/article/6/1/tyaa022/6046452>.

8. Consumers eventually ignore these disclosures altogether. See Joe Nocera, *How Cookie Banners Backfired*, N.Y. TIMES (Jan. 29, 2022), <https://www.nytimes.com/2022/01/29/business/dealbook/how-cookie-banners-backfired.html>.

H.B. 1181's age verification requirement will be significantly more intrusive than those current disclosures because readers will have to age-verify before they can proceed to the publisher's site. This access barrier forces readers to spend time and mental energy deciding whether to verify their ages. And successfully completing the age verification process will consume even more time and mental energy. Readers may rationally decide not to spend their time and mental energy that way, especially when the reader cannot easily assess the value of the content behind the verification screen.

In the offline world, some retailers, such as clubs and dispensaries, may age-verify all customers before they enter the premises. Pre-transaction age verification may be the retailer's choice, and the law permits retailers to make that choice. And even where it's not the retailer's choice, age verification requirements are less likely to deter consumers' entry because the consumer has already determined they want or need the items behind the age verification barrier. Furthermore, mandatory pre-transaction age verification for offline retailers of restricted consumables like alcohol or drugs don't have meaningful consequences on the availability of constitutionally protected speech.

In the online world, however, readers routinely visit dozens of websites a day, often not sure whether they will be interested in the content available at those sites. Ordinarily, a reader can casually browse these sites without significant hassle. If, however, these sites must age-verify all its visitors before they can access the content, readers will be significantly more aggravated and discouraged than they are with current cookie and

privacy disclosures. This is especially true if the reader is seeking to access only unrestricted content on a regulated publisher's website. Knowledge that an onerous age verification barrier separates them from the content will reduce readers' willingness to visit new publishers and obtain constitutionally protected speech.

Interstitial Screens Increase Bounce Rates

H.B. 1181's mandatory age verification methods will require publishers to display at least one interstitial screen to every visitor, i.e. a web display that prevents readers from accessing the publisher's website until the verification is complete. Interstitial screens are widely viewed by readers as too inconvenient and not worth the hassle to access content. When readers encounter interstitial screens before reaching their online destination, some turn around and leave. The percentage of visitors who enter a site and then leave, rather than continuing to view other pages within the same site, is called the "bounce rate."⁹

Internet readers place a high premium on the ability to access content quickly and easily. As a result, studies have shown that interstitial barriers can lead to increased bounce rates. For example, Google+'s decision to implement an interstitial screen to promote its mobile

9. Some readers bounce back to a prior starting point, like a search results page, and click on an alternative link hoping for a better result. The search engine optimization (SEO) community calls that process "pogo sticking." Other readers abandon their quest out of frustration.

app before readers could access the service on a mobile device caused a 69% bounce rate.¹⁰

Readers respond negatively to anything that slows down or disrupts their website access. The speed of a service’s response time to display content is called “latency,” and bounce rates correlate to latency. “Research shows that sites lose up to 10% of potential visitors for every additional second a site takes to load, and that 53% of visitors will simply navigate away from a page that takes longer than three seconds to load.”¹¹ Another study showed that a latency increase from one to three seconds increased the bounce probability by 32%, and an increase from one to five seconds increased the bounce probability by 90%.¹²

Every age verification process necessarily adds some delay to a reader’s access to their desired content. And even a few seconds delay will increase bounce rates. One article indicates that first-time users of an age verification vendor called Yoti must navigate 52 different steps to complete the verification, a process that took a reporter

10. See David Morell, *Google+: A Case Study on App Download Interstitials*, GOOGLE SEARCH CENTRAL BLOG (July 23, 2015), <https://developers.google.com/search/blog/2015/07/google-case-study-on-app-download-interstitials>.

11. *Will Co. v. Lee*, 47 F.4th 917, 924-25 (9th Cir. 2022) (footnote omitted).

12. Daniel An, *Find Out How You Stack Up to New Industry Benchmarks for Mobile Page Speed*, THINK WITH GOOGLE (Feb. 2018), <https://www.thinkwithgoogle.com/marketing-strategies/app-and-mobile/mobile-page-speed-new-industry-benchmarks/>.

over five minutes to complete.¹³ In the online world, five minutes is an eternity that will undoubtedly increase bounce rates by a significant margin. As one case noted, “the imposition of age verification requirements will reduce traffic to impacted websites by approximately 80%.”¹⁴ And with respect to one pornography website, “over 99% of users subjected to a verification requirement did not verify their age.”¹⁵

In short, H.B. 1181 necessarily creates barriers that were not raised by the law at issue in *Ginsberg*. Only consumers ready to purchase restricted items required age verification in *Ginsberg*. Other consumers who weren’t buying restricted items could browse the retailer and transact without ever navigating the age verification barrier—a luxury that online readers will no longer enjoy due to H.B. 1181. Furthermore, the incremental additional delay due to offline age verification was relatively minor in comparison to the other steps required to complete the purchase (which includes queuing in line, paying, and

13. See Samantha Cole, *Accessing Porn In Utah Is Now a Complicated Process That Requires a Picture of Your Face*, MOTHERBOARD (May 3, 2023), <https://www.vice.com/en/article/z3mnqx/utah-age-verification-pornhub-xhamster-laws>.

14. *Rokita*, 2024 WL 3228197 n.16; see also *NetChoice LLC v. Griffin*, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023) (“many adults who otherwise would be interested in becoming account holders on regulated social media platforms will be deterred—and their speech chilled—as a result of the age-verification requirements”).

15. David Cooke & Sarah Bain, *Brief Submitted to Standing Committee on Public Safety and National Security*, AYLO & ETHICAL CAPITAL PARTNERS (Apr. 18, 2024), <https://www.ourcommons.ca/Content/Committee/441/SECU/Brief/BR13047484/br-external/Jointly2-e.pdf>.

bagging the item). As a result, the more onerous online barriers will deter readers from accessing constitutionally protected materials.

2. Online Age Verification Increases Online Publishers' Costs and Reduces Revenues Compared to Offline Age Verification.

Compared to the law at issue in *Ginsberg*, H.B. 1181's age verification requirements would result in increased costs and lost revenue for online publishers that would ultimately reduce the availability of constitutionally protected speech.

Verification Costs

Online age verification services are costly to implement. The regulated publishers must build, buy, or outsource a verification solution (including any necessary hardware and software) and must incur further costs to integrate the solution into their website. The regulated publishers must also incur ongoing costs to verify their readers, including constant diversion of employee time or paying an outside vendor. Indeed, one estimate indicates that authenticating 5 million readers per month "can cost upward of \$7 million."¹⁶ Costs per user would be even more expensive depending on the volume that certain adult-websites see. As one district court noted, "Pornhub

16. *Rokita*, 2024 WL 3228197 at *1.

Other estimates further illustrate the point. "Plaintiffs' complaint includes several commercial verification services, showing that they cost, at minimum, \$40,000.00 per 100,000 verifications." *Colmenero*, 689 F. Supp. 3d 373 at 385-86.

receives 115 million visits per day, which would cost \$13.8 million a day to verify at 12 cents a user.”¹⁷

For publishers that only incidentally cater to minors, these verification costs will hit particularly hard. For example, even if minors comprise one percent of a service’s audience, that service will still need to incur the costs required to age-verify the other ninety-nine percent who are adults.

Lost Revenues

As discussed above, interstitial screens create higher latency and higher bounce rates. Beyond annoying and deterring readers, those higher rates also cause a reduction in traffic amongst online publishers’ sites. Reduced traffic means reduced profits. For example, “Amazon recently found that every 100 milliseconds of latency cost it 1% in sales.”¹⁸ Another study showed that a “site that loads in one second enjoys an e-commerce conversion rate that is 2.5x higher than a site that loads in 5 seconds.”¹⁹ In other words, latency inversely correlates to profitability. Lower latency means increased revenue-making opportunities. The age verification barriers created by H.B. 1181, however, will cause analogous degradations in conversion rates, sales, and other revenue-generating activities.

17. *Rokita*, 2024 WL 3228197, at *1 n.4.

18. *Will Co.*, 47 F.4th at 925.

19. Michael Wiegand, *Site Speed Is (Still) Impacting Your Conversion Rate*, PORTENT (Apr. 20, 2022), <https://www.portent.com/blog/analytics/research-site-speed-hurting-everyones-revenue.htm>.

In sum, H.B. 1181’s economic impact on regulated publishers ultimately suppresses the availability of constitutionally protected speech by discouraging new entrants to the market²⁰ and causing existing entities to exit the market. Indeed, leading pornography service Pornhub keeps withdrawing its offerings from states that impose age verification obligations.²¹ If subject to H.B. 1181, many more publishers are sure to follow.

Differences from the Offline World

Unlike H.B. 1181, the verification costs at issue in *Ginsberg* were far less impactful on speech. As discussed above, an offline retailer who verifies a consumer’s age at the point of purchase only verifies buyers—not all shoppers—and only those buyers purchasing restricted items. Because a smaller percentage of consumers needed verification, the verification costs imposed by *Ginsberg* were lower and didn’t significantly impact profitability. The delayed verifications also reduced the risk of losing revenues from consumers who never needed verification.

20. *More Than Just a Number: How Determining User Age Impacts Startups*, ENGINE (Feb. 2024), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/65d51f0b0d4f007b71fe2ba6/1708465932202/Engine+Report+-+More+Than+Just+A+Number.pdf> (“The direct and indirect costs of determining user age . . . will make it harder for startups to compete”).

21. Anna Washenko, *Pornhub to Leave Five More States over Age-Verification Laws*, ENGADGET (June 19, 2024), <https://engadget.com/pornhub-to-leave-five-more-states-over-age-verification-laws-194906657.html>.

Furthermore, an offline retailer is unlikely to incur any significant marginal costs due to the verification. While in-person age verification would require some additional labor and time to conduct, it can be integrated with the existing checkout processes. As such, a retailer would likely not need to hire additional workers or pay third-party vendors out of pocket to absorb the incremental costs.

Put simply, compliance with offline verification does not jeopardize the availability of constitutionally protected materials as much as H.B. 1181 does because it does not significantly impact profitability. Offline implementation and verification costs are lower and fewer consumers are dissuaded from transacting. The costs of compliance with H.B. 1181, however, have already been proven to be too great.

3. Online Verification Poses Unprecedented Privacy and Security Risks to Readers.

In the offline world, age verifications are commonly done manually without any technological intervention. Online age verifications, however, can only be conducted by technology, which introduces significant privacy and security risks to readers.

H.B. 1181 contemplates two primary methods of age verification: document review or face scans. Each requires readers to disclose highly sensitive information—the information contained on the government ID, or a person’s face for biometric scanning. For readers already annoyed by the time delay and nuisance of the age verification process, privacy concerns about these sensitive disclosures

give them another reason to stop accessing the websites (i.e., to “bounce”).²² Indeed, “66% of Americans are not comfortable sharing their identification documents or biometric information with online platforms.”²³ These reader concerns will especially apply to startups who are still trying to earn readers’ trust.²⁴

In contrast, offline age verification rarely creates any records of the consumers’ data. The retailer can visually inspect the consumer or their documents and make an age determination without collecting or keeping any private information.²⁵

The online verification’s digital trail, however, exposes consumers to heightened privacy and security

22. Alice Marwick et al, *Child Online Safety Legislation: A Primer*, CENTER FOR INFORMATION TECHNOLOGY, https://assets.pubpub.org/lwejmvq1/Child_Online_Safety_Legislation_wDOI-11716569855951.pdf (“widespread age verification would negatively impact access to information for marginalized groups”).

23. *Rokita*, 2024 WL 3228197, at *1 (cleaned up). “70% are uncomfortable with their children using such methods.” *Id.*

24. Engine, *supra* note 20 (“A startup that requires users to submit their drivers licenses as part of signing up for a service has to worry about whether users feel comfortable handing that sensitive information over, or whether they’ll seek out an alternative offered by a larger, more established company.”).

25. See Ashley Johnson, *How to Address Children’s Online Safety in the United States*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION (June 2024), <https://www2.itif.org/2024-child-online-safety.pdf> (“because bars, casinos, and liquor stores do not store a copy of each customer’s ID, these in-person ID checks pose lower privacy risks than do online ID checks”).

risks. Indeed, online security breaches are inevitable. When expropriated by malefactors, highly sensitive verification information can be used for a wide range of improper purposes, including identity theft, extortion and blackmail, financial fraud, more tailored commercial pitches, and building individualized consumer profiles.²⁶ That verification data will also attract malefactors²⁷ aiming to find vulnerable spots in verifiers' security so they can exfiltrate the data. The security of this information will be paramount.

In recognition of this risk, H.B. 1181 requires verifiers to promptly delete any highly sensitive information they collect in the age verification process.²⁸ But as a practical matter, that data will not always be deleted. Verifiers will need to show the accuracy of their verifications if they are challenged, and they may need to retain records evidencing this—a reality that H.B. 1181 does not account

26. Martin Sas & Jan Tobias Mühlberg, *Trustworthy Age Assurance?*, GREENS/EFA IN THE EUROPEAN PARLIAMENT (Feb. 2024), <https://extranet.greens-efa.eu/public/media/file/1/8760> (“unauthorized access can open the door to various forms of misuse, potentially resulting in significant harm to individuals”).

27. *E.g.*, Taryn Plumb, *Face off: Attackers Are Stealing Biometrics to Access Victims' Bank Accounts*, VENTUREBEAT, Feb. 21, 2024, <https://venturebeat.com/security/face-off-attackers-are-stealing-biometrics-to-access-victims-bank-accounts/>.

28. *Towards Digital Safety by Design for Children*, OECD DIGITAL ECONOMY PAPERS No. 363 (June 2024), https://www.oecd-ilibrary.org/science-and-technology/towards-digital-safety-by-design-for-children_c167b650-en (“To mitigate privacy risks, age assurance solutions should incorporate robust privacy protections, such as principles of data minimization to collect and retain the minimal amount of data required”).

for.²⁹ Verifiers also may be under litigation holds or other mandatory record retention obligations. Other verifiers may inadvertently retain user data due to incompetence or oversight. While some might intentionally disregard any deletion obligations as violations will be hard to detect. And other verifiers may ask for express consent to retain and share data for various reasons, such as research purposes. Yoti, for example, requires users to “agree[] to several pages of terms and conditions, a privacy policy, and acknowledgement of how Yoti may use personal data for research purposes” just to complete the verification process.³⁰

Because of the verification data’s value, malefactors can also exploit any vulnerabilities in the verification process to make real-time interceptions. In extreme cases, scammers will build dummy websites with illegitimate verification procedures for the sole purpose of collecting and expropriating readers’ authentication data.³¹ By the time readers realize they have been duped, their data will already be gone.

29. Marwick, *supra* note 22 (“If information is deleted immediately following verification, then those systems are substantially less auditable because there would be no concrete record of the information provided for verification”).

30. *See* Cole, *supra* note 13.

31. *See* Shoshana Weissmann & Maureen Flatley, *25 Percent of Kids Will Face Identity Theft Before Turning 18. Age-Verification Laws Will Make This Worse.*, R STREET (July 25, 2024), <https://www.rstreet.org/commentary/25-percent-of-kids-will-face-identity-theft-before-turning-18-age-verification-laws-will-make-this-worse/>.

In sum, online readers may reasonably assume their age verification data will be stored despite the statutory requirement to delete that data. And readers' worries about the security of their personal data will increase their tendencies to turn around and "bounce."³² Indeed, as confirmation that readers' nervousness is reasonable and justified, several verification vendors have already experienced embarrassing and troubling security failures that put readers' personal data at grave risk.³³

As a result, unlike offline verification, electronic mediation of the online age verification process—which involves collection and potential storage (or interception)

32. See *Colmenero*, 689 F. Supp. 3d, at 400 (the premise that readers will "trust that companies will actually delete" their authentication data is "dubious"). "It is the threat of a leak that causes the First Amendment injury, regardless of whether a leak ends up occurring." *Id.*

33. Joseph Cox, *ID Verification Service for TikTok, Uber, X Exposed Driver Licenses*, 404 MEDIA (June 26, 2024), <https://www.404media.co/id-verification-service-for-tiktok-uber-x-exposed-driver-licenses-au10tix/> (describing security vulnerabilities of authentication service provider AU10TIX); Jessica Kidd, Isobel Roe, & Jesse Hyland, *Cybercrime Detectives Arrest Man Following Alleged Data Breach Involving More Than 1 Million NSW Clubs Customer Records*, ABC NEWS (May 1, 2024), <https://www.abc.net.au/news/2024-05-02/clubs-nsw-cybersecurity-potential-data-breach-venues/103793584> (Australian bars are required to verify patrons' ages before entry and retain the records; the verification service provider Outabox suffered a security breach that exposed those records); see also *Notice of Data Security Incident*, NEXTSTEPS.LA.GOV, <https://nextsteps.la.gov/substitute-notice/> (Progress Software Corp., a third-party vendor that the Louisiana Office of Motor Vehicle uses to assist with driver's license information, experienced a data security breach of verification data due to a cyberattack).

of personal data—makes online authentication riskier to the reader from a privacy and security standpoint.

CONCLUSION

Compared to offline age verification, H.B. 1181's age verification requirement causes unprecedented and significant problems for readers, publishers, and the Internet generally. These adverse consequences raise serious concerns that the means selected by Texas do not fit the regulatory goals and that alternative regulatory solutions may be less restrictive. For those reasons, this Court should reverse the judgment of the court below.

Respectfully submitted,

RONAN P. DOHERTY
Counsel of Record
AMBER D. GREENAWAY
BONDURANT MIXSON & ELMORE, LLP
1201 West Peachtree Street, NW
Suite 3900
Atlanta, GA 30309
(404) 881-4100
doherty@bmelaw.com

Counsel for Amici Curiae

September 23, 2024

APPENDIX

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**APPENDIX —
SIGNATORIES OF INTERNET LAW PROFESSORS**

Signatories
(affiliations for identification purposes only)

Prof. Zachary Catanzaro, St. Thomas University,
Benjamin L. Crump College of Law

Prof. Eric Goldman, Santa Clara University School of Law

Prof. Robert Heverly, Albany Law School

Prof. Jane Kirtley, University of Minnesota, Hubbard
School of Journalism and Mass Communication

Prof. Mark Lemley, Stanford Law School

Prof. David Levine, Elon University School of Law

Prof. Yvette Joy Liebesman, Saint Louis University
School of Law

Prof. Jess Miers, University of Akron School of Law
(VAP)