

**In the Supreme Court of the United States**

STUDENTS ENGAGED IN ADVANCING TEXAS, ET AL.,  
*Applicants,*

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,  
*Respondent.*

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,  
*Applicant,*

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,  
*Respondent.*

On Application to the Hon. Samuel A. Alito, Jr., Associate Justice of the  
Supreme Court of the United States and Circuit Justice for the Fifth Circuit

**RESPONSE IN OPPOSITION TO APPLICATIONS TO VACATE STAY**

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## **PARTIES TO THE PROCEEDINGS**

In No. 25A1389, Applicants, the plaintiffs-appellees below, are Students Engaged in Advancing Texas; M.F., by and through next friend Vanessa Fernandez; and Z.B., by and through next friend S.B.

In No. 25A1390, Applicant, the plaintiff-appellee below, is Computer & Communications Industry Association.

In both proceedings, Respondent, the defendant-appellant below, is Ken Paxton, in his official capacity as Attorney General of Texas.

## **RELATED PROCEEDINGS**

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

*Students Engaged in Advancing Texas, et al. v. Paxton*, No. 1:25-CV-1662 (Dec. 23, 2025) (order granting preliminary injunction)

*Comput. & Commc'ns Indus. Ass'n v. Paxton*, No. 1:25-CV-1660 (Dec. 23, 2025) (order granting preliminary injunction)

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

*Students Engaged in Advancing Texas, et al. v. Paxton*, No. 25-51073, consolidated with *Comput. & Commc'ns Indus. Ass'n v. Paxton*, No. 26-50001 (June 4, 2026) (order staying preliminary injunctions pending appeal)

## TABLE OF CONTENTS

Parties to the Proceedings .....	i
Related Proceedings .....	i
Table of Authorities.....	iii
Introduction.....	1
Background .....	2
Argument.....	9
I. This Court Is Unlikely to Grant Certiorari. ....	10
II. The Fifth Circuit Correctly Held That the State Is Likely to Succeed on Appeal. ....	14
A. The district court failed to conduct the required facial-invalidity analysis under <i>Moody</i> . ....	15
B. S. B. 2420 regulates, at most, commercial speech and survives intermediate scrutiny.....	20
C. The exceptions to parental consent survive scrutiny under <i>Barr</i> . ....	27
D. At a minimum, the State is likely to prevail in its challenge to the universal injunctions under <i>Trump v. CASA</i> .....	31
III. Plaintiffs Have Not Shown That They Will Be Seriously and Irreparably Harmed, and Equity Favors Texas. ....	32
Conclusion.....	34

## TABLE OF AUTHORITIES

### Cases:

<i>Am. Ass’n of Pol. Consultants, Inc. v. FCC</i> , 923 F.3d 159 (4th Cir. 2019) .....	29
<i>Argello v. City of Lincoln</i> , 143 F.3d 1152 (8th Cir. 1998) .....	12
<i>Ariix, LLC v. NutriSearch Corp.</i> , 985 F.3d 1107 (9th Cir. 2021) .....	12
<i>Barr v. Am. Ass’n of Pol. Consultants, Inc.</i> , 591 U.S. 610 (2020) .....	1, 13, 15, 27, 28, 29, 30
<i>Bd. of Trs. v. Fox</i> , 492 U.S. 469 (1989) .....	12, 20, 29
<i>Billups v. City of Charleston</i> , 961 F.3d 673 (4th Cir. 2020) .....	12
<i>Bolger v. Youngs Drug Prods. Corp.</i> , 463 U.S. 60 (1983) .....	12
<i>Brnovich v. Democratic Nat’l Comm.</i> , 594 U.S. 647 (2021) .....	22
<i>Brown v. Ent. Merch. Ass’n</i> , 564 U.S. 786 (2011) .....	13, 24, 25, 29
<i>Cent. Hudson Gas &amp; Elec. Corp. v. Pub. Serv. Comm’n of N.Y.</i> , 447 U.S. 557 (1980) .....	1, 15, 21
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43 (1994) .....	30
<i>City of Los Angeles v. Patel</i> , 576 U.S. 409 (2015) .....	18
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986) .....	23
<i>Clark v. Cmty. for Creative Non-Violence</i> , 468 U.S. 288 (1984) .....	27
<i>Coleman v. Paccar, Inc.</i> , 424 U.S. 1301 (1976) .....	32
<i>Comput. &amp; Commcn’s Indus. Ass’n v. Uthmeier</i> , No. 25-11881, 2025 WL 3458571 (11th Cir. Nov. 25, 2025) .....	11
<i>Dex Media W., Inc. v. City of Seattle</i> , 696 F.3d 952 (9th Cir. 2012) .....	11, 12

<i>Free Speech Coal., Inc. v. Paxton</i> , 606 U.S. 461 (2025) .....	8, 24, 25, 26
<i>Ginsberg v. State of New York</i> , 390 U.S. 629 (1968) .....	33
<i>Gussin v. Nintendo of Am., Inc.</i> , 62 F.3d 1433 (Fed. Cir. 1995).....	2
<i>Hollingsworth v. Perry</i> , 558 U.S. 183 (2010) .....	9, 33
<i>Labrador v. Poe</i> , 144 S. Ct. 921 (2024) .....	9
<i>Lucas v. Townsend</i> , 486 U.S. 1301 (1988) .....	33
<i>Maryland v. King</i> , 567 U.S. 1301 (2012) .....	33
<i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024) .....	1, 10, 14, 15, 16, 17, 18, 19, 20, 29
<i>NetChoice, LLC v. Bonta</i> , 113 F.4th 1101 (9th Cir. 2024).....	12
<i>NetChoice, LLC v. Fitch</i> , 134 F.4th 799 (5th Cir. 2025).....	10
<i>NetChoice, LLC v. Yost</i> , No. 25-3371, 2026 WL 1758907 (6th Cir. June 18, 2026) .....	11
<i>New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.</i> , 434 U.S. 1345 (1977) .....	33
<i>Nken v. Holder</i> , 556 U.S. 418 (2009) .....	9, 33
<i>Noem v. Vasquez Perdomo</i> , 146 S. Ct. 1 (2025) .....	32, 33
<i>Packingham v. North Carolina</i> , 582 U.S. 98 (2017) .....	2
<i>Phi Theta Kappa Honor Soc’y v. HonorSociety.org, Inc.</i> , No. 24-60452, 2025 WL 1030240 (5th Cir. Apr. 7, 2025).....	12
<i>Procter &amp; Gamble Co. v. Amway Corp.</i> , 242 F.3d 539 (5th Cir. 2001) .....	12
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015) .....	22, 28
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011) .....	20

<i>Telescope Media Grp. v. Lucero</i> , 936 F.3d 740 (8th Cir. 2019) .....	13
<i>TikTok Inc. v. Garland</i> , 604 U.S. 56 (2025) .....	22, 23, 26
<i>Trump v. CASA, Inc.</i> , 606 U.S. 831 (2025) .....	9, 31, 32
<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994) .....	23, 26
<i>United States v. Edge Broad. Co.</i> , 509 U.S. 418 (1993) .....	26
<i>United States v. Hansen</i> , 599 U.S. 762 (2023) .....	16, 19
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968) .....	23
<i>United States v. Texas</i> , 144 S. Ct. 797 (2024) .....	9
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989) .....	22
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008) .....	15, 16
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972) .....	2, 25, 33
<i>Woodlands Pride v. Paxton</i> , 168 F.4th 293 (5th Cir. 2026) .....	10
<b>Constitutional Provisions, Statutes, and Rules:</b>	
Tex. Const. art. I, § 37 .....	2, 25, 33
42 U.S.C. § 1983 .....	31
App Store Accountability Act, 89th Leg., R.S., ch. 200, Tex. Gen. Laws 385–90 .....	3, 30
Tex. Bus. & Com. Code	
§ 17.46 .....	7
§ 121.002 .....	4

§ 121.021.....	4, 6, 8
§ 121.022.....	4, 5, 6, 8, 27, 28
§ 121.023.....	4
§ 121.024.....	5, 6, 8
§ 121.025.....	6
§ 121.026.....	6, 8
§ 121.052.....	4, 6
§ 121.053.....	5, 6, 8
§ 121.054.....	6, 8
§ 121.055.....	6
§ 121.056.....	6, 7, 8, 33
§ 121.101.....	7
Tex. Civ. Prac. & Rem. Code § 129B.002.....	18
Tex. Educ. Code § 32.151.....	28
Tex. Gov’t Code § 311.032.....	30
Sup. Ct. R. 10.....	10

**Other Authorities:**

Apple, Family Privacy Disclosure for Children, <a href="https://www.apple.com/legal/privacy/en-ww/parent-disclosure/">https://www.apple.com/legal/privacy/en-ww/parent-disclosure/</a> .....	15
Eldar Haber & Tammy Harel Ben Shahar, <i>Algorithmic Parenting</i> , 32 Fordham Intell. Prop. Media & Ent. L.J. 1 (2021).....	3
H.J. of Tex., 89th Leg., R.S. (2025) .....	3, 4, 14, 22, 24
Nila Bala, <i>Policing Children’s Data</i> , 103 Wash. U.L. Rev. 249 (2025).....	3
S.J. of Tex., 89th Leg., R.S. (2025).....	3

## INTRODUCTION

A minor child who downloads a software application from an app store agrees to contractual terms of service, including whether the child’s location will be tracked, whether the child’s privacy will be protected, whether information from the child’s phone can be sold by the developer, and whether the child waives the right to sue. Before allowing minor children to acquire products from app stores and agree to these terms, Texas requires parental consent, including disclosures to parents about the product and contract terms. With only narrow exceptions, these requirements apply to any application available on an app store—from calculators and measuring tools to social media and e-books—regardless of its content and regardless of whether it would receive any First Amendment protection.

As the Fifth Circuit motions panel correctly held, the district court committed several errors in issuing universal preliminary injunctions enjoining enforcement of S. B. 2420. First, the district court erroneously applied strict scrutiny to a statute that governs, at most, commercial speech—*i.e.*, speech “propos[ing] a commercial transaction.” CCIA.App.4a–8a; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). Second, even if one or both of the statute’s limited exceptions to parental consent were problematic, the district court failed to follow this Court’s severability precedent. CCIA.App.8a–9a; *see Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 614 (2020) (plurality op.) (“[S]even Members of the Court conclude that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute.”). Third, the district court “failed to conduct a proper facial-invalidity analysis under *Moody v. NetChoice*, 603 U.S. 707 (2024).” CCIA.App.8a n.19. These errors of law confirm the State’s likelihood of success on appeal.

This Court is unlikely to grant certiorari on these issues of fact-bound error correction in this interlocutory posture, and this Court should deny the applications.

## BACKGROUND

I. This Court has long acknowledged that the “history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.” *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). The “primary role of the parents in the upbringing of their children” is “beyond debate as an enduring American tradition.” *Id.* The Texas Constitution recognizes a parent’s “responsibility to nurture and protect the parent’s child and the corresponding fundamental right to exercise care, custody, and control of the parent’s child, including the right to make decisions concerning the child’s upbringing.” Tex. Const. art. I, § 37.

As detailed in the amicus brief of the Institute for Family Studies, the digital world places new demands on parents, making it challenging to fulfill their traditional role in raising children. *See Packingham v. North Carolina*, 582 U.S. 98, 118 (2017) (Alito, J., concurring in the judgment) (“Cyberspace is different from the physical world.”). Parents can observe physical objects possessed by their children in their homes and are ordinarily involved in acquiring them. Seven-year-olds, for example, need their parents to take them to a bookstore or a library. *Cf. id.* (“[I]t is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their Internet use[, and] if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others.”). Even early videogame systems involved games played on televisions observable by parents. *See Gussin v. Nintendo of Am., Inc.*, 62 F.3d 1433 (Fed. Cir. 1995) (unpublished table decision) (“Nintendo sells the ‘Super Nintendo Entertainment System’ (SNES), a home video game system that allows a user of the system to play an assortment of video game cartridges on an ordinary television monitor.”).

But the modern digital world is different. A child with access to an app store and a mobile device (such as a tablet or smartphone) can potentially download any number of software applications, potentially agreeing to invasions of the child’s privacy and sale of the

child’s data and be exposed to any conceivable content without parental consent or even parental knowledge. *See* Eldar Haber & Tammy Harel Ben Shahr, *Algorithmic Parenting*, 32 Fordham Intell. Prop. Media & Ent. L.J. 1, 12–13 (2021) (explaining that “children may be exposed to online dangers while out of their parents’ sight” and that “online activity is time-consuming and difficult to monitor”); Nila Bala, *Policing Children’s Data*, 103 Wash. U.L. Rev. 249, 286 (2025) (“Due to cell phones’ compact size and the tendency to carry them around all the time, parents find smartphones (as compared to televisions or computers) particularly difficult to monitor.”).

II. With overwhelming bipartisan support, the Texas Legislature enacted Senate Bill 2420—known as the App Store Accountability Act<sup>1</sup>—to protect children and secure parents’ rights. Only one state senator voted against the Act, and the vote in the Texas House was 120 in favor to 9 opposed. S.J. of Tex., 89th Leg., R.S. 1326 (2025); H.J. of Tex., 89th Leg., R.S. 3721 (2025).

Just as States have long protected minors from alcohol, cigarettes, and other harmful products, S. B. 2420 protects children against dangerous modern products. Representative Fairly, introducing the bill to the House, explained its “two key elements.” H.J. of Tex., 89th Leg., R.S. 3578 (2025). First, S. B. 2420 addresses the “contractual agreements” that users accept when downloading software applications from an app store. *Id.* Second, S. B. 2420 provides transparency for parents, who “deserve to have access to the information about the apps that their kids are downloading.” *Id.*

To protect parents’ ability to make decisions concerning their children’s upbringing in the modern world, S. B. 2420 requires disclosures to parents and parental consent for minors to acquire software applications from “app stores,” which “distribute[] software applications from the owner or developer of a software application to the user of a mobile

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<sup>1</sup> 89th Leg., R.S., ch. 200, Tex. Gen. Laws 385–90, codified at Tex. Bus. & Com. Code ch. 121.

device.” Tex. Bus. & Com. Code § 121.002(2).<sup>2</sup> With narrow exceptions for one provision, S. B. 2420 applies to all software applications, regardless of their content and regardless whether they would receive any First Amendment protection. The Texas Legislature consciously “d[id] not want to discriminate against apps.” H.J of Tex. 89th Leg., R.S. 3579 (2025); *see also id.* at 3586 (emphasizing that the bill “is not attempting to discriminate on content”).

S. B. 2420 requires app stores to use a commercially reasonable method to verify the age category of an individual who creates an account. Tex. Bus. & Com. Code § 121.021(a). Any minor’s account must be affiliated with a parent account. *Id.* § 121.022(a). “[A]n app store must obtain consent from the minor’s parent or guardian through the parent account affiliated with the minor’s account before allowing the minor to: (1) download a software application; (2) purchase a software application; or (3) make a purchase in or using a software application.” *Id.* § 121.022(d). Software developers must assign an age rating to each software application (and each purchase that can be made through the software application) and must provide the app store with the rating and the content that led to the assigned rating. *Id.* § 121.023(a)–(b).

To obtain consent, the app store owner must disclose to the parent:

- (A) the specific software application or purchase for which consent is sought;
- (B) the rating under Section 121.052 assigned to the software application or purchase;
- (C) the specific content or other elements that led to the rating assigned under Section 121.052;

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<sup>2</sup> “‘Mobile device’ means a portable, wireless electronic device, including a tablet or smartphone, capable of transmitting, receiving, processing, and storing information wirelessly that runs an operating system designed to manage hardware resources and perform common services for software applications on handheld electronic devices.” Tex. Bus. & Com. Code § 121.002(4).

(D) the nature of any collection, use, or distribution of personal data that would occur because of the software application or purchase; and

(E) any measures taken by the developer of the software application or purchase to protect the personal data of users.

*Id.* § 121.022(f)(1).

App stores must notify parents before significant changes are made to the terms of service or privacy policy of a software application for which consent has been given. *Id.* §§ 121.022(g), .053(a). A software developer must provide notice to the app store “before making any significant change to the terms of service or privacy policy of the software application.” *Id.* § 121.053(a). Significant changes include changes (1) to the use of personal data, (2) affecting the rating of the app or content that led to the rating, (3) adding new monetization features, or (4) that “materially change[] the functionality or user experience” of the application. *Id.* § 121.053(b).

Parental consent is not required for a minor to download a software application that “provides a user with direct access to emergency services,” including “9-1-1 emergency services,” “a crisis hotline,” or “an emergency assistance service that is legally available to a minor.” *Id.* § 121.022(h)(1)(A). The emergency services application must be operated by a qualifying entity, must limit data collection in specific ways, and cannot require the minor to create an account to access and use the application. *Id.* § 121.022(h)(1)(B)–(D). Parental consent is also not required if the software application “is operated by or in partnership with” a regulated nonprofit organization that “develops, sponsors, or administers” standardized tests used for postsecondary educational institutions. *Id.* § 121.022(h)(2). The nonprofit organization must be subject to chapter 32 of the Texas Education Code, which regulates use of student information. *Id.* § 121.022(h)(2)(B).

App stores must use a commercially available method to allow software developers to access information about the age category of each user and whether consent has been obtained for each minor. *Id.* § 121.024. A developer must use this information only to verify

the age category of a user and, if the user is a minor, verify whether consent has been obtained, *id.* § 121.054, and must “delete [this] personal data . . . on completion of the verification,” *id.* § 121.055(b).

S. B. 2420 imposes duties on app stores to protect the personal data of users, including “limiting the collection and processing of personal data to the minimum amount necessary” to accomplish enumerated tasks and “transmitting personal data using industry-standard encryption protocols that ensure data integrity and confidentiality.” *Id.* § 121.025.

An app store violates S. B. 2420 if it:

- (1) enforces a contract or a provision of a terms of service agreement against a minor that the minor entered into or agreed to without consent under Section 121.022;
- (2) knowingly misrepresents information disclosed under Section 121.022(f)(1) [relating to disclosures required to obtain consent];
- (3) obtains a blanket consent to authorize multiple downloads or purchases; or
- (4) shares or discloses personal data obtained for purposes of Section 121.021, except as required by Section 121.024 or other law.

*Id.* § 121.026(a). “The owner of an app store is not liable” if it “uses widely adopted industry standards” to “verify the age of each user” and to “obtain parental consent,” provided the app store “applies those standards consistently and in good faith.” *Id.* § 121.026(b).

A software developer violates S. B. 2420 if it:

- (1) enforces a contract or a provision of a terms of service agreement against a minor that the minor entered into or agreed to without consent under Section 121.054;
- (2) knowingly misrepresents an age rating or reason for that rating under Section 121.052; or
- (3) shares or discloses the personal data of a user that was acquired under this subchapter.

*Id.* § 121.056(a). Not only must a software developer “knowingly misrepresen[t]” a rating to be liable, but the statute reinforces that the developer cannot be liable if the developer

“uses widely adopted industry standards to determine the rating” and “applies those standards consistently and in good faith.” *Id.* § 121.056(b). And with respect to consent, software developers are protected if they “rel[y] in good faith on age category and consent information received from the owner of an app store.” *Id.* § 121.056(c).

A violation of S. B. 2420 is a violation of the Texas Deceptive Trade Practices Act, which is enforceable by the Texas Attorney General. *Id.* §§ 121.101, 17.46.

**III.** Before S. B. 2420 could take effect on January 1, 2026, two sets of plaintiffs sued the Attorney General in the Western District of Texas, alleging that S. B. 2420 violates their First Amendment rights and contains several unconstitutionally vague provisions. *CCIA v. Paxton*, 1:25-CV-1660 (W.D. Tex.); *SEAT v. Paxton*, 1:25-CV-1662 (W.D. Tex).

One suit was brought by Students Engaged in Advancing Texas, which “represents a coalition of Texas students—from middle school to college-age—who seek to increase youth participation in policymaking, including through connecting with coalition members through mobile apps” and two minors, M.F. and Z.B. (collectively, “SEAT”). SEAT.App.17a. “M.F. is a 17-year-old high school student and photographer who uses apps and paid content—including social media apps and documentaries he purchases online—to follow the news, edit photographs, study, and conduct research for his debate team and other school activities.” ROA.84.<sup>3</sup> “Z.B. is a 16-year old high school student journalist and content creator who uses apps to socialize, study, report stories, follow current events, and publish valuable information regarding financial literacy and study skills to her audience of over 1 million teens.” ROA.84.

The other suit was brought by Computer & Communications Industry Association (“CCIA”), a “trade organization representing internet, technology, and communications companies.” CCIA.App.184a. According to CCIA, its “members include operators of app

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<sup>3</sup> “ROA” refers to the record on appeal in case number 25-51073 in the Fifth Circuit.

stores (like Google, Apple, and Amazon) and developers of mobile apps (like YouTube, Audible, Apple TV, IMDb, and Goodreads).” CCIA.App.184a.

Both sets of plaintiffs sought preliminary injunctions against enforcement of S. B. 2420. Following a combined hearing, the district court entered a universal injunction in each case. In the SEAT case, the injunction prohibits the Attorney General “from taking any action to implement or enforce Tex. Bus. & Com. Code §§ 121.021, 121.022(a)-(b), 121.022(d)-(g), 121.024, 121.026(a)(3), 121.026(b), 121.053, 121.054, and 121.056(c).” SEAT.App.34a. In the CCIA case, the injunction prohibits “any action to implement, enact, or enforce Texas S.B. 2420.” CCIA.App.36a.

The preliminary injunctions were entered on December 23, 2025. The State appealed both orders, and the appeals were consolidated. On January 23, the State moved in the district court to stay the injunctions pending appeal, and on May 6, the district court denied the State’s motions for a stay. CCIA.App.38a–42a.

On May 15, the State moved in the Fifth Circuit to stay the preliminary injunctions pending appeal. Dkt. No. 33, *SEAT v. Paxton*, No. 25-51073 (5th Cir. May 15, 2026). After receiving Plaintiffs’ responses, the Fifth Circuit entered an administrative stay, CCIA.App.14a–15a, and later granted the motion to stay the injunctions pending appeal, CCIA.App.2a–12a.

The Fifth Circuit motions panel held that the State demonstrated a likelihood of success on appeal based on five primary errors in the district court’s analysis. “*First*, the district court likely erred in applying strict scrutiny to significant parts, if not all, of the Act.” CCIA.App.4a. *Second*, if analyzed as a regulation on commercial speech, “Texas has likely shown that [S. B. 2420] survives intermediate scrutiny because the Act ‘advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.’” CCIA.App.5a–6a (quoting *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 495–96 (2025)). “*Third*, the district court likely improperly deemed two exceptions to the parental-consent

provisions to be ‘coverage definitions’ that would affect the scope and application of all of SB2420’s provisions.” CCIA.App.7a (footnote omitted). “*Fourth*, SB2420’s terms are likely not unconstitutionally vague.” CCIA.App.9a. “*Fifth*, the district court’s universal preliminary injunctions likely ‘fall[] outside the bounds of a federal court’s equitable authority’ in barring Texas from enforcing SB2420 against anyone.” CCIA.App.10a (citing *Trump v. CASA, Inc.*, 606 U.S. 831, 847 (2025)).

The Fifth Circuit recognized that “Texas has a substantial, if not compelling, interest in protecting children, and parents need to have the necessary information to make informed choices affecting their children’s upbringing.” CCIA.App.11a. “Any purported burden on app stores and developers is minimal because SB2420 requires only ‘commercially reasonable’ verification methods and allows developers to use ‘widely adopted industry standards’ in determining age ratings and those related to corresponding content.” CCIA.App.11a. Thus, “[t]he balance of equities and public interest are clearcut in Texas’s favor.” CCIA.App.11a. CCIA and SEAT separately filed applications in this Court to vacate the stay pending appeal.

## ARGUMENT

“This Court has used different formulations of the factors for granting emergency relief. All formulations basically encompass (1) likelihood of success on the merits (or a fair prospect of success); (2) certworthiness; (3) the harms to the parties; and (4) the equities and public interest.” *Labrador v. Poe*, 144 S. Ct. 921, 929 n.2 (2024) (Kavanaugh, J., concurring in the grant of stay) (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)); *see also United States v. Texas*, 144 S. Ct. 797, 797–98 (2024) (Barrett, J., concurring in denial of applications) (“If the Fifth Circuit had issued a stay pending appeal, this Court would apply the four-factor test set forth in *Nken v. Holder*[, 556 U.S. 418, 434 (2009)]—including, as relevant in this Court, an assessment of certworthiness—to decide whether to vacate it.”). These factors do not warrant vacating the stay.

## I. This Court Is Unlikely to Grant Certiorari.

This Court is unlikely to grant certiorari following the Fifth Circuit’s final resolution of this appeal, particularly if the merits panel’s analysis follows that of the motions panel.

Although questions about the application of the commercial speech doctrine to laws regulating the distribution of smartphone or tablet software applications to minors may well present important First Amendment issues that this Court might eventually need to resolve, CCIA Appl. 19 & nn.5–6; SEAT Appl. 12, 14–16, 15 n.2 (identifying related lawsuits pending around the country), this case will likely present a poor vehicle. Because the district court failed to hold Plaintiffs to this Court’s “rigorous standard” for bringing a facial challenge, *Moody*, 603 U.S. at 723, *see infra* at II-A, the Fifth Circuit may not even reach the merits of any First Amendment issues, *see, e.g., Woodlands Pride v. Paxton*, 168 F.4th 293, 307–08 (5th Cir. 2026) (vacating injunction and remanding for *Moody* analysis without reaching merits of First Amendment issues); *NetChoice, LLC v. Fitch*, 134 F.4th 799, 807–09 (5th Cir. 2025) (same). The Fifth Circuit correctly identified the district court’s failure to apply *Moody* as an independent ground demonstrating likelihood of success. CCIA.App.8a n.19. That conclusion was correct and implicates no circuit split, and this Court would be unlikely to grant certiorari to reiterate and apply the facial-challenge standards it set forth just two years ago.

Even if the Fifth Circuit were to proceed past *Moody*, none of Plaintiffs’ three arguments for why this Court is likely to grant review has merit.

*First*, SEAT contends (at 14–16) that the Fifth Circuit’s stay opinion “conflicts with the decisions of numerous lower courts.” But Rule 10(a) speaks of conflicts among “United States court[s] of appeals,” not district court decisions, which do not create a conflict that warrants this Court’s review. Sup. Ct. R. 10(a). SEAT’s application suggests, at most, that further percolation is warranted to see if a split among the circuits emerges. SEAT. Appl. 14–16, 15 n.2 (compiling additional list of district-court cases involving First Amendment

challenges to laws regulating minors’ access to software applications and social media platforms); CCIA Appl. 19 & nn.5–6 (same).

SEAT nevertheless argues (at 15) that “[i]t is likely that, by the time the Fifth Circuit issues its merits decision, at least one of the Fourth, Sixth, Tenth, and Eleventh Circuits will have affirmed a decision applying strict scrutiny and enjoining an age-based, parental-consent restriction, creating a clear circuit split as to the standard of review and the constitutionality of such restrictions.” That is far from clear. As SEAT acknowledges in the next paragraph, after a Florida district court enjoined that State’s law regulating minors’ access to certain social-media platforms, the Eleventh Circuit issued a decision that “ultimately applied intermediate scrutiny and entered an order staying the preliminary injunction,” just like the Fifth Circuit here. SEAT Appl. 16 (citing *Comput. & Commc’ns Indus. Ass’n v. Uthmeier*, No. 25-11881, 2025 WL 3458571 (11th Cir. Nov. 25, 2025)). And last week, the Sixth Circuit reversed a permanent injunction enjoining Ohio’s law requiring parental consent and age verification for minors’ use of social-media websites, concluding that the law complied with the First Amendment and was not unconstitutionally vague. *NetChoice, LLC v. Yost*, No. 25-3371, 2026 WL 1758907 (6th Cir. June 18, 2026).

Although SEAT suggests (at 16) a conflict in reasoning because the Eleventh Circuit did not apply the commercial-speech framework, the different analysis is hardly surprising: Florida’s law does not concern transactions in an app store but instead concerns minors’ access to social-media platforms with certain “addictive features.” *Uthmeier*, 2025 WL 3458571, at \*1; see *Yost*, 2026 WL 1758907, at \*1–\*4, \*10–\*15 (Clay, J.) (similar). To the extent that challenges to the Florida and Texas laws are even comparable given their substantive differences, the decisions suggest consistency among the circuits rather than conflict.

*Second*, CCIA argues (at 17–19) that the Fifth Circuit’s commercial-speech analysis created a circuit split with the Fourth, Eighth, and Ninth Circuits. CCIA primarily points to the Ninth Circuit’s holding that neither a speaker’s “economic motive,” *Dex Media W.*,

*Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012), nor the “fact that a business may earn revenue from its services,” *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1119–20 (9th Cir. 2024), is sufficient—“by itself”—to render speech commercial, CCIA Appl. 17, 18.

But the Fifth Circuit did not hold that software applications with expressive content receive lesser First Amendment protection because they are sold. Instead, the Fifth Circuit correctly followed this Court’s holding in *Central Hudson* that “speech that ‘proposes a commercial transaction,’ . . . is subject to intermediate scrutiny,” CCIA.App.4a (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 482 (1989)), and correctly recognized that S. B. 2420 merely regulates, at most, speech proposing a commercial transaction, CCIA.App.4a–5a. There is no conflict.<sup>4</sup> CCIA’s theory—that if some of its members’ software applications receive First Amendment protection, then they are exempt from content-neutral regulation of commercial transactions and commercial speech—finds no support in the cases it cites.

CCIA’s cases from the Fourth and Eighth Circuits fare no better. CCIA Appl. 18–19. Those decisions hold that the commercial-speech doctrine does not apply to an ordinance banning unlicensed tour guides, *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020), and an ordinance banning fortunetelling, *Argello v. City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998). In both cases, the ordinances regulated the underlying speech activity involved, *i.e.*, serving as a tour guide or fortunetelling. *See Billups*, 961 F.3d at 683 (the ordinance “completely prohibits unlicensed tour guides from leading visitors on paid tours”); *Argello*, 143 F.3d at 1153 (the ordinance did not regulate “the offer to tell a fortune,” “which is

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<sup>4</sup> To be sure, following this Court’s lead in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983), both the Fifth Circuit and the Ninth Circuit consider the speaker’s “economic motivation” as one of three factors for assessing the applicability of the commercial speech doctrine. *See Phi Theta Kappa Honor Soc’y v. HonorSociety.org, Inc.*, No. 24-60452, 2025 WL 1030240, at \*2 n.2 (5th Cir. Apr. 7, 2025) (per curiam) (quoting *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001)); *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115–20 (9th Cir. 2021); *Dex Media*, 696 F.3d at 958. But neither considers that factor to the exclusion of the other two.

commercial speech” but instead “the actual telling of the fortune”). In contrast, S. B. 2420 is a content-neutral law that regulates *only* the commercial transactions in app stores (and, at most, speech proposing those transactions)—not any speech involved in the creation or use of the software applications.

CCIA’s final case, *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), does not mention the commercial-speech doctrine. The Eighth Circuit held that wedding videographers engage in First Amendment activity when they make wedding videos and that it made no difference that they do so “through a for-profit enterprise.” *Id.* at 751. The application of Minnesota antidiscrimination law challenged in *Telescope Media Group* concerned the underlying expressive activity of providing wedding videography—not speech proposing a commercial transaction for the acquisition of wedding videography services—so the commercial speech doctrine was irrelevant. *Id.* at 751–52. The decision does not conflict with the Fifth Circuit’s decision below.

*Third*, both SEAT and CCIA argue that this Court is likely to grant certiorari because the Fifth Circuit’s decision conflicts with several cases of this Court, including *Brown* and *Free Speech Coalition*. SEAT Appl. 13–14; CCIA Appl. 15–17. But as explained below, the Fifth Circuit’s decision is fully consistent with those decisions, and S. B. 2420 complies with the First Amendment. *See infra* at II-B.

And to the extent SEAT and CCIA defend the district court’s reliance on narrow, speaker-focused exceptions to parental consent as a justification for applying strict scrutiny and enjoining the entire statute, the Fifth Circuit merits panel will almost certainly hold that the district court’s analysis involved a straightforward misapplication of *Barr v. American Association of Political Consultants*. *See* CCIA.App.8a n.18 (discussing 591 U.S. at 610); *see also* 591 U.S. at 614 (plurality op.) (“[S]even Members of the Court conclude . . . that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute.”). Even if SEAT and CCIA sought certiorari for this Court to

review a decision vacating the preliminary injunctions because of the district court's misapplication of *Barr*, they would be requesting only fact-bound error correction.

If the Fifth Circuit merits panel follows the same analysis as the motions panel, this Court is unlikely to grant certiorari.

## **II. The Fifth Circuit Correctly Held That the State Is Likely to Succeed on Appeal.**

The Fifth Circuit correctly held that the State is likely to succeed on the merits of its appeal. Portions of the district court's analysis go undefended. The district court referred to the law's "targeted advertising requirements," CCIA.App.27a, SEAT.App.24a, but S. B. 2420 contains no such requirements. Nor does S. B. 2420 restrict "what content can be bought and sold," CCIA.App.27a, SEAT.App.24a—it applies equally to all software applications regardless of content.

The most straightforward error demonstrating the State's likelihood of success on appeal is that the district court did not follow the standard for facial challenges set forth in *Moody v. NetChoice*, 603 U.S. at 707. The "first step" is "to assess the state laws' scope," recognizing that "[t]he online world is variegated and complex." *Id.* at 724–25. Only then does a court "decide which of the laws' applications violate the First Amendment" and "measure them against the rest," noting "each thing covered." *Id.* at 725. In contrast, the district court began with the constitutional analysis, concluded that S. B. 2420 fails strict scrutiny and intermediate scrutiny, CCIA.App.30a–31a, SEAT.App.28a, and only then turned to *Moody* in a brief, one-paragraph analysis with a conclusory assertion about the "vast majority" and "vast minority" of applications, CCIA.App.34a–35a; SEAT.App.31a–32a.

On the merits, the district court misapplied the test for commercial speech. CCIA.App.27a; SEAT.App.24a. The preliminary injunction record demonstrates that listing a software application on an app store proposes a commercial transaction with a user. To download a software application, a user must agree to contractual terms and conditions,

potentially waiving important privacy rights. H.J. of Tex., 89th Leg., R.S. 3578 (2025); Lambert Decl. Supp. Pl.’s Mot. Prelim. Inj., Ex. E-1 at 11–12, No. 1:25-cv-01660, Dkt. No. 15-3 (W.D. Tex. Oct. 23, 2025); CCIA.App.5a & n.6.<sup>5</sup> S. B. 2420 does not regulate the underlying content of software applications—*i.e.*, “what content can be bought and sold,” CCIA.App.27a—but instead regulates the ability of minors to enter into these contracts. This is, at most, regulation of speech that “propos[es] a commercial transaction.” *Cent. Hudson*, 447 U.S. at 562 (internal quotation marks omitted). And the law readily survives intermediate scrutiny because it serves the purpose of empowering parents to control their children’s upbringing by deciding which software applications their children should access and to which contractual terms their children should agree.

The district court’s other justification for applying strict scrutiny was that the law contains a “content-based” “coverage definition.” CCIA.App.26a; SEAT.App.23a. This is doubly incorrect: As the decision below explains, the exceptions for emergency services and test administrators apply only to parental consent (not coverage of the law as a whole) and are not content-based. CCIA.App.7a–9a. Moreover, even if one or both exceptions were unconstitutional, the district court erred by not following this Court’s precedent and applying S. B. 2420’s robust severability clause. *Barr*, 591 U.S. at 624 (plurality op.).

**A. The district court failed to conduct the required facial-invalidity analysis under *Moody*.**

1. Plaintiffs “chose to litigate these cases as facial challenges, and that decision comes at a cost.” *Moody*, 603 U.S. at 723. “Claims of facial invalidity often rest on speculation’

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<sup>5</sup> Developers in Google Play must have their own Terms of Service and Privacy Policies, which are considered “critical documentation about the app.” CCIA.App.138a (Bye Decl.). Apple warns that its app store disclosure “does not apply to the data collection practices of any third parties, including developers” and suggests parents “should review the terms, policies, and practices of such third-party apps to understand what data they may collect from your child and how such data may be used.” Apple, *Family Privacy Disclosure for Children*, <https://www.apple.com/legal/privacy/en-ww/parent-disclosure/> (last visited June 21, 2026) (capitalization altered).

about the law’s coverage and its future enforcement.” *Id.* (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). “[F]acial challenges threaten to short circuit the democratic process’ by preventing duly enacted laws from being implemented in constitutional ways.” *Id.* (quoting *Wash. State Grange*, 552 U.S. at 451). This Court has “made facial challenges hard to win.” *Id.*

*Moody* emphasizes that plaintiffs bringing facial challenges must clear a “high bar.” *Id.* A proper analysis of a facial challenge requires mapping the statute’s “full range” of applications by identifying the actors and activities regulated; distinguishing between constitutional and unconstitutional applications; and determining whether unconstitutional applications “substantially outweigh” constitutional ones. *Id.* at 717, 724. Only then may a court hold a statute facially invalid. *Id.* at 723–24.

Plaintiffs bear the burden to evaluate the full scope of a law’s coverage, to show which of the law’s applications are constitutionally permissible and which are not, and to show that “the ratio of unlawful-to-lawful applications is . . . lopsided enough to justify the strong medicine of facial invalidation.” *United States v. Hansen*, 599 U.S. 762, 784 (2023) (internal quotation marks omitted). “The need for [plaintiffs] to carry [their] burden on those issues is the price of [their] decision to challenge the laws as a whole.” *Moody*, 603 U.S. at 744.

The district court inverted the *Moody* analysis. After holding that “SB 2420 is a content-based regulation and fails strict scrutiny,” the district court then turned briefly to *Moody*. CCIA.App.33a–34a; SEAT.App.31a–32a. In a single paragraph, the opinion recites that “the requirements exclusively target speech, only a small portion of which falls outside First Amendment coverage.” CCIA.App.34a; SEAT.App.32a. This approach reversed the correct order: *Moody* should be the framework for a court evaluating a facial challenge under the First Amendment, not an afterthought addressed only after a court has already analyzed constitutionality.

The district court’s analysis falls short of *Moody*’s requirements. Plaintiffs did not provide evidence of the full range of applications of S. B. 2420, including, for example, the

variety of different software applications to which it applies. *Moody*, 603 U.S. at 744. The few examples of software applications mentioned in the district court’s orders, CCIA.App.29a–30a; SEAT.App.27a, do not cover the millions of software applications available on app stores and do not provide a basis for determining whether they might present a constitutional or unconstitutional application of any particular provision of S. B. 2420. The district court provided no analysis of potential First Amendment protections for a host of software applications and application types or for different ages of minors protected by the law. CCIA.App.34a–35a; SEAT.App.32a.

To be clear, correctly understood as a regulation of commercial transactions (or commercial speech), all applications of S. B. 2420 are constitutional, but under Plaintiffs’ view, in which the First Amendment analysis depends on the expressive content of the software application being acquired, utility applications (such as calculators or appliance controls) and commercial applications (such as banking, insurance, or restaurants) might well require a different analysis than the social media and other communicative applications referenced by the district court. CCIA Appl. 21; SEAT Appl. 32. No systematic analysis was performed, let alone any mapping of the full range of covered software applications. *Cf. Moody*, 603 U.S. at 725 (“[W]hat do the laws have to say, if anything, about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends’ financial exchanges, or how a ride-sharing service like Uber runs?”). Nor did the district court consider the full range of minor children covered by S. B. 2420.

The Fifth Circuit motions panel correctly held that “the district court failed to conduct a proper facial-invalidity analysis under *Moody*” and that “[i]t is highly unlikely that Plaintiffs have met this rigorous standard.” CCIA.App.8a n.19 (internal quotation marks omitted).

2. The district court also misapplied *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), in stating that it must ignore applications of the statute “that are already covered by other laws.” CCIA.App.34a; SEAT.App.32a.

*Patel* holds that courts must ignore applications where the statute at issue “do[es] no work” in analyzing facial challenges. 576 U.S. at 419. In this case, the district court held that because other Texas laws—including H. B. 1181, the statute at issue in *Free Speech Coalition*—restrict harmful online content for minors, “only in the vast minority of applications would SB 2420 have a constitutional application to unprotected speech not addressed by other laws.” CCIA.App.35a; SEAT.App.32a.

The district court did not consider the text of H. B. 1181, which applies to (1) commercial entities that (2) “publis[h] or distribut[e] material on an Internet website” of which (3) “more than one-third . . . is sexual material harmful to minors.” Tex. Civ. Prac. & Rem. Code § 129B.002(a). S. B. 2420, in contrast, applies to software applications on mobile devices, not Internet websites, to non-commercial entities, and without regard to the amount of sexual material harmful to minors. Even for software applications that might be used to view internet websites, S. B. 2420 continues to “do . . . work,” *Patel*, 576 U.S. at 419, by providing information about age rating and content that parents can use to determine whether the child should download the application at all.

Nor did the district court grapple with the variety of software applications available on app stores that likely contain no expressive content. A calculator, level, or white noise generator would hardly seem to constitute protected speech. The district court’s assertion that because of H. B. 1181, only a “vast minority of applications” of S. B. 2420 would concern software applications that involve unprotected speech rests entirely on speculation.

3. CCIA argues that it can avoid *Moody* “because CCIA only sought relief as to the provisions targeting mobile app stores, of which its members comprise all of the legislature’s intended targets.” CCIA Appl. 37 (emphasis omitted). But this is no answer: CCIA argues that S. B. 2420 is unconstitutional because minors use software applications

from mobile app stores to access speech protected by the First Amendment, CCIA Appl. 21, so to address CCIA's argument, courts must consider the full scope of applications (including different software applications) of the statutory provisions that CCIA alleges to be constitutionally infirm. When this Court instructed courts to "explore the laws' full range of applications," *Moody*, 603 U.S. at 726, it did not instruct them to consider only the entities to which the law would directly apply.

4. Like the district court, SEAT asserts that only "a narrow subset of the content available on apps (like obscenity) may be unprotected," SEAT Appl. 30, but there is no basis for this assumption in the record. SEAT argues that "[i]t is common sense" that software applications disseminate information protected by the First Amendment. SEAT Appl. 31. This may well be true of some software applications available for mobile devices, but no one asserts that every software application disseminates protected material.

For the first time before this Court, SEAT attempts to quantify the number of applications that disseminate material protected by the First Amendment, citing a January 2025 article for the proposition that "about 54.9%" of software applications available on the Apple App Store "involve games, news, music, books, entertainment, sports, education, social media, health or fitness instructions, travel information and reviews, photography, lifestyle, and reference apps like Wikipedia." SEAT Appl. 32. The article was not presented to the district court, and even if this Court considered it, the article (1) does not reflect the current makeup of the Apple App Store, (2) relies on the Apple App Store's broad categories rather than analyzing specific software applications themselves, and (3) does not give any information about the Google Play Store or Amazon Appstore. Even crediting SEAT's assumption that the content-neutral commercial regulations of S. B. 2420 cannot constitutionally be applied to software applications that disseminate protected speech, the article fails to carry SEAT's burden to show that "the ratio of unlawful-to-lawful applications is . . . lopsided enough to justify the strong medicine of facial invalidation." *Hansen*, 599 U.S. at 784 (internal quotation marks omitted).

SEAT suggests in the alternative that the injunctions should be modified to apply only to the listed categories of apps in its alternative Prayer for Relief in its complaint. SEAT Appl. 32. It appears that SEAT is asking for this Court to address an as-applied challenge in the first instance. Neither the district court nor the Fifth Circuit considered any as-applied claims, and this Court should not do so in the first instance. *See Moody*, 603 U.S. at 726 (“[This is] a court of review, not of first view.” (internal quotation marks omitted)).

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*Moody* set a high bar for facial challenges. The district court did not consider the full scope of S. B. 2420’s applications and weigh constitutional applications against any unconstitutional ones. Based on the failure to follow *Moody* alone, the Fifth Circuit correctly determined that the State is likely to succeed on appeal.

**B. S. B. 2420 regulates, at most, commercial speech and survives intermediate scrutiny.**

1. S. B. 2420 regulates commercial transactions. *Fox*, 492 U.S. at 482. The preliminary injunction record demonstrates that in order to download a software application from an app store, a user must agree to contractual terms and conditions on important issues such as data privacy. CCIA.App.162a. Many “free” applications profit from this user data, either through targeted advertising or sales of private information. *See* CCIA.App.5a (“[U]ser data, including that of minors, is the lifeblood of the app store monetization ecosystem.”). “App listings propose commercial transactions, regardless of whether any monetary payment is made.” CCIA.App.4a.

S. B. 2420 regulates the conditions on which minors may enter these contracts. CCIA.App.4a n.3. As the motions panel recognized, S. B. 2420 likely “regulates commercial conduct with an incidental relationship to speech.” CCIA.App.5a n.7. “[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). In the same way that the State can deny drivers’ licenses to children under sixteen, even though

some fourteen-year-olds may wish to drive to a bookstore and purchase a book, the State can restrict children’s downloads of software applications to mobile devices as a product category, even if some children may wish to use applications to engage in expressive conduct. *See* Tech Scholars Amicus Br. 8 (noting other restrictions on minors, including tattooing).

2. To the extent that S. B. 2420 is subject to scrutiny under the First Amendment at all, it is reviewed only for intermediate scrutiny because, at most, it concerns speech that “propos[es] a commercial transaction.” *Cent. Hudson*, 447 U.S. at 562. App stores propose commercial transactions to users who download applications, and by downloading an application, users accept contractual terms and conditions. *See* CCIA.App.4a (“[U]sers browsing an app store can see a catalog of applications, obtain additional information, and download or purchase an application.”).

SEAT and CCIA are wrong to suggest that because some software applications disseminate content protected by the First Amendment, the State cannot regulate the commercial activity between minors, app stores, and developers. CCIA.App.6a. This Court has never held that the State cannot regulate a shopping mall if it contains a movie theater (or that movie theaters are exempt from laws applicable to all stores in a mall). Bookstores, like other sellers, must comply with state usury laws, even if an exemption from these laws might result in additional sales. Nor does purchasing a book require a child to agree to being monitored by the author or having the child’s private data sold.

As SEAT acknowledged before the district court, children have no right to mobile devices at all, CCIA.App.64a–65a, and necessarily no right to access software applications on mobile devices. Parents must “initially giv[e] their children access to the phone” and can refuse to “get [them] a phone contract.” CCIA.App.64a–65a; *see also* CCIA.App.65a (SEAT: “[T]hat’s exactly right[.]”). S. B. 2420 merely provides parents with more granular control: Rather than putting parents to the choice of allowing or disallowing a child from having *any* access to a mobile device—a decision admittedly within parents’ control,

CCIA.App.64a—S. B. 2420 gives parents the same choice with respect to each software application that a child might download. Neither SEAT nor CCIA attempts to explain why parental control over children’s access to mobile devices as a whole satisfies the First Amendment but parental control over children’s access to specific software applications violates it.

Plaintiffs misread this Court’s precedent in arguing that strict scrutiny applies because S. B. 2420 has a “content-based justification.” CCIA Appl. 27; SEAT Appl. 20. Like the district court, they treat this test as one of legislative intent, suggesting that if a discussion of content can be found in the legislative history, then a “content-based justification” has been offered for the law, so strict scrutiny applies. CCIA Appl. 27; SEAT Appl. 20.

As an initial matter, they fail to grapple with this Court’s precedent regarding legislative intent, which concerns “the legislature as a whole.” *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 689 (2021). Regardless of what a bill’s sponsor said, “the legislators who vote to adopt a bill are not the agents of the bill’s sponsor or proponents,” *id.*, and courts cannot assume a shared impermissible intent.

More significantly, SEAT and CCIA’s use of legislative history misapplies this Court’s precedent. Strict scrutiny applies to laws that “*cannot be justified* without reference to the content of the regulated speech.” *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (emphasis added; internal quotation marks omitted); *see also TikTok Inc. v. Garland*, 604 U.S. 56, 70 (2025) (same). “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

On its face, S. B. 2420 serves purposes unrelated to the content of expression: It supports the ability of parents to make decisions regarding the upbringing of their children; which applications children have access to; and the terms on which children enter contracts. H.J. of Tex., 89th Leg., R.S. 3578 (2025). That rationale is content-agnostic: It neither references the content of protected communication through applications nor reflects

disagreement with any message conveyed by any application. *TikTok*, 604 U.S. at 72. To the contrary, S. B. 2420 leaves control over applications—including decisions about the content to which children should be exposed—entirely within the hands of parents.

S. B. 2420’s content neutrality is confirmed by the fact that software developers cannot avoid the laws’ burdens by altering the content of their software. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994) (“[A]n operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers.”); *id.* at 645 (noting that a burden “extends to all cable programmers irrespective of the programming they choose to offer viewers”).

Plaintiffs and the district court err by transforming this Court’s test—whether a regulation *can be* justified without reference to the content of expression—into an inquiry into legislative history. In *City of Renton v. Playtime Theatres, Inc.*, this Court rejected the proposition that “if ‘a motivating factor’ in enacting [an] ordinance was to restrict respondents’ exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played.” 475 U.S. 41, 47 (1986). To the contrary, *City of Renton* reaffirmed that “this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *Id.* at 48 (quoting *United States v. O’Brien*, 391 U.S. 367, 383 (1968)). “What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.” *Id.* (quoting *O’Brien*, 391 U.S. at 384); *see also Turner Broad. Sys.*, 512 U.S. at 652 (“Appellants’ ability to hypothesize a content-based purpose for these provisions . . . does not cast doubt upon the content-neutral character.”). What matters is “[t]he scope and operation of the challenged provisions.” *Turner Broad. Sys.*, 512 U.S. at 649. Because the scope and operation of the challenged provisions of S. B. 2420 are justified without any reference to any protected content, they are not subject to strict scrutiny.

Nor does *Brown v. Entertainment Merchants Association*, 564 U.S. at 786, change the analysis. That case involved a content-based restriction on “violent” videogames. California attempted to “create a wholly new category of content-based regulation that is permissible only for speech directed at children.” *Id.* at 794. There was no “longstanding tradition in this country of specially restricting children’s access to depictions of violence.” *Id.* at 795. California “impose[d] a restriction on the content of protected speech.” *Id.* at 799. Because California applied its rule only to “violent” videogames, its invocation of parental authority was unavailing: The law’s content-based “effect [wa]s only in support of what the State thinks parents *ought* to want.” *Id.* at 804.

Nothing of the sort is at issue in S. B. 2420. Rather than single out a particular category of software applications for disfavored treatment based on their content, the State evenhandedly applies its regulation to all software applications, regardless of their content (and regardless of whether they convey any protected expression at all). *See* Software & Info. Indus. Ass’n Amicus Br. 6 (acknowledging that S. B. 2420 “does not preselect for harmful content”). This was a conscious choice by the Texas Legislature, which “d[id] not want to discriminate against apps.” H.J. of Tex. 89th Leg., R.S. 3579 (2025). S. B. 2420 does not tell parents what they *ought* to want but supports parents in whatever choices parents make in deciding which software applications their children should have access to and what contracts their children should enter. Unlike the law at issue in *Brown v. Entertainment Merchants*, S. B. 2420 is a content-neutral law, subject at most to intermediate scrutiny.

3. The Fifth Circuit motions panel correctly held that the State is likely to succeed in showing that S. B. 2420 survives intermediate scrutiny. “Requiring age verification, parental consent, and app-related content ratings likely directly and materially advances Texas’s substantial interest in protecting children’s data, safety, and privacy in a digital world.” CCIA.App.6a; *see also Free Speech Coal.*, 606 U.S. at 479 (“Requiring age verification is common when a law draws lines based on age.”). “Thus, there is likely a ‘reasonable fit’ between SB2420’s methods and goals allowing parents to direct and

supervise children’s downloads of apps and in-app purchases.” CCIA.App.6a. As in *Free Speech Coalition*, S. B. 2420 likely “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” CCIA.App.5a–6a (internal quotation marks omitted); see also *Free Speech Coal.*, 606 U.S. at 483 (“[A]dults have no First Amendment right to avoid age verification[.]”).

The district court erred by dismissing the State’s important interest in advancing parental consent. Before S. B. 2420, minor children could contract away their data and privacy rights to app stores and software developers. Curbing this practice—and empowering parents—falls squarely within Texas’s core police powers of consumer protection, contract capacity, and child protection. Tex. Const. art. I, § 37; *Yoder*, 406 U.S. at 232.

The district court incorrectly held that S. B. 2420 burdens more speech than necessary to further Texas’s interests. Protecting parents’ ability to make choices regarding their children’s upbringing properly applies to all software applications available on app stores. A narrower law hypothesized by the district court would require the sort of content-based distinctions that this Court rejected in *Brown v. Entertainment Merchants*. See, e.g., CCIA Appl. 38 (arguing that Texas should “tailor [S. B. 2420’s] requirements to [a] more targeted category of apps”). Moreover, all software applications require the user to accept contractual terms of service and data collection practices. CCIA.App.5a (“Any minor who downloads an app must accept its terms of service, including agreements about how the minor’s data is used.”). S. B. 2420 allows parents to decide whether they should accept this contract and consent to the terms of use.

Rather than crediting and evaluating the State’s rationale for the law—allowing parents to direct and supervise children’s downloads of applications and in-app purchases—the district court faulted the law for not serving the content-based purpose that the district

court identified.<sup>6</sup> See CCIA.App.29a (criticizing the State for not “narrowly target[ing] regulations toward apps that . . . have specific addictive qualities” and suggesting that the State restrict only “the subset of apps which contain harmful material”); CCIA.App.30a (noting that the “same [harmful] content offered via apps remains available to minors” through other means); CCIA.App.30a (suggesting that the State should have “block[ed] children from accessing harmful content on select apps”). Far from supporting the district court’s conclusion, the fact that S. B. 2420 does not serve the content-based purpose hypothesized by the district court confirms its error. S. B. 2420 is a content-neutral regulation that empowers parents to make decisions about minor children’s access to software applications on mobile devices, a purpose for which it is neither over- nor under-inclusive. Moreover, “under intermediate scrutiny, ‘the First Amendment imposes no freestanding underinclusiveness limitation,’ and Texas ‘need not address all aspects of a problem in one fell swoop.’” *Free Speech Coal.*, 606 U.S. at 498 (quoting *TikTok*, 604 U.S. at 76). This Court does not require a government to “make progress on every front before it can make progress on any front.” *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993).

Plaintiffs are wrong to insist that the State was required to support these legislative judgments with empirical evidence at the preliminary injunction stage. “Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.” *Turner Broad. Sys.*, 512 U.S. at 665. It is sufficient, as the Fifth Circuit recognized, that it be “apparent” that “[S. B. 2420] narrowly focuses on the

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<sup>6</sup> The district court repeatedly criticized the State for not engaging in content-based regulation. The district court suggested, for example, that Texas should have created a content-based exception for applications “that seek to promote physical or mental health, such as mindfulness apps like Calm, fitness apps like Strava, or therapy providers like BetterHelp.” CCIA.App.29a. Amicus Software & Information Industry Association similarly faults Texas (at 6) for blocking “resources a child-protective State should wish [minors] to have.”

Government’s substantial interest.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (recognizing that a sleeping ban serves the government’s interest “in maintaining the parks in the heart of our Capital in an attractive and intact condition”). It is readily apparent that S. B. 2420’s disclosures and parental consent serve the State’s substantial interest in supporting parents in protecting children’s data, safety, and privacy. The Fifth Circuit correctly held that the challenged provisions of S. B. 2420 are likely to survive intermediate scrutiny.

**C. The exceptions to parental consent survive scrutiny under *Barr*.**

The district court based its analysis of S. B. 2420, including its application of strict scrutiny to the entire statute, on exceptions to the parental-consent provisions that the district court incorrectly characterized as “‘coverage definitions’ that would affect the scope and application of all of SB2420’s provisions.” CCIA.App.7a (discussing CCIA.App.26a).

The district court misinterpreted the statute. The exceptions apply only to parental consent—not to the other provisions of S. B. 2420—so they could affect the analysis only of the parental-consent provisions.

Moreover, even with respect to the parental-consent provisions, the district court’s analysis failed to follow this Court’s decision in *Barr*, which addressed a narrow, content-based exception to a content-neutral law.

1. As the decision below explains, the two exceptions to the parental-consent provisions—for emergency services and nonprofits that administer standardized tests—are not content-based. CCIA.App.7a.

The emergency-services exception does not require parental consent to download a software application that “provides a user with direct access to emergency services.” Tex. Bus. & Com. Code § 121.022(h)(1)(A). These applications provide a particular function, not particular expressive content. There is no suggestion, for example, that an application

providing access to “9-1-1 emergency services” provides any expressive content protected by the First Amendment.

The second exception allows the download of software applications “operated by or in partnership with a nonprofit organization that (A) develops, sponsors, or administers a standardized test used for purposes of admission to or class placement in a postsecondary educational institution or a program within a postsecondary educational institution.” *Id.* § 121.022(h)(2). This definition concerns the speaker, not the content of speech.

Unlike in *Barr*, the exceptions do not “focu[s] on whether the [app developer] is *speaking* about a particular topic.” 591 U.S. at 620 (plurality op.). The exceptions to the parental-consent provisions of S. B. 2420 are a far cry from the content-based exceptions at issue in *Barr*. *See id.* at 619 (“This statute singles out calls ‘made solely to collect a debt owed to or guaranteed by the United States,’ not all calls from authorized debt collectors.”). Because the exceptions to S. B. 2420 are not content-based, they are not subject to strict scrutiny. *See id.* at 619–20 (providing that a content-based restriction requires “the legislature’s speaker preference [to] reflect[] a content preference” (internal quotation marks omitted)) (quoting *Reed*, 576 U.S. at 170).

2. Moreover, unlike in *Barr*, the exceptions to the parental-consent requirements do not exempt the two categories entirely but instead apply different burdens. To qualify for the emergency-services exception to parental consent, a software application must (1) “provid[e] a user with direct access to emergency services,” (2) strictly limit data collection to particular information; (3) “allow[] a user to access and use the software application without requiring the user to create an account,” and (4) be operated by or in partnership with a governmental entity, a nonprofit organization, or an authorized emergency service provider. Tex. Bus. & Com. Code § 121.022(h)(1)(A)–(D). The test-administrator exception requires compliance with strict data privacy laws. *See id.* § 121.022(h)(2)(B) (requiring compliance with Tex. Educ. Code § 32.151, *et seq.*).

In *Barr*, the law at issue “favor[ed] speech made for collecting government debt over political and other speech.” *Id.* at 619 (plurality op.). Given the other restrictions on emergency services and test-administrator entities, Plaintiffs cannot show that this speech is “favored.” At most, they can say that these software applications are regulated differently, but under intermediate scrutiny, “fit” need only be “reasonable,” not “perfect.” *Fox*, 492 U.S. at 480 (“Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.”).

3. Even if the exceptions were treated as content-based, under *Barr*, the district court erred by applying strict scrutiny to enjoin enforcement of the statute as a whole (or even the parental-consent provisions as a whole). 591 U.S. at 622–24 (plurality op.).

First, the emergency-services exception likely survives strict scrutiny. The statute at issue in *Barr* included a similar exception for “a call made for emergency purposes.” *Id.* at 616 n.2. These calls “serve the vital purpose of protecting the safety and welfare of Americans.” *Am. Ass’n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159, 170 (4th Cir. 2019), *aff’d sub nom. Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610 (2020). At a minimum, Plaintiffs have not shown that the emergency-services exception fails strict scrutiny in substantially more applications than not. *Moody*, 603 U.S. at 723–24.

Second, if it were content- rather than speaker-based, the test-administrator exception might fail strict scrutiny, but it would not justify enjoining enforcement of the parental-consent requirements as a whole.

As in *Barr*, the exception “is only a slice of the overall [software application] landscape.” 591 U.S. at 622 (plurality op.). “This is not a case where a restriction on speech is littered with exceptions that substantially negate the restriction.” *Id.*<sup>7</sup> The exception for test administrators does not “diminish the credibility of the government’s rationale for

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<sup>7</sup> This contrasts sharply with *Brown v. Entertainment Merchants*, in which the California law targeted only a small category of videogames based on their content. 564 U.S. at 794.

[S. B. 2420] in the first place.” *Id.* (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)). As in *Barr*, a narrow exception to a broad law—even if content-based—does not lead to enjoining enforcement of the law as a whole.

As a result, ordinary severability principles apply. “When [a legislature] includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause.” *Barr*, 591 U.S. at 624 (plurality op.).

S. B. 2420 contains a robust severability provision:

It is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act to every person, group of persons, or circumstances, is severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid for any reason, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected.

S. B. 2420, 89th Leg., R.S., ch. 200, § 2, Tex. Gen. Laws 385–90 (CCIA.App.99a–100a);<sup>8</sup> *see also* Tex. Gov’t Code § 311.032(a) (“If any statute contains a provision for severability, that provision prevails in interpreting that statute.”).

As in *Barr*, the text of the severability clause squarely covers any unconstitutional exception and “requires that [a court] sever it.” 591 U.S. at 629 (plurality op.). Even if any exceptions to the parental-consent provisions were unconstitutional, the exceptions should be severed and the law enforced without exceptions. “[T]he remainder of the law is capable of functioning independently and thus would be fully operative as a law.” *Id.* at 630.

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<sup>8</sup> Even in the absence of this provision, Texas law would presume severability. *See* Tex. Gov’t Code § 311.032(c) (“In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.”).

Even if the district court’s analysis of the exceptions were correct, the district court erred by not applying S. B. 2420’s severability clause and instead enjoining enforcement of the entire Act.

**D. At a minimum, the State is likely to prevail in its challenge to the universal injunctions under *Trump v. CASA*.**

The district court’s orders bar the Attorney General from enforcing S. B. 2420 against anyone, not just the Plaintiffs. CCIA.App.36a; SEAT.App.34a. They are universal preliminary injunctions.

The Fifth Circuit correctly held that “the district court’s universal preliminary injunctions likely ‘fall[] outside the bounds of a federal court’s equitable authority’ in barring Texas from enforcing SB2420 against anyone.” CCIA.App.10a (quoting *CASA*, 606 U.S. at 847). The Fifth Circuit “express[ed] great skepticism that Plaintiffs are entitled to relief,” but even if they were, “any such relief, if warranted, would be an injunction limited to enforcement against [SEAT] plaintiffs and any identified members of [CCIA].” CCIA.App.10a. At a minimum, the Fifth Circuit would need to vacate the injunctions “to the extent that [they] are broader than necessary to provide complete relief to each plaintiff with standing to sue.” *CASA*, 606 U.S. at 861.

1. CCIA argues that its “members represent virtually the universe of app stores.” CCIA Appl. 38. If that is correct, then it means only that a proper, plaintiff-specific injunction will be broad, not that a universal injunction is permissible.

2. SEAT argues that *CASA* is inapplicable because *CASA* was decided based on the equitable authority that federal courts possess under the Judiciary Act of 1789. SEAT Appl. 33. SEAT correctly notes that *CASA* does not construe § 1983, SEAT Appl. 33, but SEAT identifies no provision of § 1983 (or another statute) that expands the equitable authority of the courts to providing relief to non-parties. “A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power.” *CASA*, 606 U.S. at 841.

SEAT cites Justice Kavanaugh’s concurrence, SEAT Appl. 33, but that concurrence notes that plaintiffs “may sometimes seek to proceed by class action” and “may ask a court to preliminarily ‘set aside’ a new agency rule” under the Administrative Procedure Act. *CASA*, 606 U.S. at 869 (Kavanaugh, J., concurring). Neither is relevant here.

SEAT next argues “app stores need to *identify* which of their users are Applicants to allow them to bypass the State’s restrictions, imposing the exact gating measure Applicants sued to enjoin.” SEAT Appl. 34. But identifying the SEAT plaintiffs for purposes of limiting the scope of the injunction would not be equivalent to enforcing S. B. 2420 against them, and even if identification were considered a burden or the SEAT plaintiffs were unable to engage in speech with other minors who did not obtain parental consent to download a particular software application, SEAT Appl. 34, such minimal burdens would not justify a universal injunction, *cf. CASA*, 606 U.S. at 853–54 (“After all, to say that a court *can* award complete relief is not to say that it *should* do so. Complete relief is not a guarantee—it is the maximum a court can provide.”).

The universal injunctions conflict with *CASA*, demonstrating the State’s likely success on the merits.

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Plaintiffs have not established that the Fifth Circuit was “demonstrably wrong in its application of accepted standards in deciding to issue the stay,” *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers), or that the Fifth Circuit erred in determining that the State is likely to succeed on appeal.

### **III. Plaintiffs Have Not Shown That They Will Be Seriously and Irreparably Harmed, and Equity Favors Texas.**

Finally, Plaintiffs have also failed to demonstrate that they will be “seriously and irreparably injured” without a stay from this Court. *Id.* “The moving party also must show a likelihood that it would suffer irreparable harm if a stay were not granted.” *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 2 (2025) (Kavanaugh, J., concurring in the grant of the

application for stay). “Particularly in ‘close cases,’ the Court also considers the balance of harms and equities to the parties, including the public interest.” *Id.* (quoting *Hollingsworth*, 558 U.S. at 190); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

“[A]ny time a State is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Texas has a sovereign interest in enforcing S. B. 2420. The Texas Legislature determined that this statute is necessary to protect Texas parents and children; blocking that protection imposes an injury.

When an injunction affects a State, the balance of equities and public interest factors merge. *Nken*, 556 U.S. at 435. Texas’s interest coincides with the public’s interest in protecting children and granting parents the necessary information to make informed choices about their children’s upbringing and choices about contracts children enter into. *See* Tex. Const. art I, § 37; *Ginsberg v. State of New York*, 390 U.S. 629, 640 (1968) (noting a State’s “interest in the well-being of its youth”); *Yoder*, 406 U.S. at 232 (recognizing the “primary role of the parents in the upbringing of their children”).

On the other hand, S. B. 2420 requires only “commercially reasonable” verification methods and permits developers to use “widely adopted industry standards” when determining the rating and specific content. Tex. Bus. & Com. Code § 121.056(b).

CCIA’s members contend that they will suffer “not only deprivations of First Amendment rights (paradigmatic irreparable harm) but also unrecoverable compliance costs and burdens.” CCIA Appl. 39; *cf.* SEAT Appl. 34–36 (alleging non-monetary First Amendment harm). A “stay is not a matter of right, even if irreparable injury might otherwise result” but is “instead an exercise of judicial discretion . . . dependent upon the circumstances of the particular case.” *Nken*, 556 U.S. at 433 (internal quotation marks omitted). Even if S. B. 2420 imposes compliance costs on CCIA, the Fifth Circuit correctly

concluded that this content-neutral regulation of commercial transactions likely complies with the First Amendment. The equities also weigh against vacating the Fifth Circuit’s stay pending appeal.

### CONCLUSION

For these reasons, this Court should deny the applications to vacate the Fifth Circuit’s stay pending appeal.

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