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

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

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING VACATUR**

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## QUESTION PRESENTED

In 2023, the State of Texas enacted a law requiring each commercial entity that "publishes or distributes material on an Internet website * * * more than one-third of which is sexual material harmful to minors" to verify, through certain approved methods, that visitors to the site are at least 18 years old. Tex. Civ. Prac. & Rem. Code Ann. § 129B.002(a) (West Supp. 2023); see *id.* § 129B.003. A district court preliminarily enjoined the law, but the court of appeals vacated the injunction in pertinent part. The question presented is whether, in assessing the statute's constitutionality under the First Amendment, the court of appeals erred by applying rational-basis review rather than strict scrutiny.

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## INTEREST OF THE UNITED STATES

This case concerns the standard for judging the constitutionality of a state law enacted to address the long-standing challenge of protecting children from harmful sexual material on the Internet. Congress has previously enacted laws with the same objective, including a statute that the court of appeals described as "very similar" to the law at issue here. Pet. App. 16a; see *Ashcroft* v. *ACLU*, 542 U.S. 656, 661-663 (2004). Congress may legislate in this area again. Cf. Kids Online Safety and Privacy Act, S. 2073, 118th Cong., 2d Sess. (as passed by the Senate, July 30, 2024). The United States therefore has a substantial interest in the development of the applicable First Amendment principles.

## STATEMENT

### A. Legal And Factual Background

1. This Court has long recognized that the government has a "compelling interest" in protecting minors from exposure to harmful sexual material, even material "that is not obscene by adult standards." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); see *Ginsberg* v. *New York*, 390 U.S. 629, 640-641 (1968). Until the 1990s, shielding children from sexual content was a matter of restricting their access to explicit movies, periodicals, and the like. See, *e.g.*, *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 206 (1975) ("films containing nudity"); *Ginsberg*, 390 U.S. at 631 (pornographic magazines). But the advent of the Internet made an unprecedented amount of "sexually explicit material, including hardcore pornography," accessible to children with unprecedented ease. *Ashcroft* v. *ACLU*, 535 U.S. 564, 566-567 (2002) (*Ashcroft I*). Congress and state legislatures have passed a variety of laws in an attempt to address that problem.

For present purposes, the most relevant federal effort was the Child Online Protection Act (COPA), 47 U.S.C. 231. Enacted in 1998, COPA generally authorized criminal and civil penalties for anyone who used the Internet to "make[] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a). COPA included an affirmative defense for a defendant who, "in good faith, has restricted access by minors to material that is harmful to minors" by "requiring use of a credit card, debit account, adult access code, or adult personal identification number," "by accepting a digital certificate that verifies age," or "by any other

reasonable measures that are feasible under available technology." 47 U.S.C. 231(c)(1).

COPA defined "material that is harmful to minors" as material "that is obscene" or that would satisfy this Court's test for obscenity if the test were adapted to a minor's perspective. 47 U.S.C. 231(e)(6); see *Miller* v. *California*, 413 U.S. 15 (1973). Thus, material would be covered if, among other things, "the average person, applying contemporary community standards, would find, taking the material as a whole *and with respect to minors*, [that it] is designed to appeal to, or is designed to pander to, the prurient interest." 47 U.S.C. 231(e)(6)(A) (emphasis added); cf. *Miller*, 413 U.S. at 24. In *Ashcroft I*, this Court considered whether "COPA's reliance on community standards to identify 'material that is harmful to minors'" rendered the statute facially unconstitutional, holding that it did not. 535 U.S. at 585.

Two years later, however, this Court affirmed a preliminary injunction barring enforcement of COPA on the ground that the statute likely violated the First Amendment. *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004) (*Ashcroft II*). The Court described COPA as "a content-based speech restriction" and subjected it to strict scrutiny, asking whether it was "the least restrictive means among available, effective alternatives" for advancing the government's interest in restricting minors' access to harmful sexual content online. *Id.* at 665-666. Because the Court concluded that the record suggested that "blocking and filtering software" was a less restrictive and potentially more effective alternative than the measures imposed by COPA, the Court held that the injunction was not an abuse of discretion and remanded the case for trial. *Id.* at 666; see *id.* at 666-670.

In so doing, the Court emphasized the preliminary nature of its analysis and noted that its decision did not preclude the government from satisfying strict scrutiny on remand. *Ashcroft II*, 542 U.S. at 672-673; see, *e.g.*, *id.* at 664-665. Nevertheless, the district court permanently enjoined COPA after a trial, see *ACLU* v. *Gonzales*, 478 F. Supp. 2d 775, 809 (E.D. Pa. 2007), and the Third Circuit affirmed, see *ACLU* v. *Mukasey*, 534 F.3d 181 (2008). This Court denied the government's petition for a writ of certiorari. See *Mukasey* v. *ACLU*, 555 U.S. 1137 (2009) (No. 08-565). COPA has thus never been enforced.

2. Beginning in 2022, many States enacted laws that, like COPA, require publishers and distributors of sexual content online to employ age-verification technology.[1] One of those States was Texas, which adopted such a law in 2023. Texas's H.B. 1181 requires each

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[1] See Ala. Code § 8-19G-1 *et seq.* (West 2024) (effective Oct. 1, 2024); Ark. Code Ann. § 4-88-1301 *et seq.* (West 2024) (effective Aug. 1, 2023); Fla. Stat. Ann. § 501.1737 (West 2024) (effective Jan. 1, 2025); Ga. Code Ann. § 39-5-5 (West 2024) (effective July 1, 2025); Idaho Code Ann. § 6-3801 *et seq.* (Supp. 2024) (effective July 1, 2024); Ind. Code Ann. § 24-4-23-1 *et seq.* (West 2024) (effective July 1, 2024); Ky. Rev. Stat. Ann. § 436.001 *et seq.* (West 2024) (effective July 15, 2024); La. Rev. Stat. Ann. § 9:2800.29 (Supp. 2024) (effective Jan. 1, 2023); Miss. Code Ann. § 11-77-1 *et seq.* (West Supp. 2023) (effective July 1, 2023); Mont. Code Ann. § 30-14-159 (West 2024) (effective Jan. 1, 2024); Neb. Rev. Stat. Ann. § 87-1001 *et seq.* (2024) (effective July 19, 2024); N.C. Gen. Stat. Ann. § 66-501 (Supp. 2024) (effective Jan. 1, 2024); Okla. Stat. Ann. tit. 15, § 791.1 *et seq.* (West 2024) (effective Nov. 1, 2024); S.C. Code Ann. § 37-1-310 (2024) (effective May 21, 2024); Utah Code Ann. § 78B-3-1001 *et seq.* (Supp. 2024) (effective May 3, 2023); Va. Code Ann. § 8.01-40.5 (West 2024) (effective July 1, 2023); see also Protect Tennessee Minors Act, 2024 Tenn. Pub. Acts, ch. 1021 (effective Jan. 1, 2025); 2024 Kan. Sess. Laws, ch. 28, § 1 (effective July 1, 2024).

commercial entity that "publishes or distributes material on an Internet website * * * more than one-third of which is sexual material harmful to minors" to "use reasonable age verification methods" to confirm that users attempting to access that material are at least 18 years old. Tex. Civ. Prac. & Rem. Code Ann. § 129B.002(a) (West Supp. 2023). Like COPA, H.B. 1181 defines "[s]exual material harmful to minors" using the *Miller* obscenity test adapted for minors. *Id.* § 129B.001(6). The permitted "reasonable age verification methods" are requiring users to "provide digital identification" (*i.e.*, "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") or requiring users to "comply with a commercial age verification system" that uses "government-issued identification" or "a commercially reasonable method that relies on public or private transactional data to verify the age of an individual." *Id.* § 129B.003 (capitalization and emphasis omitted).

H.B. 1181 forbids covered entities that perform the required age verification (or third parties that perform that function) from "retain[ing] any identifying information of the individual." Tex. Civ. Prac. & Rem. Code Ann. § 129B.002(b) (West Supp. 2023). It authorizes civil penalties of up to $10,000 per violation of that prohibition, and up to $10,000 per day for violations of the age-verification requirement. *Id.* § 129B.006(a) and (b). An entity whose violation of the age-verification requirement results in a minor accessing harmful sexual material faces a fine of up to $250,000. *Id.* § 129.006(b)(3). The law exempts "news-gathering organization[s]" and "bona fide news or public interest broadcast[s]," as well as "Internet service provider[s]," "search engine[s],"

and "cloud service provider[s]" insofar as they only "provid[e] access or connection to" sexual content that is not under their control. *Id.* § 129B.005.

In a separate provision not at issue here, H.B. 1181 also requires covered entities to display on their websites and in their advertisements certain notices about the dangers posed by pornography. See Tex. Civ. Prac. & Rem. Code Ann. § 129B.004 (West Supp. 2023).

**B. Prior Proceedings**

1. Before H.B. 1181 took effect, petitioners—most of them commercial purveyors of pornography, led by an adult-industry trade association—filed suit against the state attorney general in the United States District Court for the Western District of Texas. As relevant here, petitioners brought a facial challenge to H.B. 1181 under the First Amendment and sought a preliminary injunction. After a hearing, the court granted the injunction. Pet. App. 90a-161a.

The district court determined that petitioners were likely to succeed on the merits. Pet. App. 96a-136a. The court first concluded that H.B. 1181's age-verification provisions were subject to strict scrutiny, noting that they were similar to COPA and that respondent had "largely concede[d] that strict scrutiny applies" under this Court's precedents. *Id.* at 108a; see *id.* at 107a-111a. The district court held that the age-verification provisions likely fail strict scrutiny because they are both under- and overinclusive, as well as unclear. For example, the court faulted H.B. 1181 for exempting search engines, and effectively exempting social-media sites (because they do not contain "at least one-third sexual material"), even though many of them host sexual content. *Id.* at 113a; see *id.* at 112a-114a. The court also noted that "material that is patently offensive to

young minors is not necessarily offensive to 17-year-olds," and it believed that H.B. 1181 "provide[d] no guidance," *id.* at 114a-115a, as to the relevant age for assessing whether material is "harmful to minors," Tex. Civ. Prac. & Rem. Code Ann. § 129B.001(6) (West Supp. 2023). And because the law regulates material that is legally obscene only as to children, the court explained, it covers "virtually all salacious material" and burdens access to "material that has cultural, scientific, or educational value to adults." Pet. App. 109a, 122a.

The district court further found that there was a less restrictive means available to protect minors from sexual content online—namely content filtering, "the modern version of [the] 'blocking and filtering software'" that this Court found promising in *Ashcroft II*. Pet. App. 128a (citing 542 U.S. at 666-673). The district court highlighted what it perceived as several virtues of that technology, such as its capacity to "more precisely screen out sexual content" than age verification and the greater difficulty minors have in circumventing it. *Id.* at 132a; see *id.* at 134a.

Having found H.B. 1181's age-verification provisions "considerably more intrusive while less effective than other alternatives," the district court concluded that they "d[id] not withstand strict scrutiny." Pet. App. 136a. H.B. 1181's health-warnings provisions met the same result after the court held that they compelled speech in violation of the First Amendment. *Id.* at 136a-150a. The court found that petitioners also satisfied the remaining elements of the preliminary-injunction standard and therefore enjoined H.B. 1181 in its entirety. *Id.* at 155a-161a.

2. The court of appeals issued an administrative stay, and then a stay pending appeal, of the preliminary

injunction, permitting H.B. 1181 to be enforced during respondent's appeal. See Pet. App. 165a-168a. A divided panel of the court of appeals ultimately vacated the preliminary injunction in part and affirmed it in part. *Id.* at 1a-87a.

a. The court of appeals held that the district court had erred by applying strict scrutiny to H.B. 1181's age-verification provisions. Pet. App. 8a-26a. The court of appeals relied on this Court's 1968 decision in *Ginsberg*, which applied rational-basis review to a state law criminalizing the sale of pornographic magazines to minors. *Id.* at 8a; see *Ginsberg*, 390 U.S. at 641. The court acknowledged that H.B. 1181 was "very similar" to COPA, which this Court had subjected to strict scrutiny in *Ashcroft II*. Pet. App. 16a. But the court of appeals reasoned that *Ashcroft II* had merely accepted the parties' agreement that strict scrutiny applied, and thus set no binding precedent on the applicable level of scrutiny. See *id.* at 17a-19a.

Although the court of appeals offered "no opinion as to how [H.B. 1181] would fare under any other standard of review," it concluded that the law's age-verification provisions "easily" survive rational-basis scrutiny in light of evidence establishing "the sort of damage that access to pornography does to children." Pet. App. 26a-27a. The court therefore vacated the district court's injunction as to those provisions. *Id.* at 44a. Agreeing with the district court's analysis of the required health warnings, however, the court of appeals affirmed the injunction as to those provisions. *Id.* at 27a-38a, 44a.

b. Judge Higginbotham dissented from the court of appeals' decision on the age-verification provisions. Pet. App. 45a-87a. He observed that this Court "has unswervingly applied strict scrutiny to content-based reg-

ulations that limit adults' access to protected speech." *Id.* at 54a; see *id.* at 58a-64a. He distinguished *Ginsberg* because he believed that unlike H.B. 1181, the law at issue there did not "burden the free speech interests of adults." *Id.* at 56a.

Judge Higginbotham would have held that H.B. 1181 "fails exacting scrutiny at this stage in large part for want of evidence," concluding that the preliminary injunction record was "bereft of evidence responsive to the burdens of strict scrutiny." Pet. App. 85a. But he emphasized that his conclusion applied only "[a]t this junction and on this record," leaving open the possibility that respondent could provide the necessary evidence at trial. *Ibid.*

3. In April 2024, several months after the court of appeals allowed Texas to begin enforcing H.B. 1181's age-verification provisions, petitioners filed a petition for a writ of certiorari and sought a stay of the court of appeals' judgment. This Court denied the application for stay, see 144 S. Ct. 1473 (No. 23A925), but later granted certiorari.

## SUMMARY OF ARGUMENT

Under *Ashcroft II* and this Court's other relevant precedents, H.B. 1181's age-verification provisions are subject to strict scrutiny. The court of appeals therefore erred in applying only rational-basis review, and this Court should follow its usual practice by vacating the decision below and remanding to allow the court of appeals to apply the proper standard in the first instance. In so doing, however, the Court should make clear that the First Amendment does not prohibit Congress and the States from adopting appropriately tailored measures to prevent children from accessing harmful sexual material on the Internet—potentially in-

cluding age-verification requirements analogous to those that have long been applied to the distribution of such material in the physical world.

A. The principle that content-based regulations of speech are subject to strict scrutiny is a pillar of this Court's First Amendment jurisprudence. Although that principle includes an exception for obscenity and other historically unprotected categories of speech, the Court has made clear that there is no exception for content-based restrictions of sexually explicit or indecent speech that does not sink to the level of obscenity.

This Court has also recognized that the government has a compelling interest in shielding children from exposure to harmful sexual material, even if that material is not obscene as to adults. Consistent with the Court's general approach to content-based regulations, however, it has repeatedly held that content-based laws aimed at achieving that important goal must be subjected to strict scrutiny to ensure that they do not unnecessarily burden adults' access to protected speech. In *Ashcroft II*, for example, the Court addressed a federal law "very similar" to H.B. 1181, Pet. App. 16a, and applied strict scrutiny even though the material covered by the law was obscene as to minors and thus constitutionally unprotected as to them under *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

B. The court of appeals' holding that H.B. 1181 is subject only to rational-basis review contradicts those established First Amendment principles and precedents. It is undisputed that H.B. 1181's age-verification provisions impose a content-based restriction on speech that is obscene for children but constitutionally protected for adults. *Ashcroft II* makes particularly clear that such a law is subject to strict scrutiny, and the

court of appeals erred in declining to follow this Court's decision on the dubious theory that the Court merely assumed without deciding that strict scrutiny applied. The court of appeals likewise erred in concluding that *Ginsberg* supported its application of rational-basis review. That decision focused on the First Amendment rights of minors; it did not address the standard that governs a challenge grounded in the burdens a content-based law imposes on adults' access to material that is constitutionally protected as to them. That is the question presented here, and it is answered by *Ashcroft II* and this Court's other precedents applying strict scrutiny to analogous challenges.

C. Petitioners urge this Court not only to correct the court of appeals' error about the appropriate standard of review, but also to hold that H.B. 1181 likely fails strict scrutiny. But this Court is a court of review, not of first view, and it should adhere to its usual practice by remanding to allow the court of appeals to apply the proper standard in the first instance. In so doing, the Court should make clear that strict scrutiny does not foreclose Congress or the States from restricting the distribution of harmful sexual material to children online, just as legislatures have traditionally restricted the distribution of such material in the physical world.

With the mass proliferation of online pornography and Internet-enabled devices, the compelling interest of federal, state, and local governments in protecting children from harmful sexual material is more pressing than ever before. Appropriately tailored age-verification laws and regulations may be a necessary element of governmental efforts to accomplish that compelling objective, and thus may be permissible under the applicable First Amendment standards. We take no position

on whether H.B. 1181 or any other specific law or proposal satisfies strict scrutiny. But the Court should not adopt petitioners' view of that standard, which would threaten to foreclose effective regulation addressing an important problem that has only become more urgent in the years since the Court last considered it.

## ARGUMENT

Texas enacted H.B. 1181 to serve a governmental interest of great importance: protecting children from exposure to harmful sexual material on the Internet. But H.B. 1181's age-verification provisions pursue that aim by drawing content-based lines and burdening speech that is constitutionally protected for adults, even though not for children. This Court's decisions establish that such a law is subject to strict scrutiny, and the court of appeals erred in holding otherwise. In correcting that error, however, the Court should make clear that strict scrutiny does not prevent Congress or the States from adopting effective and appropriately tailored measures to restrict the distribution of harmful sexual material to minors.

### A. Content-Based Regulations Of Protected Speech Are Subject To Strict Scrutiny

1. Under the First Amendment, governments generally "have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *National Inst. of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 766 (2018) (citation and internal quotation marks omitted). Content-based regulations of speech are subject to strict scrutiny, meaning they "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* (quoting *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015)). That principle encompasses not only regula-

tions that flatly prohibit speech, but also content-based "regulations that suppress, disadvantage, or impose differential burdens upon speech." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994). "The distinction between laws burdening and laws banning speech is but a matter of degree." *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000).

"There are of course exceptions" to the general rule that content-based burdens trigger strict scrutiny. *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 791 (2011). In a "few limited areas," the "prevention and punishment" of speech based on its content "has never been thought to raise any constitutional problem" because the speech is not protected by the First Amendment at all. *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010) (citations and internal quotation marks omitted). Those traditionally unprotected categories of speech include "incitement," "fighting words," and—most relevant here—"obscenity." *Entertainment Merchants*, 564 U.S. at 791; see *Miller* v. *California*, 413 U.S. 15 (1973) (setting forth the constitutional standard for obscenity). And as this Court held in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), speech can be obscene as to children, and thus constitutionally unprotected as to them, even if it is not obscene for adults. *Id.* at 637.

There is no general First Amendment exception, however, for sexually explicit or indecent expression that does not qualify as obscene as to adults. To the contrary, the Court has repeatedly held that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). And although preventing minors from accessing material that is ob-

scene as to them is a laudable and even compelling goal, that does not change the constitutional standard. "[B]enign motivation * * * is not enough to avoid the need for strict scrutiny of content-based [regulations]." *Turner Broad.*, 512 U.S. at 677 (O'Connor, J., concurring in part and dissenting in part).

2. This Court has accordingly applied strict scrutiny to laws that restrict the dissemination of sexual content that is not obscene as to adults even if it was enacted with the objective of protecting children. In *Sable*, for example, the Court applied strict scrutiny to a law that sought to "restrict the access of minors to dial-a-porn" by banning "indecent [or] obscene interstate commercial telephone messages." 492 U.S. at 117, 118, 120; see *id.* at 126; *id.* at 133 (Brennan, J., concurring in part and dissenting in part). In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court applied strict scrutiny to a law prohibiting the transmission of "obscene or indecent" messages or the display of "patently offensive" messages to minors via the Internet, subject to an affirmative defense for distributors that employed age-verification measures. *Id.* at 859-860; see *id.* at 879, 882. And in *Playboy*, the Court assessed a law "requir[ing] cable television operators who provide channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission to hours when children are unlikely to be viewing." 529 U.S. at 806 (citation omitted). On "what standard the Government must meet" for the law to pass constitutional muster, the Court was emphatic: "The standard is strict scrutiny." *Id.* at 814.

3. In light of those well-established precedents, the government acknowledged in *Ashcroft II* that the Child Online Protection Act was subject to strict scrutiny.

Specifically, the government explained that "because [the statute] regulates on the basis of content, COPA 'must be narrowly tailored to promote a compelling government interest' in order to be constitutional under the First Amendment." U.S. Br. at 18, *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004) (No. 03-218) (quoting *Playboy*, 529 U.S. at 813). The government defended COPA by arguing that Congress "has a compelling interest in shielding minors from the harmful effects of pornography on the Web" and that "COPA is narrowly tailored to that interest." *Ibid.*; see *id.* at 18-44.

This Court applied the same standard. It began by explaining that COPA was a successor to the statute the Court had held invalid in *Reno*, and that like its predecessor COPA was a "content-based restriction[] on speech." *Ashcroft II*, 542 U.S. at 660; see also, *e.g.*, *id.* at 670 ("*Playboy Entertainment Group*, like this case, involved a content-based restriction designed to protect minors from viewing harmful materials."). The Court emphasized that "[w]hen plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Id.* at 665. The Court declined to disturb the preliminary injunction because it determined that there were likely "plausible, less restrictive alternatives to COPA." *Ibid.* And although the Court emphasized that COPA might ultimately be deemed constitutional on remand, the Court made clear that the statute would survive only if it was "the least restrictive alternative to accomplish Congress's goal." *Id.* at 673. The Court's opinion, in short, was built

around the understanding that COPA was subject to strict scrutiny.[2]

Justice Breyer, joined by Chief Justice Rehnquist and Justice O'Connor, disagreed with the Court's conclusion that COPA was not narrowly tailored but expressly agreed that strict scrutiny applied. "Like the Court," Justice Breyer wrote, "I would subject the Act to 'the most exacting scrutiny,' requiring the Government to show that any restriction of nonobscene expression is 'narrowly drawn' to further a 'compelling interest' and that the restriction amounts to the 'least restrictive means' available to further that interest." *Ashcroft II*, 542 U.S. at 677 (citations omitted). Justice Scalia alone contended that strict scrutiny was inappropriate on the theory that "commercial pornography" has no First Amendment protection at all, even as to adults. *Id.* at 676 (Scalia, J., dissenting) (citing, *e.g.*, *Playboy*, 529 U.S. at 831 (Scalia, J., dissenting)).

### B. H.B. 1181 Is A Content-Based Regulation Subject To Strict Scrutiny

Like COPA, H.B. 1181 imposes a content-based restriction on speech that is constitutionally protected as to adults in order to protect children from harmful sexual material on the Internet. That is a compelling government interest that is highly relevant in determining whether H.B. 1181 survives strict scrutiny. But the court of appeals erred in treating it as a basis for dis-

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[2] The Court's application of strict scrutiny in *Ashcroft II* was also consistent with its opinion in *Ashcroft I*. There, the Court reserved judgment on several issues related to COPA's constitutionality, including whether the statute would "survive strict scrutiny"—but not on whether strict scrutiny applied at all. *Ashcroft* v. *ACLU*, 535 U.S. 564, 585-586 (2002).

pensing with heightened First Amendment scrutiny altogether.

***1. Like COPA, H.B. 1181 is a content-based restriction subject to strict scrutiny***

a. H.B. 1181's age-verification provisions require a website operator to conduct age verification if "more than one-third" of the site consists of sexual content that is obscene as to minors. Tex. Civ. Prac. & Rem. Code Ann. § 129B.002(a) (West Supp. 2023). That requirement is content based under this Court's precedents because it "targets speech based on its communicative content." *City of Austin* v. *Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 69 (2022) (citation omitted). In *Playboy*, for example, the Court held that a statute directed at "sexually explicit adult programming" because of its harmful effects on children reflected "the essence of content-based regulation." 529 U.S. at 811-812 (citation and internal quotation marks omitted).

H.B. 1181 also includes within its sweep a substantial amount of speech protected by the First Amendment. Material that is obscene for minors can be constitutionally protected for adults, see *Sable*, 492 U.S. at 126, and up to two-thirds of a covered website may be material protected even as to children, see Tex. Civ. Prac. & Rem. Code Ann. § 129B.002(a) (West Supp. 2023). Despite respondent's focus on the most extreme forms of online pornography, see, *e.g.*, Br. in Opp. 3-5, it is undisputed that H.B. 1181 extends more broadly to indecent material that is protected as to adults. The statute thus cannot be justified as a regulation of obscenity that has no First Amendment protection at all.

Because H.B. 1181 is a content-based regulation of speech that is constitutionally protected as to adults, a long line of this Court's precedents makes clear that it

is subject to strict scrutiny—even though it seeks to promote the government's compelling interest in protecting children from harmful sexual material. See pp. 12-16, *supra*. The Court's application of strict scrutiny to COPA in *Ashcroft II* makes that conclusion particularly clear. As the court of appeals recognized, "H.B. 1181 is very similar to COPA," Pet. App. 16a, from its *Miller*-derived definition of harmful sexual content to its reliance on age-verification technology to shield children from that material. See *id.* at 4a (H.B. 1181 "mimics [COPA's] language"); pp. 2-6, *supra*.

b. The court of appeals nonetheless asserted that it was not bound by *Ashcroft II*'s application of strict scrutiny, asserting that this Court had merely assumed without deciding that strict scrutiny applied based on the parties' agreement on the relevant standard. See Pet. App. 17a-19a. That account contradicts both this Court's decision in *Ashcroft II* and the precedents on which the Court relied.[3]

Although this Court sometimes merely assumes the validity of a legal proposition without deciding it, that is not what the Court did in *Ashcroft II*. To the contrary, the Court concluded that COPA was a "content-based

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[3] The court of appeals also noted that "COPA was criminal" whereas "H.B. 1181 is civil" and that "COPA allowed age-verification as an affirmative defense, yet H.B. 1181 requires it upfront." Pet. App. 16a. While those distinctions may be relevant in determining whether the law survives strict scrutiny, the court did not suggest that they affected the level of First Amendment scrutiny that applies as a threshold matter. Under this Court's precedents, the applicable standard turns on whether a law is a content-based regulation of protected speech—not whether it is civil or criminal, or on the procedural mechanisms by which it is enforced. See, *e.g.*, *Entertainment Merchants*, 564 U.S. at 789, 799-804 (applying strict scrutiny to a civil prohibition).

restriction" of speech subject to strict scrutiny under *Playboy*, *Reno*, and the Court's other established precedents. *Ashcroft II*, 542 U.S. at 670; see *id.* at 660, 665. That the Court did not belabor the level of scrutiny does not mean that it failed to consider the point; instead, it suggests only that the Court, like the government, understood the applicable standard of scrutiny to be settled by recent precedent. See p. 14, *supra* (discussing *Sable*, *Reno*, and *Playboy*). And it is particularly implausible to maintain that this Court merely assumed without deciding that strict scrutiny applied because Justice Scalia specifically argued for a different approach in his dissent, relying on his earlier dissent in *Playboy*. See *Ashcroft II*, 542 U.S. at 676.

Until the decision below, courts of appeals assessing the constitutionality of state laws similar to COPA and H.B. 1181 had uniformly concluded that this Court's precedents required strict scrutiny. See *PSINet, Inc.* v. *Chapman*, 362 F.3d 227, 233 (4th Cir. 2004) (citing *Playboy*); *American Booksellers Found.* v. *Dean*, 342 F.3d 96, 101-102 (2d Cir. 2003) (citing *Reno*); *ACLU* v. *Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999) (citing *Sable* and *Reno*); see also *ACLU* v. *Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008) (applying strict scrutiny to COPA after remand in *Ashcroft II*), cert. denied, 555 U.S. 1137 (2009). Those courts correctly identified the applicable standard of review.

#### *2. The court of appeals erred in holding that* Ginsberg *justified the application of rational-basis review*

The court of appeals did not dispute that H.B. 1181 is "content-based." Pet. App. 22a; see *id.* at 19a. It also did not deny that the law reaches a substantial amount of speech that is constitutionally protected as to adults. But the court nonetheless broke from its sister circuits

and applied rational-basis review to H.B. 1181's age-verification provisions based on this Court's decision in *Ginsberg*. *Id.* at 8a-26a. *Ginsberg* cannot bear the weight the court of appeals placed upon it—and it certainly does not justify the court of appeals' departure from *Ashcroft II* and this Court's other more recent precedents applying strict scrutiny.

a. In *Ginsberg*, a shopkeeper was convicted of violating a state law prohibiting "the sale to minors under 17 years of age" of magazines "defined to be obscene" as to minors. 390 U.S. at 631. Although Ginsberg mounted a "broad challenge" to the statute, Pet. App. 12a n.18, the Court understood that challenge to rest on a putative right of minors "to read or see material concerned with sex," not on the right of adults to access such material. 390 U.S. at 636. The Court rejected that claim, holding that children have no constitutional right to buy, and adults have no right to sell to children, sexual material that is obscene as to children. *Id.* at 636-637. The Court framed its holding in those terms, explaining that it could not "say that the statute invades the area of freedom of expression constitutionally secured to minors." *Id.* at 637. The Court thus concluded that the State could prohibit minors from accessing the covered material so long as "it was not irrational for the legislature to find that exposure to material condemned by the statue is harmful to minors." *Id.* at 641.

The court of appeals was correct to say that *Ginsberg* "must stand for something." Pet. App. 22a. But as *Ginsberg* itself makes clear, the decision stands for the principle that minors have no constitutional right to access material that is obscene as to them. Minors could not, for example, challenge H.B. 1181 on the theory that it prohibits them from viewing material that is obscene

for minors, and petitioners could not challenge H.B. 1181 on the theory that it prohibits them from distributing such material to minors. Those claims are foreclosed because, as to minors, such material is outside the First Amendment altogether: Insofar as minors are concerned, it falls within one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." *Stevens*, 559 U.S. at 468-469 (citation omitted).

That is not, however, the nature of the claim that petitioners have brought here. Instead, like the plaintiffs in *Sable*, *Reno*, *Playboy*, and *Ashcroft II*, they contend that a law that is aimed at protecting minors from harmful sexual content violates the First Amendment because it restricts petitioners' ability to distribute to *adults* material that is not obscene as to them (and restricts adults' corresponding right to receive that material). *Ginsberg* had no occasion to address the appropriate standard of scrutiny for such a challenge.

b. The court of appeals failed to justify its contrary reading of *Ginsberg*. The court emphasized, for example, this Court's references to *Ginsberg* in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), and *Entertainment Merchants*, *supra*. Pet. App. 9a-10a. But those decisions simply acknowledge the vitality of *Ginsberg*'s holding that speech that is obscene for children is constitutionally unprotected as to children. *Erznoznik*, which invalidated a city ordinance banning drive-in theaters from showing films containing nudity, cited *Ginsberg* in disapproving the ordinance for covering content that "cannot be deemed obscene even as to minors." 422 U.S. at 212-213. And *Entertainment Merchants* declined to extend *Ginsberg* to a state law deeming certain

video games unsuitable for children based on violent, not sexual, content. 564 U.S. at 793-794.

The court of appeals also suggested that *Ginsberg* engaged in a more complete analysis of "the appropriate level of scrutiny" than *Ashcroft II*. Pet. App. 12a n.18. It is true that *Ginsberg* explained that rational-basis review applied to the challenge in that case because the relevant material was constitutionally unprotected as to children. But the Court's decision cannot plausibly be read as "carv[ing] out an exception to heightened scrutiny of content-based speech regulations" for material that is protected as to adults. *Id.* at 22a. To the contrary, *Ginsberg* was decided at a time when this Court's modern framework of First Amendment scrutiny was just emerging. See *Americans for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 622 (2021) (Alito, J., concurring in part and concurring in the judgment). In *Ashcroft II*, by contrast, this Court's application of strict scrutiny followed from a well-established line of precedent.

Nor did the court of appeals justify its elevation of *Ginsberg* over those more recent and more pertinent precedents. The court identified several distinctions between H.B. 1181 and the law invalidated in *Reno*, which, for example, "included prohibitions on non-sexual material" in the form of "'excretory activities.'" Pet. App. 14a-15a & n.19 (quoting *Reno*, 521 U.S. at 846). But the court did not explain why those differences affected the level of judicial scrutiny as opposed to the laws' relative chances of satisfying it. The court distinguished *Sable* as involving "an outright ban" on protected speech, *id.* at 16a (citation omitted), even though content-based bans and burdens alike trigger strict scrutiny, see p. 13, *supra*. As for *Playboy*, the court

emphasized that the law in that case restricted even adults' access to sexual programming, whereas "H.B. 1181 allows adults to access as much pornography as they want whenever they want." Pet. App. 21a. But H.B. 1181 undeniably imposes a content-based burden on adults' access to protected speech by requiring that covered websites verify that they *are* adults. The degree of that burden and the ease with which it can be satisfied are important considerations in determining whether H.B. 1181 *satisfies* strict scrutiny—but the court of appeals failed to explain why those considerations justify a novel exception to the established rule that content-based burdens on protected speech are subject to strict scrutiny.

### C. This Court Should Remand For The Application Of Strict Scrutiny While Making Clear That The First Amendment Does Not Necessarily Foreclose Appropriately Tailored Age-Verification Laws

Because the court of appeals erroneously concluded that H.B. 1181 was subject only to rational-basis review, it specifically declined to consider "how [the law] would fare under any other standard of review." Pet. App. 27a. Petitioners contend (Br. 37-43) that this Court should apply strict scrutiny and hold that H.B. 1181 is likely unconstitutional. But because this Court is "a court of review, not of first view," its typical practice in this situation is to vacate the decision below and remand to allow the court of appeals to apply the correct legal standard. *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2399 (2024) (citation omitted). The Court should adhere to that usual practice here. The question on which this Court granted certiorari included only the applicable standard of review, not its application to H.B. 1181. Pet. i; see Sup. Ct. R. 14.1(a). As the Court emphasized in

*Ashcroft II*, the application of strict scrutiny to a law like H.B. 1181 requires a fact- and record-intensive analysis of the current state of age-verification technology, as well as potential alternatives. 542 U.S. at 671-673. And deferring this Court's consideration of the question how strict scrutiny applies to a law like H.B. 1181 would also allow the Court to benefit from the lower courts' analysis of First Amendment challenges to the many similar laws that have been adopted in other States. See p. 4 n.1, *supra*.

In remanding for the application of strict scrutiny, however, the Court should make clear that the First Amendment does not foreclose appropriately tailored measures to restrict the distribution of harmful sexual material to children on the Internet—potentially including age-verification measures. This Court took care to note in *Ashcroft II* that its "opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials," nor did it foreclose a determination that an age-verification law like COPA itself could satisfy strict scrutiny. 542 U.S. at 672-673. In this case, the Court should likewise clarify that its preliminary analysis of COPA in 2004 does not foreclose Congress or the States from adopting age-verification measures in light of two decades of technological developments and additional experience with the serious problem of children accessing harmful sexual material online.

#### *1. Strict scrutiny affords legislatures some flexibility in restricting access to sexual content online*

This Court has recognized that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" *Johnson* v. *California*, 543 U.S. 499, 514 (2005) (citation omitted). In

the context of a law aimed at furthering the government's compelling interest in "protecting children from harmful materials," the purpose of strict scrutiny is to ensure that the law does not result in "*unnecessarily broad* suppression of speech addressed to adults," *Reno*, 521 U.S. at 875 (emphasis added)—not to foreclose laws that impose *any* burden on adults. The application of strict scrutiny in this context should be guided by the urgency of the government's interest in protecting children, the special challenges of regulating in the Internet context, and the established tradition of requiring age verification for the distribution of similar material in the physical world.

a. "[T]he need to protect children from exposure to patently offensive sex-related material" is "an extremely important justification, one that th[e] Court has often found compelling." *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 743 (1996) (plurality opinion); see p. 2, *supra*. The importance of that interest has only increased over time. When this Court considered COPA, for example, high-speed Internet, social media, and smartphones were all in their infancy; the Court was thus focused on minors who accessed the Internet on computers "in homes, schools, and libraries." *Ashcroft I*, 535 U.S. at 567; see Br. in Opp. 15-16.

Today, in contrast, many children have their own smartphones or other Internet-enabled devices and spend hours online every day. See Kids Online Health & Safety Task Force, *Online Health and Safety for Children and Youth: Best Practices for Families and Guidance for Industry* 12 (July 2024) (noting over half of teenagers spend four or more hours a day on social media alone), https://tinyurl.com/4kbua4fc. And as the Surgeon General has warned, "[e]xtreme, inappropri-

ate, and harmful content" is now "easily and widely accessible by children and adolescents" online. U.S. Surgeon Gen.'s Advisory, *Social Media and Youth Mental Health* 8 (2023), https://tinyurl.com/yrzznept; see *id.* at 13 ("Nearly 70% of parents say parenting is now more difficult than it was 20 years ago, with technology and social media as the top two cited reasons.").

b. Although "'the basic principles' of the First Amendment 'do not vary'" when applied to "'ever-advancing technology,'" *NetChoice*, 144 S. Ct. at 2403 (citation omitted), the First Amendment does not bar consideration of the extraordinary regulatory challenges presented by the Internet—a sprawling and complex environment that "evolves at a rapid pace," *Ashcroft II*, 542 U.S. at 671; see *NetChoice*, 144 S. Ct. at 2398 ("The online world is variegated and complex, encompassing an ever-growing number of apps, services, functionalities, and methods for communication and connection."). To the contrary, strict scrutiny by definition demands a context-sensitive inquiry into the effectiveness of the challenged regulation and whether "less restrictive alternatives would be at least as effective in achieving" the relevant government interest. *Ashcroft II*, 542 U.S. at 665.

Strict scrutiny cannot properly be applied without attention to the "unique problems" presented by the relevant mode of expression. *Playboy*, 529 U.S. at 813 (there, cable television). Given how the Internet works, for example, it is difficult to imagine any effective means of restricting children's access to obscene or indecent material online that would not affect at least some measure of innocuous material. See, *e.g.*, *Ashcroft II*, 542 U.S. at 668 (noting that content-filtering software "may block some materials that are not harmful to

minors"). In addition, the realities of the Internet mean that "any attempt to identify the user" of a website as a child "will implicate adults in some way." Pet. App. 22a. But the mere fact that a law prohibiting children from accessing material that is obscene as to them imposes a corollary burden on adults by requiring them to establish that they *are* adults should not necessarily be disqualifying. To the contrary, as Judge Higginbotham emphasized, a State has the right and the obligation "to protect its minors, and in doing so, it must have the means to frustrate their access to pornographic materials consistent with the First Amendment." *Id.* at 85a-86a.

c. Traditional regulations that apply in the physical world underscore that principle and should likewise inform the First Amendment analysis of age-verification laws on the Internet. "States have long denied minors access to certain establishments frequented by adults," such as places of "adult entertainment." *Reno*, 521 U.S. at 887 & n.1 (O'Connor, J., concurring in the judgment in part and dissenting in part) (citation and internal quotation marks omitted). And as *Ginsberg* illustrates, States have also long "denied minors access to speech deemed to be 'harmful to minors.'" *Id.* at 887; see *id.* at 887 n.2 (collecting dozens of examples).

Those content-based laws necessarily impose some burden on adults. Adults who seek to enter adult theaters or buy pornographic magazines are often required to show a driver's license or otherwise verify their age—a requirement that may deter some adults from accessing speech that is protected as to them and that may pose particular obstacles for people who do not have a government-issued identification. But those burdens do not mean that traditional and ubiquitous age-verification

requirements in the physical world flunk strict scrutiny; instead, they are the least restrictive means of furthering the government's compelling interest in preventing minors from accessing harmful sexual material.[4]

To be sure, the process of age verification on the Internet is more complicated—and, depending on the technology, may be more burdensome—than the process by which "a bouncer checks a person's driver's license before admitting him to a nightclub." *Reno*, 521 U.S. at 890 (O'Connor, J., concurring in the judgment in

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[4] Petitioners assert that laws like the one upheld in *Ginsberg* do not "burden[] the speech rights of adults" because they bar only "'knowing'" sales to minors and do not "prescribe age verification in any form." Pet. Br. 30 (citation omitted). It is true that *Ginsberg* did not consider any First Amendment claim based on the law's burden on the rights of adults. See pp. 20-21, *supra*. But that is not because no such burden existed. To the contrary, the law defined "knowingly" to include not only actual knowledge, but also "reason to know, or a belief or ground for belief which warrants further inspection or inquiry" into "the age of the minor." *Ginsberg*, 390 U.S. at 646 (citation omitted). And the law further provided that "an honest mistake" as to age "shall constitute an excuse from liability" only if the seller "made a bona fide attempt to ascertain the true age of such minor." *Ibid.* (citation omitted). In practice, therefore, the New York law required sellers to verify the age of individuals seeking to buy covered materials if they were not obviously adults. Similar laws remain commonplace today. See, *e.g.*, Cal. Penal Code § 313.1(a) (West 2024) (making it unlawful to distribute harmful sexual material to a minor while "fail[ing] to exercise reasonable care in ascertaining the true age of [the] minor"); 720 Ill. Comp. Stat. Ann. § 5/11-21(b) (West 2017) (similar); N.C. Gen. Stat. Ann. § 14-190.15(a) and (c)(3) (2023) (prohibiting the distribution of harmful material to minors but providing an affirmative defense if the defendant "requested and received" an "official governmental or educational identification card" indicating the minor was over 18).

part and dissenting in part). But the longstanding and widespread tradition of restricting minors' access to harmful sexual material in the physical world suggests that content-based age-verification requirements are not inherently inconsistent with the First Amendment. Cf. *Vidal* v. *Elster*, 602 U.S. 286, 301 (2024) (relying on "history and tradition, as we have done before when considering the scope of the First Amendment"). And that tradition provides further reason why courts reviewing laws like H.B. 1181 should not reflexively treat strict scrutiny as "a death knell." Pet. App. 22a.

***2. An appropriately tailored age-verification requirement could satisfy strict scrutiny***

In *Reno*, 521 U.S. at 876-877, and *Ashcroft II*, 542 U.S. at 668, this Court expressed reservations about age-verification technology in light of its cost and susceptibility to circumvention by minors. More than two decades later, however, there is good reason to believe that age verification has significantly improved on both fronts. Cf. *id.* at 671 (noting that "[m]ore and better filtering alternatives may" have already emerged in the five years between the creation of the preliminary-injunction record and this Court's decision). In the district court, respondent offered evidence that "[a]ge verification providers have invested heavily" in anticircumvention technology and that competition has lowered the cost of deploying age verification for entities like petitioners. D. Ct. Doc. 26-6, at 15 (Aug. 18, 2023); see *id.* at 14-16, 18-21. Entirely new and potentially less burdensome methods of age verification have also become widely available in recent years. See *id.* at 8-12 (describing, *e.g.*, "facial age estimation" technology); WeProtect Global Alliance, *The role of age verification technology in tackling child sexual exploitation and*

*abuse online* 10, 15 (Nov. 2022), https://tinyurl.com/4mybf4tv.

The United States takes no position on whether H.B. 1181, or any other specific existing or proposed law, satisfies strict scrutiny. That is a fact-intensive question best answered on a full record and with the benefit of full consideration by the lower courts. But recent technological developments may provide reason to believe that appropriately tailored age-verification laws may satisfy strict scrutiny today even if they would not have done so in years past. And the Court should decline to adopt the contrary reasoning advanced by petitioners and the district court, aspects of which would threaten to foreclose any effective age-verification requirement, no matter how carefully drawn.

To take one example, petitioners and the district court place substantial emphasis on underinclusivity concerns driven by H.B. 1181's inapplicability to search engines and social media. See Pet. Br. 38-39; Pet. App. 112a-114a. But "the First Amendment imposes no free-standing 'underinclusiveness limitation.'" *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 449 (2015) (citation omitted); see Pet. App. 25a. To the contrary, "Congress need not deal with every problem at once." *Denver Area*, 518 U.S. at 757. And if there were ever a problem that governments may understandably want to address incrementally, rather than "in one fell swoop," *Williams-Yulee*, 575 U.S. at 449, it would be the complex challenge of protecting minors from sexually harmful material on the Internet. See pp. 26-27, *supra*. It is doubtful that the limitations on H.B. 1181's scope reflect an impermissible legislative attempt to give some preferred purveyors of sexual material an "advantage"

over others. *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994).

Echoing *Ashcroft II*, petitioners and the district court also rely extensively on content-filtering technology as an alternative to age verification that would "target minor[s'] access to pornography with fewer burdens on adults' access to protected sexually explicit materials." Pet. App. 128a; see Pet. Br. 39-41; see also *Ashcroft II*, 542 U.S. at 666-670. The question under strict scrutiny, however, is whether a less restrictive alternative would be equally effective in "accomplish[ing]" the legislative objective, *Ashcroft II*, 542 U.S. at 673—not merely whether the alternative would "target" the problem, Pet. App. 128a. To be sure, content-filtering technology is an important tool—in part because, as the district court emphasized, parents can use it to restrict their children's access to sexually explicit content online. See *id.* at 129a-131a. But "filtering software depends upon parents willing to decide where their children will surf the web and able to enforce that decision." *Ashcroft II*, 542 U.S. at 685 (Breyer, J., dissenting); see 8/23/23 Tr. 13-17 (confirming that filters' effectiveness can depend on "parents knowing they're available and then understanding how to implement" and maintain them); cf. U.S. Surgeon Gen.'s Advisory, *supra*, at 13. Content filtering has now been "widely available and easy to obtain" for decades, *Mukasey*, 534 F.3d at 201 (citation omitted), but the problem of child exposure to sexual content online has only worsened during that time. Two decades of experience thus provide further reason not to treat as controlling *Ashcroft II*'s tentative view that content filtering "may be more effective" than age verification. 542 U.S. at 673.

In recent years, Texas and many other States have apparently concluded that content filtering and other voluntary measures have proved insufficient to address the worsening problem of children's ready access to harmful sexual material online, and that some form of age-verification requirement is necessary. Particularly given the rapidly evolving state of the relevant technology, this Court should make clear that the application of strict scrutiny does not necessarily foreclose appropriately tailored age-verification requirements. In assessing any particular law, courts should consider, among other issues, the accuracy, efficacy, and accessibility of the relevant age-verification technologies; the effectiveness of alternative regulatory measures; and the burdens the law imposes on adults seeking to access constitutionally protected speech.

**CONCLUSION**

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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