

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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 FREE SPEECH COALITION, INC.,)
 ET AL.,)
 Petitioners,)
 v.) No. 23-1122
 KEN PAXTON, ATTORNEY GENERAL)
 OF TEXAS,)
 Respondent.)

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10 - - - - -

11
12 Washington, D.C.
13 Wednesday, January 15, 2025
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:13 a.m.
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7 vacatur.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 23-1122, Free
5 Speech Coalition versus Paxton.

6 Mr. Shaffer.

7 ORAL ARGUMENT OF DEREK L. SHAFFER

8 ON BEHALF OF THE PETITIONERS

9 MR. SHAFFER: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 In this case, a Fifth Circuit majority
12 held that mere rational basis review, the most
13 lax form of judicial scrutiny, applies to a
14 Texas law that burdens constitutionally
15 protected speech based on its content,
16 specifically, by imposing an age verification
17 barrier before anyone can access a sexually
18 themed website.

19 That aberrant holding defies this
20 Court's consistent precedent, including its
21 Ashcroft decision, as Judge Higginbotham well
22 explained in his dissent. This Court should
23 begin by confirming that strict scrutiny
24 continues to apply to any such content-based
25 burden on websites and their adult users.

1 Notably, Texas's law is even more
2 problematic than its failed federal
3 predecessors. It applies to entire websites
4 depending on whether one-third of their content
5 is deemed inappropriate for minors. It also
6 brands websites with stigmatizing, unscientific
7 so-called "health warnings" that, despite being
8 enjoined, evidence Texas in -- Texas's intention
9 to deter adults, even assuming they've cleared
10 the age -- age verification hurdle, from
11 accessing protected speech.

12 To abandon strict scrutiny here, Your
13 Honors, could open the door to an emerging wave
14 of regulations that imperil free speech online.
15 From there, this Court can readily restore the
16 preliminary injunction given Petitioners'
17 likelihood of success under strict scrutiny.
18 The district court found that this law's age
19 verification provisions are wildly
20 under-inclusive and unduly chilling.

21 At the same time, content filtering
22 today affords at least one alternative that is
23 both less restrictive and more efficacious.
24 Ashcroft teaches that a preliminary injunction
25 should stand in precisely these circumstances.

1 That result, Your Honors, does not
2 denigrate the government's compelling interest
3 in protecting children, nor does it prevent
4 Texas from trying to carry its burden between
5 now and final judgment or from enacting a new
6 and better-tailored law. Rather, reinstating
7 the preliminary injunction would simply maintain
8 fidelity to First Amendment rights and
9 precedents while litigation proceeds.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Can age verification
12 systems ever be found constitutional?

13 MR. SHAFFER: Justice Thomas, I think
14 a -- a government should start with content
15 filtering as a less restrictive alternative.

16 JUSTICE THOMAS: Well, but can age
17 verification ever be constitutional?

18 MR. SHAFFER: I don't think the Court
19 needs to close the door to that here, but it
20 would need to be tailored age verification of
21 the sort that the amici supporting Texas are
22 advocating, which is different from what Texas's
23 law permits.

24 JUSTICE THOMAS: And what would that
25 look like?

1 MR. SHAFFER: I think, Your Honor,
2 what you have from the amici is that there are
3 ways of verifying age short of identifying the
4 individual, short of the transactional data that
5 Texas would require be provided. And so you
6 would have less identification of the
7 individual. You would have privacy protections
8 that are maximally assured by the law. You
9 would have private rights of enforcement that
10 you do not have here. Everything depends upon
11 the Attorney General, who's avowedly hostile to
12 these websites and to their users.

13 And, last, Justice Thomas, you should
14 have confidentiality that is legally assured,
15 and the state should be providing assurance that
16 it will not misuse the information that is being
17 collected pursuant to the state mandate.

18 None of those features are present
19 in -- are present in Texas's approach to age
20 verification. And, tellingly, you have nothing
21 in the legislative record, you have nothing from
22 Texas even in its submissions to this Court,
23 that shows how the specific provisions of H.B.
24 1181 have been tailored with sensitivity to the
25 privacy concerns that exist in this context or,

1 for that matter, to actually being efficacious
2 and making sure that you have meaningful
3 protections that protect client -- that protect
4 minors across the board.

5 And so, Your Honors, if -- if -- if we
6 start with strict scrutiny --

7 JUSTICE BARRETT: Counsel, can I ask
8 you a question? Would it -- is it a barrier --
9 explain to me why the barrier is different
10 online than in a brick-and-mortar setting. I
11 mean, in a brick-and-mortar setting -- I mean,
12 it seems like a lot of your concerns are driven
13 by privacy concerns, which are really a feature
14 of the Internet. I mean, you didn't have -- you
15 don't have privacy if you go into the bookstore
16 in Ginsberg or if you go to a movie theater that
17 displays pornographic movies. You have to show
18 age verification.

19 So explain to me why this is so
20 uniquely burdensome here when it's not been in
21 the real-world context.

22 MR. SHAFFER: Let me start with that,
23 Justice Barrett, with your question about why is
24 this medium different. And the answer is you're
25 creating a permanent record on the Internet when

1 you provide this information that it is being
2 collected. It is a target for hackers. It is
3 something that is different from just flashing
4 an ID in physical space.

5 But I'd also note that you have
6 content filtering, as the Court has recognized,
7 that is the analogue in the physical space --

8 JUSTICE BARRETT: Well, whoa, whoa,
9 whoa, whoa.

10 MR. SHAFFER: -- for screening out --

11 JUSTICE BARRETT: I mean, let's see.
12 In -- in Ashcroft II, the Court, you know,
13 expressed anxiety about the fact that technology
14 moves so fast that the five years between the
15 district court findings in that case and the
16 case being at the Supreme Court, you know, that
17 technology may have moved beyond the record at
18 that point.

19 It's been 20 years since Ashcroft.
20 The iPhone was introduced in 2007 and Ashcroft
21 was decided in 2004. I mean, kids can get
22 online porn through gaming systems, tablets,
23 phones, computers. It's -- let me just say that
24 content filtering for all those different
25 devices, I can say from personal experience, is

1 difficult to keep up with.

2 So -- and -- and I think that the
3 explosion of addiction in -- to online porn has
4 shown that content filtering isn't working.

5 MR. SHAFFER: Justice Barrett,
6 let's -- let's flash forward on the technology.
7 I think it is actually common ground that
8 content filtering today is technologically
9 better than ever, more readily available than
10 ever. It's employed by this Court. It's
11 employed in workplaces throughout America. And
12 it's agreed by the experts for both sides that
13 it -- it can work specifically in this context
14 of parents protecting their kids through all the
15 devices that Your Honor just catalogued.

16 You -- you can find that in Joint --

17 JUSTICE BARRETT: This Court has an IT
18 department and so do workplaces.

19 MR. SHAFFER: But -- but this is
20 content-filtering software that's designed to be
21 implemented in the home. And so, if you -- if
22 you look at -- Joint Appendix 275-76, 282-285,
23 you can see Mr. Allen testifying for Texas about
24 content filtering today being fit for purpose.
25 It's a question of adoption.

1 And as to that, I think it is telling
2 that Texas has not considered the possibility of
3 educating parents, encouraging parents. There
4 was a proposal as to this law specifically to
5 say that devices would automatically install
6 content filtering. That would be legally
7 required.

8 They dropped that, Texas dropped that,
9 without any explanation whatsoever. You can
10 find that in the Joint Appendix at 255-56.
11 Texas decided that they would empower parents
12 and -- and equip parents and then, without
13 explanation, decided they would skip ahead to
14 this very chilling step.

15 JUSTICE ALITO: Mr. Shaffer, do you
16 know a lot of parents who are more tech-savvy
17 than their 15-year-old children?

18 (Laughter.)

19 MR. SHAFFER: Justice Alito, it's a
20 fair question and I don't know that -- that -- I
21 think kids may be ahead of parents, but that's a
22 problem with this law. It's not solving for the
23 fact that --

24 JUSTICE ALITO: Well, it's a problem
25 with -- with filtering, isn't it?

1 MR. SHAFFER: I -- I don't think it
2 is, Justice Alito, because this is filtering
3 software that is designed to withstand
4 circumvention, including by sophisticated tech
5 people in the workplace and in -- and in
6 courthouses.

7 JUSTICE ALITO: I mean, Mr. Shaffer,
8 come on, be real. There's a -- a -- a huge
9 volume of evidence that filtering doesn't work.
10 We've had many years of experience with it. We
11 now have many, many states who have adopted age
12 verification requirements.

13 You think they just -- their -- why
14 are they doing that if the filtering is so good?

15 MR. SHAFFER: Respectfully, Justice
16 Alito, they made no efforts to encourage content
17 filtering or to educate about it. And look,
18 Justice Alito, at the health warnings that are
19 in this law. Those are designed to change
20 established behavior --

21 JUSTICE ALITO: Well, those are not --
22 those are not before us. So is your -- is your
23 argument that this is unconstitutional because
24 it was -- it was motivated by improper bias in
25 the part of the -- the Texas legislature that

1 voted almost unanimously for this law?

2 MR. SHAFFER: I -- I would suggest
3 that to Your Honors, but I don't think you need
4 to go that far. What I would say is that they
5 wanted to skip ahead to the more chilling
6 efforts to change behavior as opposed to
7 starting with content filtering or even
8 considering it.

9 JUSTICE KAVANAUGH: But the -- the
10 point is that content filtering may -- may work
11 to some extent, but it doesn't work to the same
12 extent in achieving the government's interest.
13 At least that's the argument. And the relevant
14 inquiry is not does content filtering work.
15 It's does it achieve the interest to the same
16 degree.

17 And as Justice Barrett indicated with
18 Ashcroft, you know, Justice Breyer's opinion in
19 Ashcroft, whether it was right or wrong at that
20 moment, seems correct today or at least
21 prescient today.

22 MR. SHAFFER: Justices Kavanaugh,
23 Alito, Barrett, I would encourage you to look at
24 the district court's findings in Petitioners'
25 Appendix 112 to 114 about all the gaps in

1 Texas's approach to regulating. Foreign
2 websites are going to be completely --
3 undeterred and unchanged.

4 You have VPNs that minors --
5 tech-savvy minors can use to make it seem like
6 they're outside of Texas. You have search
7 engines. You have social media. All of those
8 are designedly outside the scope of Texas's law,
9 and the only way that kids are actually going to
10 be protected from all those many sources that
11 are the most readily available --

12 JUSTICE KAVANAUGH: Well, that's an
13 under --

14 MR. SHAFFER: -- that are the
15 likeliest gateways --

16 JUSTICE KAVANAUGH: -- that's an
17 under-inclusiveness argument, and -- and I don't
18 think we've said that a state has to tackle
19 every aspect of the problem or else it can't do
20 anything.

21 MR. SHAFFER: All I mean to suggest is
22 that a genuine effort, a serious effort, to
23 regulate in this area would look like the
24 federal laws that Your Honors were considering
25 that said, irrespective of source, there's

1 certain content that is sexually explicit and
2 inappropriate for minors, and that is the
3 subject of the law.

4 JUSTICE KAVANAUGH: What do you mean
5 by "genuine" and "serious?" You don't think
6 they're genuine in their interest?

7 MR. SHAFFER: I think that they're
8 genuine in their interest, Justice Kavanaugh,
9 but I think that their interest is an anti -- a
10 broader antiporn interest in preventing willing
11 adults from accessing this content. And they
12 want to make it more difficult. They want to
13 make it costlier. They want to make it
14 chilling.

15 And so, Justice Kavanaugh, what I
16 would say is, crediting the Court's concerns and
17 the concerns of a responsible government that
18 wants to regulate here, I think you should wait
19 for a government that actually shows they're --
20 they're making serious headway to tackle the
21 problem.

22 JUSTICE KAGAN: Could I take you back
23 to Justice Barrett's initial question? This was
24 about brick-and-mortar stores.

25 And if -- if -- if there's a

1 age-verification requirement about, like, porn
2 magazines, is that also subject to strict
3 scrutiny? Would that -- are you saying that
4 that should be analyzed the same way?

5 MR. SHAFFER: I'd need to see the law,
6 Justice Kagan. I would. I think, if it's an
7 age --

8 JUSTICE KAGAN: Well, no, I don't
9 think you need to see the law. Just -- I mean,
10 it's -- it's just this: It's a age-verification
11 requirement, but it applies to brick-and-mortar
12 stores, and it relates to the distribution of,
13 you know, printed smut.

14 MR. SHAFFER: Here -- here's all I
15 mean, Justice Kagan. If that law was to say age
16 verification takes the form of an affidavit or
17 show your birth certificate, I think that that
18 would absolutely, of course, be subject to
19 strict scrutiny.

20 JUSTICE KAGAN: Well, it's a
21 age-verification law that requires the same kind
22 of documentary proof or whatever that this law
23 does.

24 MR. SHAFFER: I think, if it's going
25 beyond the New York law that was addressed in

1 Ginsberg, as I understand Your Honor's question,
2 I think it would be subject to strict scrutiny.
3 It would almost surely satisfy that -- that --
4 that scrutiny, unless it was gratuitously
5 designed to chill the adult customer from making
6 a purchase.

7 JUSTICE KAGAN: And why is it that
8 that law would satisfy strict scrutiny, but this
9 law does not?

10 MR. SHAFFER: Because it's tough to
11 imagine, Justice Kagan, how else you would be
12 getting after the -- the point-of-purchase
13 exchange to a minor, short of what Your Honor's
14 describing, assuming that this is the kind of
15 traditional sort of law.

16 I do note we -- we agree with the
17 Institute --

18 JUSTICE KAGAN: So, if that's the
19 case, your answer to that really depends
20 entirely on content blocking, the availability
21 of content blocking in the online space?

22 MR. SHAFFER: I don't think entirely,
23 Justice Kagan, because, if you go to a store and
24 the clerk is just looking at an ID, there's not
25 a special cost associated with that.

1 When you have age verification for
2 every single user in the Internet context and
3 you're multiplying those costs, \$40,000 per
4 hundred thousand users, as found by the district
5 court, at a minimum, you have a serious burden
6 on the speaker.

7 And we agree with the Institute for
8 Justice in its amicus brief that when you have a
9 law that reads as this law does, saying, if you
10 are sponsoring sexually explicit content online,
11 you must answer to an across-the-board
12 age-verification mandate, that, Your Honors, is
13 content-based discrimination. That is a
14 content-based burden. That should always
15 trigger strict scrutiny.

16 JUSTICE GORSUCH: Counsel --

17 JUSTICE ALITO: Well, the court --

18 JUSTICE GORSUCH: -- can I -- I'm
19 sorry. Just -- I just want to pin -- pin you
20 down a little bit if I can -- I'm going to try.

21 Do you agree that at least in theory
22 brick-and-mortar institutions shouldn't be
23 treated differently than online, and vice versa,
24 that that principle -- that we shouldn't have a
25 constitutional regime that prefers technology --

1 one technology over another? We said as much in
2 Wayfair.

3 MR. SHAFFER: Justice Gorsuch --

4 JUSTICE GORSUCH: Do you agree with
5 that principle? Or are --

6 MR. SHAFFER: -- I -- I think it's a
7 different medium, so I'm -- I don't -- I don't
8 want to be difficult with Your Honor's question.
9 I do agree -- oh, sorry.

10 JUSTICE GORSUCH: I -- I'm going to
11 press you, all right?

12 MR. SHAFFER: Okay.

13 JUSTICE GORSUCH: I understand they're
14 different media. But does the principle apply
15 that we should try and treat those two media as
16 equally as possible?

17 MR. SHAFFER: Yes. And I think --

18 JUSTICE GORSUCH: Okay.

19 MR. SHAFFER: -- in a way that is --

20 JUSTICE GORSUCH: Okay. I'll -- I'll
21 take it. I'll take it.

22 (Laughter.)

23 MR. SHAFFER: Okay. Okay. I'll stop
24 there.

25 JUSTICE GORSUCH: Yeah. Good idea.

1 Okay. What percentage of your
2 clients' materials would be considered obscene
3 for minors?

4 MR. SHAFFER: Your Honors, it's --
5 it's tough to arrive at that calculation.

6 JUSTICE GORSUCH: Well, your friends
7 on the other side say it's all.

8 MR. SHAFFER: I don't think -- no,
9 that -- that is not true, Your Honors. We
10 respectfully disagree.

11 JUSTICE GORSUCH: Virtually all?

12 MR. SHAFFER: No. Your Honors, if you
13 look --

14 JUSTICE GORSUCH: Okay. Then you give
15 me the number. What percentage?

16 MR. SHAFFER: I -- I cannot quantify
17 it because we're dealing with, I would
18 recognize, a very large universe of material. I
19 would note, Your Honor, that among that material
20 is blogs, it is podcasts, it is -- it is --

21 JUSTICE GORSUCH: I understand. I'm
22 asking you for a percentage.

23 MR. SHAFFER: Your Honor, I cannot
24 quantify that.

25 JUSTICE GORSUCH: More than

1 50 percent?

2 MR. SHAFFER: I think that's a fair --
3 that -- that's a fair guess.

4 JUSTICE GORSUCH: More than
5 70 percent?

6 MR. SHAFFER: Your Honors, I -- I
7 don't want to go out on a limb. I think that
8 may be correct, but I can't --

9 JUSTICE GORSUCH: More than nine --

10 MR. SHAFFER: -- tell you with
11 assurance.

12 JUSTICE GORSUCH: -- more than
13 90 percent?

14 MR. SHAFFER: There, Your Honor, I
15 think we may be stretching upwards --

16 JUSTICE GORSUCH: Okay. So we --

17 MR. SHAFFER: -- as far as whether
18 it's sexually explicit.

19 JUSTICE GORSUCH: -- we got
20 70 percent, though. Okay. All right.

21 And then do you agree that there is a
22 compelling government interest in keeping
23 obscene materials from minors?

24 MR. SHAFFER: Yes, unequivocally.

25 JUSTICE GORSUCH: Okay. Thank you.

1 JUSTICE SOTOMAYOR: Counsel, can we --

2 JUSTICE ALITO: Well, why don't you --
3 to follow up on -- on Justice Gorsuch's
4 questions, why don't you talk about the most
5 popular porn sites, which I -- I gather you're
6 representing.

7 So one of the parties here is -- is
8 the owner of Pornhub, right?

9 MR. SHAFFER: Yes.

10 JUSTICE ALITO: And what percentage of
11 the material on that is not obscene as to
12 children?

13 MR. SHAFFER: Well, Your Honor, I --
14 I -- if we're talking about the youngest minors,
15 I would agree that most of it is, and we -- that
16 is how we read the law.

17 JUSTICE ALITO: But is it -- is it
18 like the old Playboy magazine? You have essays
19 there by the modern-day equivalent of Gore Vidal
20 and William F. Buckley, Junior?

21 MR. SHAFFER: Not in that sense. But,
22 in the sense you have sexual wellness posts
23 about women recovering from hysterectomies and
24 how they can enjoy sex, that's on -- on there.
25 Discussions of age-verification proposals and

1 where the industry lines up as far as what they
2 think should be legislated and what should not.

3 JUSTICE ALITO: All right. Let's go
4 down to, what's the second most popular porn
5 site?

6 MR. SHAFFER: I -- Your Honor, I
7 don't -- I don't have the exact rankings.

8 JUSTICE ALITO: You don't know? You
9 represent these people.

10 MR. SHAFFER: They -- we represent the
11 industry, Your Honor, the portion of the
12 industry that answers to U.S. laws and
13 jurisdiction, so that portion of it.

14 JUSTICE ALITO: Do you -- have you --
15 are you familiar with what they have?

16 MR. SHAFFER: Your Honor, somewhat so,
17 yes. And I think the record offers some
18 indications of that. But I'd also note that
19 some of it is soft-core by any account. It's --
20 it's people who are wearing less rather than
21 more clothing, we would recognize, but not
22 anything that anyone would think to be obscene
23 as to adults and potentially for a 17-year-old.
24 That would be up to a parent to decide what's
25 appropriate for their -- their minor.

1 JUSTICE ALITO: I mean, the district
2 court was worried that this would have an effect
3 on something like Netflix, right?

4 MR. SHAFFER: Yes.

5 JUSTICE ALITO: I mean, is Netflix a
6 party here?

7 MR. SHAFFER: No, they're not. But --

8 JUSTICE ALITO: Is there any --
9 anything -- any business, other than hard-core
10 porn, a party here, concerned about the
11 application of this law to them?

12 MR. SHAFFER: Yes, Your Honor.

13 JUSTICE ALITO: I -- I'm sorry, an
14 amicus here?

15 MR. SHAFFER: Well, Your Honor, you
16 have the American Booksellers Association. You
17 have O.schools, which is devoted to sex
18 education.

19 JUSTICE ALITO: I think you have --
20 yeah. You don't have Netflix, you don't have
21 any -- anything -- anybody else like that who is
22 concerned that this would apply?

23 MR. SHAFFER: Even in terms of the
24 client base, Justice Alito, I want to be
25 precise, one of the client websites is solely

1 soft-core. It's not anything that you would --
2 I think would answer to the description you were
3 suggesting earlier. And they are absolutely
4 going to be brought within the sweep.

5 JUSTICE ALITO: I mean, there are
6 two --

7 JUSTICE SOTOMAYOR: Counsel, can --
8 can we get to the question presented?

9 MR. SHAFFER: Yes, Justice Sotomayor.

10 JUSTICE SOTOMAYOR: The question
11 presented is not whether this law passes -- is
12 constitutional. The question is what level of
13 scrutiny, correct?

14 MR. SHAFFER: Correct.

15 JUSTICE SOTOMAYOR: And so the issue
16 that Justice Gorsuch asked you was what type of
17 scrutiny should we apply when content can be
18 obscene as to children but not obscene as to
19 adults, correct?

20 MR. SHAFFER: Correct.

21 JUSTICE SOTOMAYOR: And we have at
22 least five president -- precedents that have
23 answered that question directly?

24 MR. SHAFFER: Yes.

25 JUSTICE SOTOMAYOR: In Sable, some of

1 the material was obscene to children even if it
2 wasn't obscene as to adults because, with
3 respect to children, we have said that even
4 indecent materials can be regulated under
5 rational basis, correct?

6 MR. SHAFFER: Yes.

7 JUSTICE SOTOMAYOR: And in Sable, the
8 law applied to adults, and we said you had to
9 apply strict scrutiny.

10 MR. SHAFFER: Correct. And it was
11 invalid under it.

12 JUSTICE SOTOMAYOR: So the answer to
13 Justice Gorsuch is let's treat every medium
14 under the scrutiny that applies to the people
15 affected, correct?

16 MR. SHAFFER: Yes, Justice Sotomayor.

17 JUSTICE SOTOMAYOR: So that's strict
18 scrutiny?

19 MR. SHAFFER: That is strict scrutiny.

20 JUSTICE SOTOMAYOR: For us to apply
21 anything else would be overturning at least five
22 precedents?

23 MR. SHAFFER: That's my count as well.

24 And --

25 JUSTICE SOTOMAYOR: All right. Now

1 let's move from there, okay?

2 Assuming all of the questions that
3 have been asked of you, whether because this
4 medium is different, more ubiquitous, whether
5 because the -- the effect on children might be
6 greater today than it was back when, we have --
7 that would go to whether strict scrutiny is met,
8 isn't that true?

9 MR. SHAFFER: That is exactly right.

10 JUSTICE SOTOMAYOR: And so, if content
11 filtering is no longer as effective as we
12 thought in Ashcroft -- and I spot my colleagues
13 that that's likely true -- that would go to
14 whether this law meets -- strict scrutiny
15 because age verification is more effective,
16 correct?

17 MR. SHAFFER: Yes.

18 JUSTICE SOTOMAYOR: All right. Now,
19 having said all of that, there has been a
20 suggestion by the other side that, instead of
21 strict scrutiny, we should apply intermediate
22 scrutiny.

23 Assuming we applied a different level
24 of scrutiny -- I don't know why, because the
25 only two times that we've applied intermediate

1 scrutiny, one was Renton, where they were
2 dealing with the effects unrelated to speech,
3 correct?

4 MR. SHAFFER: Correct, secondary
5 effects.

6 JUSTICE SOTOMAYOR: Secondary effects,
7 traffic jams, noise, et cetera. But the one
8 case that might give me pause is Pacifica, all
9 right? And Pacifica had to do with a radio, and
10 we applied a different level of scrutiny because
11 of that, but it wasn't rational basis like this
12 Court did, correct?

13 MR. SHAFFER: Correct.

14 JUSTICE SOTOMAYOR: So it was at best
15 intermediate scrutiny?

16 MR. SHAFFER: Yes.

17 JUSTICE SOTOMAYOR: Why is this
18 different than Pacifica?

19 MR. SHAFFER: Two reasons I'll offer,
20 Justice Sotomayor.

21 Number one, broadcast is uniquely
22 regulated as a medium of expression, as the
23 Court has recognized, and -- and public
24 broadcasting in particular. The Internet is the
25 opposite of that through all the precedents Your

1 Honor went through, Reno and Ashcroft and the
2 way that the Internet has developed.

3 The second reason, the Court
4 emphasized just how much radio permeates the
5 entire house. If the radio is on, you may just
6 hear something. So there's no analogue for
7 content filtering, and you don't have a user
8 through the screen who is specifically electing
9 certain content.

10 And I would just note, Justice
11 Sotomayor, in *Pacifica*, it was even-handed
12 across-the-board regulation of the content
13 deemed inappropriate for kids. Here, you have
14 what Justice Kavanaugh and I were discussing in
15 terms of under-inclusiveness. I would say it is
16 so conspicuous, so inexplicable, it is
17 speaker-based discrimination. That is another
18 reason in our view why strict scrutiny would
19 apply here -- even more so than in the cases we
20 were just going through.

21 Sorry, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: No. Thank you
23 very much, counsel.

24 Sable, of course, was 35 years ago.
25 In that period, the technological access to

1 pornography, obviously, has exploded, right? I
2 mean, it was very difficult for 15-year-olds,
3 whatever, to get -- access to the type of things
4 that is available with a push of a button today.
5 And the nature of the pornography, I think, has
6 also changed in -- in those 35 years.

7 And so are those the sort of
8 developments that suggest revisiting the
9 standard of scrutiny as -- as something that we
10 should at least consider, as opposed to keeping
11 a structure that was accepted and established in
12 an entirely different era?

13 MR. SHAFFER: I'd respectfully urge
14 you not to, Mr. Chief Justice, and for the same
15 reasons that Your Honors did in the Holder case,
16 in the Yulee case, in opinions that you wrote,
17 Mr. Chief Justice. The extent of the interest
18 does not change the standard of scrutiny. It
19 simply goes to whether the applicable scrutiny
20 is satisfied.

21 And we are here conceding explicitly
22 that there is a compelling interest that is at
23 work in this area. We encourage state efforts
24 to regulate in a way that is properly tailored,
25 is respectful of adults' rights, and is really

1 going to help protect kids.

2 And so that, Your Honors, is exactly
3 where strict scrutiny does its work. And I
4 think, for the reasons that we were discussing
5 with Justice Sotomayor, it is as well warranted
6 here as in the entire string of cases where Your
7 Honors have continuously applied strict scrutiny
8 even as there were new problems, new
9 technologies, that government was trying to
10 tackle.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: Justice Sotomayor
16 mentioned some of the precedents that have been
17 cited by the parties in this case. She didn't
18 mention Ginsberg versus New York, which was
19 perhaps the decision that the court of appeals
20 relied on most heavily.

21 So I would like you to explain why
22 rational basis was appropriate in Ginsberg and
23 not appropriate here. What you say in your
24 brief is: "The law at issue in Ginsberg did not
25 place any restriction on adults' access to

1 sexual materials; it did not, for example,
2 require sellers to conduct age verification of
3 adult customers."

4 How can that be true? Suppose a
5 youngish-looking person went into Mr. Ginsberg's
6 store and wanted to buy a girly magazine.
7 Mr. Ginsberg faced the possibility of criminal
8 prosecution if he did not verify that that
9 person was not a minor. So why is there not age
10 verification built into the issue in Ginsberg?

11 MR. SHAFFER: Justice Alito, if it's
12 built in, it's tailored age verification, just
13 as you were suggesting with the question. Most
14 purchasers -- if I myself were the purchaser, I
15 don't think I would be carded. They'll -- the
16 New York law said that if there was a knowing
17 sale to a minor, someone whom the seller should
18 suspect to be a minor, that was the exceptional
19 instance where you might have, subject to the
20 seller's discretion, some reasonable effort to
21 ascertain the age. That --

22 JUSTICE ALITO: Well, if you're -- I
23 mean, if -- if what you're facing is possible
24 criminal liability, you may want to err on the
25 side of safety. I know that, when I try to buy

1 wine at a supermarket, they require me to show
2 an ID. I take it -- it's kind of -- I'm
3 flattered by it.

4 (Laughter.)

5 MR. SHAFFER: I've had the same
6 experience. But, Justice Alito, I don't think
7 the senior citizen under the New York law would
8 be as likely to be asked to produce verification
9 of age. And it certainly wasn't an
10 across-the-board age verification mandate that
11 has costs and burdens and chills.

12 JUSTICE SOTOMAYOR: Counsel, I -- I
13 think you're off on a --

14 CHIEF JUSTICE ROBERTS: I'm sorry.

15 JUSTICE SOTOMAYOR: I'm -- I'm sorry.

16 CHIEF JUSTICE ROBERTS: I'm sorry,
17 Justice Sotomayor.

18 MR. SHAFFER: Sorry.

19 CHIEF JUSTICE ROBERTS: Justice Alito.

20 JUSTICE ALITO: Well, let me -- let me
21 move on to something else.

22 So you -- you agree that the state has
23 a compelling interest, but you say they have
24 other ways, less burdensome ways, of serving
25 that interest, and I just wanted you to go

1 through those.

2 So one is filtering. We've talked
3 about filtering. Another that you referred to
4 in passing was putting some kind of a blocking
5 device on every device. You want this built
6 into every smartphone? Is that the idea?

7 MR. SHAFFER: So it's available, yes,
8 Justice Alito, right there at the click of a
9 button.

10 JUSTICE ALITO: Why is that less
11 burdensome?

12 MR. SHAFFER: It -- it -- first of
13 all, it's not burdening speech. It's the
14 conduct of producing the device that's subject
15 to the regulation. You also don't have someone,
16 when they're accessing extremely sensitive
17 content online, merely by virtue of that, going
18 through a separate transaction where they're
19 identifying themselves in a way that is specific
20 to that content, the most sensitive, private,
21 compromising content. And -- and --

22 JUSTICE ALITO: -- you don't want --
23 your clients don't want to pay for it. You
24 want -- you want to put the -- the cost on -- on
25 Apple and Google, right?

1 MR. SHAFFER: Well, Your Honor --

2 JUSTICE ALITO: That's what's
3 involved?

4 MR. SHAFFER: -- I -- I -- I'd also
5 note it's not a tax on the speaker, which has
6 been a traditional paradigmatic concern of the
7 First Amendment. Here, it is the speaker of the
8 particular expression who, by virtue of that
9 content, is subject to the tax.

10 JUSTICE ALITO: And what other --

11 MR. SHAFFER: That is --

12 JUSTICE ALITO: -- what other ways of
13 furthering this interest do you think the state
14 should have adopted?

15 MR. SHAFFER: Two more. You could
16 have blocking at the Internet service provider
17 level subject to the election of the adult who's
18 in charge of the account so that you could have
19 it cut off at the source so it doesn't flow into
20 the household unless the adult has authorized
21 it.

22 And the other, as I was discussing
23 with Justice Thomas, if the state is to pursue
24 age verification and the Court is to suggest
25 that that is open to the state, notwithstanding

1 the availability of these other alternatives,
2 let them do that in a way that is well
3 considered and tailored so that the age
4 verification process is no more burdensome than
5 it needs to be.

6 You have guarantees about what that
7 age verification looks like. You have privacy
8 protections. You have confidentiality. You
9 have enforcement mechanisms that are available
10 to the aggrieved private party. This law, H.B.
11 1181, does not answer to any of those --

12 JUSTICE ALITO: Well, there are --
13 there are services that provide age verification
14 for lots of -- and -- and -- and they are used
15 for lots of purposes, for -- for online
16 gambling, for purchasing tobacco products, and
17 they have very tough privacy limitations built
18 into them. Isn't it open to your clients to use
19 those?

20 MR. SHAFFER: Actually, it's not,
21 Justice Alito, because, if you look at
22 Petitioners' Appendix 171, you can see the
23 provisions of the law that govern age
24 verification. It has to be one of three things,
25 either a digital ID, which everyone agrees is

1 not available in Texas, so that's -- the -- the
2 number one alternative is -- is -- is not there
3 to be used.

4 The second is a government-issued ID,
5 which everyone agrees is exceptionally chilling,
6 perhaps the most chilling way to identify
7 yourself to a hostile government.

8 And the third is dependent upon
9 commercially reasonable methods that rely upon
10 transactional data, Justice Alito, so that's
11 things like your mortgage application, your --
12 your --

13 JUSTICE ALITO: So you could not use
14 Yoti, for example?

15 MR. SHAFFER: We --

16 JUSTICE ALITO: Your clients could not
17 use that?

18 MR. SHAFFER: We don't think so,
19 Justice Alito. There -- by all indications,
20 that is ruled out. And -- and I do think that
21 that's telling. You have Yoti's amicus brief,
22 but they don't pretend to marry up their
23 proposed forms of age verification with what
24 Texas has prescribed and, by implication,
25 proscribed as an available form of age

1 verification.

2 JUSTICE ALITO: Is that something
3 that's been addressed by the Texas courts or by
4 the Texas AG, whether using a service like that
5 would satisfy the requirements of the statute?

6 MR. SHAFFER: I think the plain text
7 tells us you can't. Texas didn't suggest a
8 narrowing construction below. And, of course,
9 this was a pre-enforcement challenge that
10 resulted in a preliminary injunction. So there
11 just isn't an opportunity there to have the
12 narrowing construction.

13 One other point if I may, Justice
14 Alito, there have been hacks of age-verification
15 providers. That -- that is a real thing,
16 despite all of their assurances. And Yoti, as
17 you'll see in amicus briefs in support of us --

18 JUSTICE ALITO: There have been hacks
19 of everything.

20 MR. SHAFFER: Yes, yes. And that is
21 exactly why age verification has an inherent
22 chill to it. Everyone knows what Your Honor
23 just said.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Ginsberg -- and

3 that's what the Court below relied upon --

4 Ginsberg wasn't -- was a child --

5 MR. SHAFFER: Yes.

6 JUSTICE SOTOMAYOR: -- objecting, not

7 a store.

8 MR. SHAFFER: Exactly right, Justice

9 Sotomayor.

10 JUSTICE SOTOMAYOR: And it was a child

11 saying: I don't have -- I shouldn't be barred

12 from viewing indecent materials because adults

13 shouldn't, correct?

14 MR. SHAFFER: That's correct.

15 JUSTICE SOTOMAYOR: And so the only

16 rule there was what level of scrutiny do you

17 apply to a law that applies only to children,

18 correct?

19 MR. SHAFFER: That is exactly right.

20 JUSTICE SOTOMAYOR: And what the Court

21 said is what's indecent for an adult could be

22 obscene, basically, for a child. We -- and

23 obscene materials only have to -- for

24 children -- obscene or indecent materials only

25 have to satisfy rational basis?

1 MR. SHAFFER: That's right. And I
2 would just note that Justice Brennan's for
3 the -- Justice Brennan's opinion for the Court
4 was exceptionally clear about what you were just
5 going through, Justice Sotomayor, what was and
6 was not being addressed.

7 JUSTICE SOTOMAYOR: So, in terms of
8 Ginsberg being a precedent, it's not a precedent
9 involving a burden on adults?

10 MR. SHAFFER: Yes. And our challenge
11 is solely on behalf of adults. We are not
12 invoking the rights of minors for purposes of
13 our challenge.

14 JUSTICE SOTOMAYOR: Sable was a case
15 in which there was a burden on children and a
16 burden on adults. The Court applied rational
17 basis to the burden on children and explicitly
18 applied strict scrutiny to the burden on adults,
19 correct?

20 MR. SHAFFER: Yes.

21 JUSTICE SOTOMAYOR: So we have direct
22 precedent that says you'll apply different
23 scrutiny to each age category.

24 MR. SHAFFER: That's right. And I
25 would just note that in Reno, Justice O'Connor's

1 separate opinion there differentiated, just as
2 Your Honor's suggesting, between the rights of
3 minors versus the rights of adults, which were
4 separately addressed in that opinion too.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: No.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: I had thought
11 Ginsberg was a conviction of an adult who sold
12 to minors, and it wasn't a minor asserting any
13 rights. He was -- he was charged and convicted
14 of a crime knowingly selling to minors, right?

15 MR. SHAFFER: Forgive me for agreeing
16 with both you and Justice Sotomayor.

17 JUSTICE GORSUCH: Yeah. I --

18 MR. SHAFFER: The challenge --

19 JUSTICE GORSUCH: But only one of us
20 can be right.

21 MR. SHAFFER: Well, here's -- here's
22 how I -- I square the circle. It was a
23 challenge by the seller, invoking the rights of
24 minors. So that was what the Court was
25 presented with.

1 JUSTICE GORSUCH: It -- it was
2 invoking his right to sell to minors.

3 MR. SHAFFER: Justice Gorsuch, I --

4 JUSTICE GORSUCH: He was convicted of
5 a crime for knowingly selling to minors,
6 counsel.

7 MR. SHAFFER: As Your Honor knows, in
8 the -- in the First Amendment context, the
9 overbreadth -- the availability of the
10 overbreadth challenge can invoke the rights of
11 others. And that's exactly what I understood,
12 per Justice Brennan, the -- the challenger there
13 to have done --

14 JUSTICE GORSUCH: All right.

15 MR. SHAFFER: -- invoking the rights
16 of the minor.

17 JUSTICE GORSUCH: Okay. You agree he
18 was challenging his criminal conviction for
19 knowingly selling --

20 MR. SHAFFER: I -- I'm not going to
21 disagree with --

22 JUSTICE GORSUCH: You can't --

23 MR. SHAFFER: -- the procedural march,
24 Your Honor, just -- just the substance.

25 JUSTICE GORSUCH: All right. And your

1 distinction of Ginsberg is, there, he didn't
2 have to check every ID? Is that your -- is that
3 your distinction?

4 MR. SHAFFER: Correct. Liability
5 arose from a knowing sale.

6 JUSTICE GORSUCH: So you think that a
7 law that would require brick-and-mortar stores
8 to check all IDs would be impermissible?

9 MR. SHAFFER: I think it would be
10 subject to strict scrutiny potentially. If the
11 adult shows the sorts of burdens that we have
12 here, then I think --

13 JUSTICE GORSUCH: And you would argue
14 that -- undoubtedly, that it chills and,
15 therefore, it's a problem, right?

16 MR. SHAFFER: Justice Gorsuch, my
17 arguments would not be anywhere near as strong.
18 I don't envision any such challenge, and I don't
19 know of any such challenge being brought. I'm
20 not suggesting the Court should write its
21 opinion here in a way that invites those
22 challenges.

23 JUSTICE GORSUCH: And with respect to
24 age verification online, which you -- you treat
25 as a different kettle of fish, gambling, age ID

1 is required by a lot of states.

2 MR. SHAFFER: If it's not involving
3 expression -- protected expression, I'm not
4 bringing a First Amendment challenge.

5 JUSTICE GORSUCH: Okay. Applying to
6 get a gun, Second Amendment, got to do that
7 online?

8 MR. SHAFFER: Different standard.
9 We're not concerned with chill in the same way.
10 We don't have all the precedents that call for
11 strict scrutiny when you have burdens on adults
12 and -- and the concerns that are operative here.

13 JUSTICE GORSUCH: To vote in some
14 states, you have to show an ID, a
15 government-issued ID?

16 MR. SHAFFER: We're not suggesting
17 that's at issue here.

18 JUSTICE GORSUCH: Okay. All those are
19 okay, but this is different?

20 MR. SHAFFER: Your Honor, it -- it is
21 different, and I think part of it's because of
22 the Internet, part of it's because of the law,
23 and part of it's because we're talking about a
24 content-based burden on the speaker.

25 JUSTICE GORSUCH: Okay. And then we

1 do have an amicus, you know, from the
2 age-verification providers saying that this can
3 be done now online, anticipating it talking
4 about Justice O'Connor's very thoughtful
5 concurrence in Reno saying this technology is
6 going to change, and they say it indeed has
7 changed.

8 And you point out that we don't have
9 much of a record given that this is on a PI.
10 What do we do about that?

11 MR. SHAFFER: I think it was incumbent
12 upon the Texas legislature to make a record and
13 show that it was wrestling with these
14 considerations.

15 JUSTICE GORSUCH: Or -- or -- or is it
16 incumbent upon the challenger to the law,
17 especially in a facial challenge, to make the
18 record?

19 MR. SHAFFER: I think, under strict
20 scrutiny, it's Texas that bears the burden. It
21 is a content-based burden on expression. You
22 have the instruction of this Court that was
23 clear as can be in Ashcroft and no consideration
24 by the Texas legislature about content
25 filtering. So I think that gives us likelihood

1 of success out of the gate.

2 But I would also note, Justice
3 Gorsuch, as found by the district court, we
4 showed that age verification, as implemented by
5 H.B. 1181, will chill and will be invading
6 privacy.

7 One last point. This is a one-third
8 trigger. And -- and what Your Honor's positing
9 is a more targeted law, a more tailored law that
10 says: Here's a particular concern, and we're
11 regulating according to that.

12 JUSTICE GORSUCH: And then what --
13 what do you do about our statement in Moody that
14 those who bring facial challenges have an
15 especially hard row -- not road -- row to hoe?

16 (Laughter.)

17 MR. SHAFFER: Yes. We think we --
18 we've -- we've done what Moody's would require
19 any First Amendment challenger to do. We've
20 shown that the heartland applications are
21 unconstitutional, particularly when it comes to
22 lack of tailoring. As you expand beyond these
23 particular challengers who are the avowed
24 targets of the law, the analysis only gets worse
25 for Texas.

1 We don't read Moody's to have
2 transformed First Amendment jurisprudence so
3 that you can never bring a First Amendment
4 challenge when you're dealing with certain
5 unknowns and a wide array of speech that's being
6 regulated.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE KAVANAUGH: On Justice
11 Sotomayor's questions about what's before us --

12 JUSTICE GORSUCH: We don't hoe --

13 JUSTICE KAVANAUGH: -- is it just
14 whether we apply heightened scrutiny, do we go
15 on to apply heightened scrutiny, you, in your
16 opening, asked us to restore the preliminary
17 injunction.

18 In order to restore the preliminary
19 injunction as you are asking, we have to make an
20 assessment of likelihood of success on how the
21 standard is applied, not just what the standard
22 is, correct?

23 MR. SHAFFER: Correct, Justice
24 Kavanaugh. So I'm -- I'm -- but I'm
25 respectfully making that ask of the Court, but

1 we recognize you could stop short.

2 JUSTICE KAVANAUGH: Okay. And do you
3 dispute the problem that Texas is targeting of
4 children's access to pornography?

5 MR. SHAFFER: We don't dispute the
6 underlying problem. We support efforts to solve
7 the problem --

8 JUSTICE KAVANAUGH: Do you --

9 MR. SHAFFER: -- as long as they're
10 properly tailored.

11 JUSTICE KAVANAUGH: -- do you dispute
12 the societal problems that are created both
13 short term and long term from the rampant access
14 to pornography for children?

15 MR. SHAFFER: Justice Kavanaugh, that
16 is a complicated question that I -- I don't know
17 that I can speak to definitively.

18 I would say this. I think that
19 there's a discussion, a robust discussion and a
20 healthy discussion, about whether all sorts of
21 things involving screens and the Internet and
22 social media and interactions over the Internet,
23 whether those are unhealthy for children.

24 JUSTICE KAVANAUGH: Okay.

25 MR. SHAFFER: And we understand that

1 this is part of that discussion. I just don't
2 think it's confined, as Your Honor was
3 suggesting with the court -- with the question,
4 to pornography.

5 JUSTICE KAVANAUGH: And then thinking
6 back to Ashcroft 20 years ago versus now, age
7 verification technology has become cheaper, more
8 effective in preventing circumvention. At least
9 that's what is represented to us.

10 Do you dispute that?

11 MR. SHAFFER: I think that the
12 technology has evolved. We don't dispute that.
13 I think the forms of age verification that are
14 built into the law are absolutely susceptible to
15 cheating because you can get the supposed proof
16 of age --

17 JUSTICE KAVANAUGH: The question was
18 whether it's improved since the time of
19 Ashcroft.

20 MR. SHAFFER: I think that it has
21 improved, Justice Kavanaugh. I don't know that
22 it's fit for purpose, but it has improved.

23 JUSTICE KAVANAUGH: And then European
24 countries, France and others, are requiring age
25 verification for this kind of thing?

1 MR. SHAFFER: Your Honor, they have
2 explored it. I would note that the U.K. has
3 actually suspended age verification pending
4 technological developments. And they do not --
5 to the extent that they require age
6 verification, the way that they're doing it
7 looks fundamentally different from Texas
8 because, as Your Honor knows, Europe builds in
9 all sorts of ferocious privacy protections and
10 penalties if there are violations.

11 JUSTICE KAVANAUGH: And then -- that's
12 a fair point there.

13 On the -- on the change in
14 technologies, how do we evaluate the ubiquitous
15 nature of smartphones that did not exist at the
16 time of Ashcroft?

17 MR. SHAFFER: I think it tells you
18 that this law is not going to accomplish its
19 aims because a smartphone can access the foreign
20 websites. It can access -- you can use VPNs at
21 the click of a button to make it seem like
22 you're not in Texas. You can go through the
23 search engines. You can go through social
24 media. You can access the same content in the
25 ways that kids are likeliest to do. And H.B.

1 1181, by its design, does nothing, I do mean
2 nothing, to address that.

3 JUSTICE KAVANAUGH: And, again, I'm
4 asking those questions because you are asking us
5 to restore the preliminary injunction, and,
6 therefore, we need to have some sense of those
7 questions.

8 MR. SHAFFER: I appreciate the
9 questions.

10 JUSTICE KAVANAUGH: Yeah. And, last,
11 on stare decisis, because that's been raised
12 appropriately, how do we think about stare
13 decisis with a case like Ashcroft as to its
14 evaluation of the facts on the ground as opposed
15 to its legal standard articulation?

16 MR. SHAFFER: I think Ashcroft was
17 exactly on point because it was predictive. It
18 was not the Court saying definitively that here
19 is the -- the way of the world for all time and
20 in a way --

21 JUSTICE KAVANAUGH: Do you think it's
22 permissible for the Court to say, you know,
23 looking at it now, with the technology as it's
24 evolved with the smartphones, with the
25 experience of the problems caused by children's

1 access to pornography, that we now essentially
2 agree with Justice Breyer's evaluation of how to
3 apply this standard?

4 MR. SHAFFER: Respectfully, no,
5 Justice Kavanaugh, because of the --

6 JUSTICE KAVANAUGH: And why is that?

7 MR. SHAFFER: Because of the posture
8 we're in. We're here on a preliminary
9 injunction that is --

10 JUSTICE KAVANAUGH: Like -- likelihood
11 that we would agree with Justice Breyer.

12 MR. SHAFFER: Well, but, Justice
13 Kavanaugh, I think the district court has work
14 to do, as reflected in its undisturbed,
15 unchallenged, well-substantiated findings about
16 what the record says about these --

17 JUSTICE KAVANAUGH: But you agree,
18 to --

19 MR. SHAFFER: -- questions right now.

20 JUSTICE KAVANAUGH: -- to restore a
21 preliminary injunction by this Court, we would
22 have to find that you have a likelihood of
23 success on how whatever level of scrutiny is
24 applied, correct?

25 MR. SHAFFER: I have a friendly

1 amendment to that. You would find that the
2 district court did not abuse its discretion by
3 so concluding preliminarily in predicting likely
4 success based upon a preliminary record. That's
5 exactly what Ashcroft addressed. That's exactly
6 what Your Honors have before you in this case.

7 JUSTICE KAVANAUGH: Okay. Thank you
8 very much.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: A question about the
12 level of scrutiny. So this law is a little
13 bit -- well, it -- there are significant
14 differences between the way this law works and
15 the way the law worked in Ashcroft II.

16 And we all agree, and I -- I
17 understood you to concede earlier, that a
18 minor -- that -- that only rational basis would
19 apply if a minor brought a First Amendment
20 challenge to this law because the law very
21 specifically tracks only the category of speech
22 that minors have no right -- that -- that's
23 obscene for minors, so that minors have no right
24 to access, right?

25 MR. SHAFFER: I do agree with that. I

1 would just note, Justice Barrett, that, here, we
2 don't know the age of the minor in question. So
3 I could -- I don't want to prejudice the right
4 of a 17-year-old --

5 JUSTICE BARRETT: Right.

6 MR. SHAFFER: -- to say I'm being
7 limited to the rights of a 3-year-old.

8 JUSTICE BARRETT: Point taken.

9 MR. SHAFFER: But we're not here
10 asserting any such theory.

11 JUSTICE BARRETT: Point taken. What
12 I'm getting at here is, and just in thinking
13 about whether strict scrutiny is the right
14 standard, the law draws a line between speech
15 that's entirely unprotected as to one class and
16 speech that is protected. It doesn't try to
17 infringe upon the ability of adults to get it.
18 I understand it burdens it with the age
19 verification, but it doesn't prohibit it.

20 The law in Ashcroft II was content
21 discrimination on its face because it actually
22 made it illegal to post it, right, absent the
23 age verification defense?

24 MR. SHAFFER: Subject to the
25 affirmative defense, as Your Honor says, yes.

1 JUSTICE BARRETT: Subject to the
2 defense.

3 MR. SHAFFER: So --

4 JUSTICE BARRETT: Right, right, right,
5 right, right. Yeah. I -- I agree and I -- I'm
6 just --

7 MR. SHAFFER: Yeah.

8 JUSTICE BARRETT: -- exploring this
9 with you. So this law works a little bit
10 differently because the content-based line that
11 it draws -- I mean, it's not altogether taking
12 this content off the table, right? You can
13 still display it. Pornhub can still have its
14 videos up. But there's the age verification
15 requirement as the burden.

16 I -- I guess I'm wondering if there's
17 an argument for it not being strict scrutiny --
18 not being rational basis, but maybe we should be
19 thinking of this as the age verification
20 requirement burdens the adult's right to access
21 the material but in a way that's not trying to
22 discriminate on the basis of content. I know
23 you have to see the content in order to decide
24 where the age verification requirement applies,
25 but, you know, City of Austin says not every

1 check of the billboard triggers content --
2 triggers strict -- strict scrutiny, excuse me.
3 What do you have to say to that?

4 MR. SHAFFER: Two points if I may.

5 The first is what Your Honor is
6 positing is dependent upon the -- the premise
7 that they're not putting anyone out of business
8 in preventing them from showing their content.
9 The record says otherwise. I mean, the costs of
10 age verification are such that some speakers
11 cannot continue to speak here.

12 And -- and the second, Justice
13 Barrett, I do agree with Justice Sotomayor's
14 questions that in Playboy, in Sable, the Court
15 was dealing with restrictions that were not
16 total bans, especially in Playboy. It was just
17 an effort to essentially say we're going to
18 channel this expression for adults. It's still
19 available for adults. It's just in a way that
20 shields minors from it. That's exactly where
21 the Court said that the burden in that case was
22 analyzed no differently from the ban at least
23 for purposes of the applicable standard of
24 scrutiny.

25 JUSTICE BARRETT: Okay. Thanks.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 JUSTICE JACKSON: And in addition to
4 those cases, don't you also have Reno? I mean,
5 I guess I don't understand how Justice Barrett's
6 hypothesized standard would -- would be
7 consistent with what we said in Reno, where we
8 said, in order to deny minors access to
9 potentially harmful speech, the law at issue
10 there effectively suppresses a large amount of
11 speech that adults have a constitutional right
12 to receive, and, therefore, it received strict
13 scrutiny. Right?

14 MR. SHAFFER: That's right, Justice
15 Jackson.

16 JUSTICE JACKSON: The other thing I
17 was pretty surprised about was your concession
18 to Justice Kavanaugh that we have to be
19 evaluating the likelihood of success. I don't
20 really understand that in this circumstance.

21 I thought we had a district court that
22 issued a preliminary injunction and a court of
23 appeals that you say erroneously stayed it. I
24 don't know why, if we determine that the court
25 of appeals applied the wrong standard and vacate

1 its ruling, the district court's injunction
2 doesn't just come back into effect. I don't --
3 you're not asking us to issue a PI, is that
4 right?

5 MR. SHAFFER: That's right, Justice
6 Jackson. I -- I just meant -- I'm sorry.

7 JUSTICE JACKSON: So we're in a
8 situation where we really don't have to be
9 reaching the merits of success. What we're
10 doing, as Justice Sotomayor suggested, is
11 evaluating whether the court of appeals was
12 correct when it said that this was supposed to
13 be evaluated under the rational basis standard
14 as opposed to strict scrutiny, right?

15 MR. SHAFFER: Yes. All I meant to
16 suggest to Justice Kavanaugh, that I think more
17 guidance, rather than less, from the Court in
18 its opinion as to why, ostensibly, the district
19 court did not abuse its discretion would be
20 helpful here --

21 JUSTICE JACKSON: But it may not be if
22 they disagree with you. So what --

23 (Laughter.)

24 JUSTICE JACKSON: -- what -- what -- I
25 mean, this is my other question. You know, you

1 differ from the government insofar as the
2 government says just decide that the wrong level
3 of scrutiny was applied here and send it back to
4 the Fifth Circuit to apply it.

5 You say no, we should be applying the
6 standard for strict scrutiny. And I think that
7 is what is opening the door to all the questions
8 that you're getting about whether or not this is
9 actually narrowly tailored, whether or not there
10 are -- you know, content -- the content-
11 filtering software is working. It's because, it
12 seems to me, that you've asked us to apply
13 strict scrutiny in a circumstance in which it
14 would have been easy, as the government
15 suggests, to just say wrong standard, Fifth
16 Circuit, and send it back.

17 MR. SHAFFER: I never want to be
18 disagreeing with the United States unless I
19 must. So I -- we don't have much disagreement
20 with them on -- on this, Justice Jackson.

21 I would just note that we're talking
22 about undisturbed, unchallenged findings by the
23 district court and -- and a determination that
24 follows, in our view, inexorably from this
25 Court's precedent. Given that there has been

1 the detour taken by the lower court, I think it
2 would be helpful, I think it would be
3 reaffirming of First Amendment --

4 JUSTICE JACKSON: And the Fifth
5 Circuit can -- can decide on remand whether or
6 not the district court's findings actually
7 sustain this under the proper standard, correct?

8 MR. SHAFFER: It can, Justice Jackson.

9 JUSTICE JACKSON: Finally, with
10 respect to Ginsberg and whether or not the Fifth
11 Circuit was correct to look at Ginsberg as the
12 precedent that tells us what standard is
13 supposed to apply, in your colloquy with Justice
14 Gorsuch, he did -- and you admitted that we're
15 talking about a person who was convicted, and he
16 himself was an adult.

17 But I understood the Court to have
18 told us what the issue is. Well, first of all,
19 the Court in the opinion says that "his" --
20 meaning the -- the -- the person's "contention
21 is the broad proposition that the scope of the
22 constitutional freedom of expression secured to
23 a citizen to read or see material concerned with
24 sex cannot be made to depend on whether the
25 citizen is an adult or a minor." So he was

1 saying this is unconstitutional because it
2 varies between adult and minor.

3 And then the Court says: "It is
4 enough for the purposes of this case that we
5 inquire whether it was constitutionally
6 impermissible for New York ... to accord minors
7 under 17 a more restricted right than that
8 assured to adults to judge and determine for
9 themselves what sex material they ... read."

10 So, really, this was a
11 rights-of-minors case where the person appeared
12 to be arguing that you can't have this law
13 because it burdens the rights of minors. So is
14 that the situation that we have here today in
15 this case?

16 MR. SHAFFER: This is a fundamentally
17 different challenge. And I disagree with you --
18 I agree with you, Your Honor, that the Court was
19 exceptionally clear in Ginsberg about
20 adjudicating only the rights of minors in -- in
21 the face of a challenge that it understood to be
22 confined to the rights of minors.

23 JUSTICE JACKSON: And, here, we have a
24 challenge in which the person is saying: Fine,
25 whatever you do with minors, what we are

1 suggesting is that requiring adults to do
2 something, to do this thing, to access this
3 material, burdens our First Amendment right. So
4 that's a different issue, is it not?

5 MR. SHAFFER: Exactly right, adults
6 and speakers. Also the -- the websites that
7 sponsor this content. All of which have to
8 answer to the age-verification mandate at great
9 cost.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Fletcher.

14 ORAL ARGUMENT OF BRIAN H. FLETCHER

15 FOR THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING VACATUR

17 MR. FLETCHER: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 We agree with Petitioners that the
20 Fifth Circuit was wrong to apply only rational
21 basis review because Texas's law imposes a
22 content-based burden on speech that is protected
23 for adults.

24 Our office acknowledged that strict
25 scrutiny applied to a similar federal law in

1 Ashcroft II. This Court agreed. And we haven't
2 identified a basis for applying a different
3 standard here.

4 Critically, though, that should not
5 prevent Congress or the states from restricting
6 the distribution of pornography to children
7 online, just as states have traditionally done
8 it in brick-and-mortar stores and theaters.

9 In remanding for the application of
10 strict scrutiny, we'd urge the Court to
11 emphasize three points.

12 First, the government has a compelling
13 interest in protecting children from harmful
14 sexual material online.

15 Second, a law serving that interest is
16 valid as long as it does not burden adult access
17 more than necessary to exclude children.

18 And, third, Ashcroft II's preliminary
19 application of strict scrutiny 20 years ago does
20 not prevent courts from upholding
21 age-verification requirements today now that
22 verification require -- has become less
23 burdensome and experience has shown that other
24 approaches are not working.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: In the laws that
2 you -- that the Justice Department was arguing
3 in favor of in Playboy and Ashcroft --

4 MR. FLETCHER: Mm-hmm.

5 JUSTICE THOMAS: -- in -- in either of
6 those, did you ever suggest or argue that there
7 should be a lower standard?

8 MR. FLETCHER: We did in every one of
9 those cases before Ashcroft.

10 In Sable, which was the first one of
11 them, we argued for something like intermediate
12 scrutiny under Pacifica.

13 In Reno, which was the next one, we
14 again invoked Pacifica and also made a Renton
15 argument very similar to the secondary effects
16 argument that my friends from Texas make here.

17 And then, in Playboy, we again invoked
18 an argument based upon Pacifica, and Justice
19 Breyer, in dissent, made an argument based on
20 Renton.

21 So we made a pitch for intermediate
22 scrutiny repeatedly in this context. We were
23 rebuffed. And I think that's the history that
24 led us to concede in Ashcroft II that this was a
25 content-based restriction that demanded strict

1 scrutiny.

2 JUSTICE THOMAS: So do you think that
3 it's appropriate in this context of protecting
4 children to compromise the strict scrutiny
5 standard?

6 MR. FLETCHER: I wouldn't describe it
7 as compromising the strict scrutiny standard at
8 all, Justice Thomas. But I do think it would be
9 appropriate for the Court to emphasize that it's
10 going to be easier for states to satisfy strict
11 scrutiny in this context because of the very
12 unique nature of the interest here.

13 Normally, the government does not have
14 a legitimate, much less a compelling, interest
15 in restricting speech based on its content.
16 That's a fundamental principle.

17 Here, though, there's a specific
18 category of speech defined by its content,
19 speech that is obscene as to the minors, where
20 everyone agrees that the state not only has a
21 legitimate interest but a compelling interest in
22 making sure that minors do not access that
23 speech that is defined by its content.

24 So I think it's going to be much
25 easier for states to show that restrictions that

1 are based on that content are narrowly tailored
2 to a compelling interest.

3 JUSTICE KAGAN: Well, will it be easy
4 enough for this law to pass?

5 MR. FLETCHER: I don't know about this
6 law. We haven't taken a position on that.

7 JUSTICE KAGAN: I know. But, I mean,
8 you've been staring at this law for a long time.
9 And -- and -- and this law is pretty similar to
10 20 other laws that are out there. So you must
11 have some sense even if you don't want to say
12 particularly this law.

13 MR. FLETCHER: Yeah.

14 JUSTICE KAGAN: There are 20 laws out
15 there. Are some of them going to pass through
16 the -- the eye of the needle here or not?

17 MR. FLETCHER: So let me say, if the
18 question were framed the way Justice Thomas did,
19 is there some version of age verification that
20 is good enough, my answer is yes, we --

21 JUSTICE KAGAN: I -- I'm not really
22 talking about some imaginable version. I'm
23 talking about, like, some version that states
24 have enacted.

25 MR. FLETCHER: So let me be -- give

1 you a specific example. We defended COPA,
2 the -- the law this Court looked at in Ashcroft
3 II, even after remand, in the district court, in
4 the Third Circuit, and in the cert petition in
5 this Court.

6 I have no reason to think that we
7 would come to any other conclusion about a law
8 that looked like that today.

9 The reason I'm hesitating about state
10 laws is that I don't know that there's actually
11 that much variation in the state laws. And all
12 of them raise some questions that we have about
13 Texas's law that we think are questions of what
14 the law means that would inform the First
15 Amendment analysis.

16 So one is this one-third requirement.
17 I think Petitioners say the law requires
18 age-gating of an entire website even if it has a
19 substantial amount of content that's protected.

20 My friends from Texas say in the red
21 brief that the -- if you segregate out the --
22 the obscene-as-to-minors content behind an age
23 gate, you don't have to age-gate the rest of the
24 content of the website. That seems highly
25 relevant to us.

1 The second one is the -- the -- the
2 issue that my friend alluded to earlier about
3 which methods of age verification are allowed.
4 The amicus briefs and Texas highlight some of
5 these newer biometric methods that seem
6 significantly less restrictive, but there's a
7 question, as the colloquy earlier illustrated,
8 whether Texas law would allow those methods or
9 would instead require some sort of physical
10 identification or transaction records of some
11 kind.

12 And then the last one, which has also
13 already come up, is which minors are we talking
14 about when we say "obscene as to minors." I
15 take it that the plaintiffs say that means
16 obscene even as to the youngest minors.

17 When we were defending a similar law
18 in COPA, in Ashcroft II, we took the position
19 that "obscene as to minors" means obscene as to
20 all minors, as in inappropriate and lacking in
21 value even as to older minors. I think the law
22 becomes much easier to defend if Texas courts
23 would adopt the same interpretation of the Texas
24 law here.

25 If I could add one thought. You know,

1 I think that this Court has said in a series of
2 recent First Amendment cases that tradition can
3 be a very important guidepost in deciding both
4 what standard of review applies and also in
5 thinking about how to apply that standard in
6 particular circumstances.

7 I think, here, the tradition that
8 applies in brick-and-mortar contexts that's
9 reflected in Ginsberg, to be sure, but also in a
10 much broader family of laws that restrict the
11 distribution of this material, as Justice
12 O'Connor explained in Footnotes 1 and 2 of her
13 opinion in Reno, adult theaters, adult
14 bookstores, books and magazines, there's a long
15 tradition of restricting this material through
16 age-verification methods that are less formal
17 because, as Justice Alito indicated, it's just a
18 requirement: Don't sell to minors. And that
19 means that a clerk in the physical world can do
20 it by looking at the person and only requiring
21 ID if the person isn't obviously of age.

22 But there's a long tradition of
23 imposing age restrictions on the distribution of
24 this material. So I think that supports the
25 idea that --

1 JUSTICE GORSUCH: And on that point,
2 Mr. Fletcher, I mean, that -- that -- that -- so
3 you do take Ginsberg to be more than we're just
4 dealing with the rights of minors. It -- it
5 does also impact how we think about the burden
6 placed on people, adults, to ensure that minors
7 don't have access. It speaks to that, as do our
8 traditions with respect to adult theaters and
9 many other things.

10 MR. FLETCHER: I agree with that
11 wholeheartedly as to the tradition that's
12 reflected in the law --

13 JUSTICE GORSUCH: Yeah. Okay.

14 MR. FLETCHER: -- that was at issue in
15 Ginsberg. I think I read Ginsberg the same way
16 that Justice Jackson does.

17 JUSTICE GORSUCH: No, I understand
18 that. But it -- it -- it's a necessary
19 implication of the decision.

20 MR. FLETCHER: Right. No one thought
21 that that law was invalid.

22 JUSTICE GORSUCH: Right.

23 MR. FLETCHER: I think everybody
24 understood it's a content-based law. But
25 everyone understands that the burden on adults

1 is okay --

2 JUSTICE GORSUCH: And --

3 MR. FLETCHER: -- because requiring ID
4 is the least restrictive way of keeping the
5 material away from children.

6 JUSTICE GORSUCH: And -- and Sable,
7 there's burdens on speakers that we think are
8 okay to -- to protect against obscenity, right?

9 MR. FLETCHER: Right. And the Court
10 suggests in Sable -- I think, there, it was a
11 ban on the Dial-a-Porn messages, and the Court
12 suggested --

13 JUSTICE GORSUCH: Well --

14 MR. FLETCHER: -- some sort of age
15 verification or something like that would be a
16 better way to do it.

17 JUSTICE GORSUCH: And that would be a
18 burden on the speaker in that.

19 MR. FLETCHER: Exactly. Yes.

20 JUSTICE GORSUCH: And the same thing
21 with adult theaters and all, so on and so forth.

22 MR. FLETCHER: Right.

23 JUSTICE GORSUCH: Okay. If we -- if
24 we were to vacate the Fifth Circuit, as -- as --
25 as you've suggested, there's some question in

1 discussion about what that -- what -- what the
2 world looks like then.

3 MR. FLETCHER: Mm-hmm.

4 JUSTICE GORSUCH: Would the
5 preliminary injunction of the district court
6 spring back into effect, so this law that's
7 already taken effect will now no longer be
8 enforceable?

9 MR. FLETCHER: So I think that'll be a
10 question for the Fifth Circuit in the first
11 instance. If this Court vacates and sends it
12 back to the Fifth Circuit, when the Court's
13 mandate issues, the appeal would spring back to
14 life in the Fifth Circuit and it would be -- go
15 back to the state of the world before the Fifth
16 Circuit issued its opinion.

17 The state of the world was that the
18 Fifth Circuit had granted a stay of the
19 preliminary injunction pending appeal. I think
20 it would be open to the Fifth Circuit, with the
21 benefit of whatever guidance this Court provided
22 in its opinion, to decide in the first instance
23 whether to reinstate that same stay pending its
24 further consideration of the case on remand.

25 JUSTICE GORSUCH: How could it do that

1 if we've told them they've done the wrong
2 standard? I suppose they'd have to go back and
3 do the right standard. But, in the interim,
4 what happens?

5 MR. FLETCHER: Well, I think, you
6 know, there would be some period of time, I
7 think it's 35 days, before this Court's mandate
8 issues. If I were Texas, I would go to the
9 Fifth Circuit in the meantime and ask to
10 reinstate the stay. And I think Texas -- the
11 Fifth Circuit should look at it with the benefit
12 of this Court's guidance.

13 And I note that, as the parties have
14 informed the Court on Monday, a panel of the
15 Sixth Circuit stayed a preliminary injunction of
16 Tennessee's very similar law and said that they
17 concluded that a stay was appropriate even on
18 the assumption that strict scrutiny applied.

19 JUSTICE BARRETT: Mr. Fletcher, I
20 share some of Justice Thomas's discomfort with
21 watering down strict scrutiny.

22 MR. FLETCHER: Mm-hmm.

23 JUSTICE BARRETT: And I think it's
24 common ground even with Petitioners that the
25 state has a compelling interest in protecting

1 minors and -- I -- I -- I mean, I think
2 Petitioners would be back here challenging even
3 a different law as failing strict scrutiny, but
4 they've left open the door to the possibility of
5 it satisfying strict scrutiny, but, you know,
6 come on, fatal in fact.

7 And I -- I think there's a sense here
8 that the state should be able to protect
9 minors --

10 MR. FLETCHER: Mm-hmm.

11 JUSTICE BARRETT: -- from some of
12 this, but there's not a whole lot of room in the
13 way we traditionally understand strict scrutiny
14 for that to happen.

15 What is your reaction to spill-over
16 effects and whether this really would be kind of
17 loosening strict scrutiny?

18 MR. FLETCHER: So I -- I -- I
19 appreciate the concern. And I guess I'll say,
20 just as a matter of first principles, some of
21 your earlier questions got at wouldn't
22 intermediate scrutiny make sense here.

23 I have a lot of sympathy for that
24 because, if we were writing on a blank slate, as
25 I said to Justice Thomas, the government was

1 arguing for something like intermediate scrutiny
2 in this context. So, as a matter of first
3 principles, I think there's a lot of force to
4 that.

5 But we're not writing on a blank
6 slate. We have this series of precedents. And
7 so then I think the question is can we find room
8 for this intuition within the parameters that
9 the Court's decisions set. I think you can, as
10 some of the reasons I was explaining earlier
11 explain. This is the case where the state has a
12 compelling interest in restricting speech based
13 on its content. That is exceedingly unusual,
14 right?

15 And so I think for the Court to say
16 states have room here even under strict
17 scrutiny, but that is because of the particular
18 and unique nature of the interest here, I think
19 would give states the room that they need in
20 this context but without watering down the
21 strict scrutiny inquiry in other contexts where
22 that's just not going to be true.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 In terms of the precedents that

1 you're -- you're talking about, there are cases
2 where the technological developments caused the
3 Court to reconsider the precedents that were
4 developed under, you know, not quite the
5 horse-and-buggy days but -- but prior to very
6 significant changes.

7 Why -- why isn't that a pertinent
8 factor to consider here?

9 MR. FLETCHER: So I think it might be
10 pertinent, Mr. Chief Justice, but the Court has
11 also said more recently, including in NetChoice
12 last term, that the principles of the First
13 Amendment don't change with technology and it
14 has tried to maintain the same fundamental First
15 Amendment principles and apply them to new
16 technology.

17 And so, at least to me, all of the
18 technological developments, which I agree are
19 incredibly relevant to this question, fit more
20 naturally in deciding how scrutiny applies and
21 explaining why states are likely to be able to
22 satisfy strict scrutiny in this space than it
23 does to revisiting what the fundamental standard
24 for a content-based restriction on speech ought
25 to be.

1 CHIEF JUSTICE ROBERTS: Well, the
2 principles of the First Amendment don't change
3 with technology, but the application of
4 technology to the First Amendment questions can
5 alter the perspective in terms of what is
6 affecting the principles and what isn't. How
7 you apply speech protections face-to-face might
8 be different if you're in a situations where
9 you're talking about the telephone or all sorts
10 of other things. Historically, there have been
11 changes in the applications of the law even if
12 you're -- I'll correct it, the basic principles
13 are -- are the same.

14 MR. FLETCHER: So --

15 CHIEF JUSTICE ROBERTS: And they --
16 and -- and I'd just repeat one of the things
17 that's striking about the case is the dramatic
18 change in the technology of brick-and-mortar
19 stores to the -- the access to pornography,
20 which also seems to be dramatically different
21 from what it was 40, whatever, years ago.

22 MR. FLETCHER: So let me try answering
23 that two ways. One is that I -- I do think
24 there's force to the idea that there has been a
25 lot of change, but that argument sounds a little

1 bit like the argument that Texas and Florida
2 made last term in NetChoice, where they said the
3 content that's going on on social media
4 platforms is totally different than the
5 editorial page of the Miami Herald. That calls
6 for a different standard of scrutiny. And this
7 Court said: No, we're going to keep the same
8 standard of scrutiny but acknowledge that the
9 application might be different because of the
10 different facts. I think the way to be
11 consistent with that here would be to stick with
12 the same standard.

13 The second thing is, if -- if that
14 doesn't persuade you, I -- I think it might be a
15 reason to revisit the standard of scrutiny if
16 you reach the conclusion that strict scrutiny
17 does not give states the -- the window, the
18 freedom, to solve this problem.

19 We think that there is reason to
20 believe that it does leave them that freedom,
21 and if that's true, then I think that's another
22 reason not to revisit precedent in this area.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 Justice Thomas?

25 JUSTICE THOMAS: But you would admit,

1 though, that we're in an entirely different
2 world? I mean, Playboy was about squiggly lines
3 on cable TV.

4 MR. FLETCHER: I -- I don't disagree
5 with that, Your Honor.

6 JUSTICE THOMAS: And the world of
7 Ashcroft was a world of dial-up Internet.

8 MR. FLETCHER: Exactly. Ashcroft was
9 worried about children accessing this material
10 on -- you know, at home on home computers, in
11 libraries, in schools. Now every child has a
12 smartphone in their pocket with a high-speed
13 Internet connection.

14 JUSTICE THOMAS: And didn't change in
15 technology affect our opinion from the reversal
16 from Quill to Wayfair?

17 MR. FLETCHER: I don't know, Justice
18 Thomas. That -- that wasn't a First Amendment
19 case.

20 JUSTICE THOMAS: I -- I understand
21 that.

22 MR. FLETCHER: So -- and I don't mean
23 to be trying to lay down bright-line rules or to
24 suggest that technology is never a reason when
25 the Court is revisiting a precedent, as it was

1 doing there. You know, here, we think Texas
2 hasn't really squarely teed up a request to
3 overrule precedent in the way that this Court
4 usually expects before it takes that step. And,
5 instead, the Fifth Circuit thought that it was
6 applying and being consistent with this Court's
7 precedent.

8 We don't agree with that. You know,
9 again, I think, if you were going to take
10 another look at Ashcroft based on a party coming
11 in and making a pitch to overrule it and the
12 other line of precedent that it -- it stands on,
13 then technological change might be relevant.

14 Our submission here is just that you
15 don't need to do that.

16 JUSTICE THOMAS: Well, but as well as
17 the fact that you thought that your argument in
18 some of the earlier cases, like Reno -- you
19 suggested a lower standard of scrutiny, and you
20 thought it would certainly play a role here now.

21 MR. FLETCHER: We did, you know, but,
22 again, this Court disagreed and the record --

23 JUSTICE THOMAS: Yeah, you threw in
24 the towel, but, you know --

25 (Laughter.)

1 MR. FLETCHER: Well, we got -- we got
2 told no three times.

3 (Laughter.)

4 JUSTICE THOMAS: Well, and that's
5 just -- you shouldn't feel offended by that.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: Well, I don't want to
9 belabor Ginsberg too much, but it is a precedent
10 of the Court, and do you want us -- you don't
11 want us to overrule it, do you?

12 MR. FLETCHER: No, not at all.

13 JUSTICE ALITO: All right. So you
14 then have to explain why it is not very
15 important, if not controlling, here. And what
16 I've heard from you -- you'll correct me if I'm
17 wrong -- is that Ginsberg did not consider the
18 burden on the seller or the burden on adults who
19 wanted to purchase these magazines. Is that how
20 you distinguish it?

21 MR. FLETCHER: I agree with the second
22 part. I do think it was -- as Justice Gorsuch
23 explained, it was a conviction of the seller,
24 but the argument he was making -- I think this
25 is clearest on 636 to 637 of the Court's

1 opinion -- was children have the same First
2 Amendment rights as adults. And the way the
3 Court framed its rejection of that argument --
4 and this is a quote -- was the law does not
5 invade "the area of freedom of expression
6 constitutionally secured to minors."

7 JUSTICE ALITO: Well, I -- I don't
8 think that's exactly the argument that was
9 actually made, and Mr. Ginsberg was represented
10 by some very sophisticated attorneys.

11 Here's something that they said in
12 their brief: "The policing problem would become
13 an impossible burden, leading the bookseller to
14 abandon sale even to adults. Thus, the adults
15 would be deprived of such literature because it
16 was not available for distribution to
17 adolescents."

18 So the argument was before the Court.
19 The Court presumably was aware of it, took
20 account of it in its decision, and said --
21 Justice Brennan's writing for the Court -- the
22 proper standard of review here is rational
23 basis.

24 MR. FLETCHER: So I don't see that in
25 the Court's opinion. I don't disagree that the

1 parties may have put it before it, but we
2 usually read the Court's precedents for the
3 arguments and the issues that the Court actually
4 decides.

5 The other thing that I'll say is that
6 the Court did confront arguments that were
7 squarely framed in terms of the rights of adults
8 that were burdened when Congress was attempting
9 to protect minors from this material in cases
10 like Sable and Playboy and Reno and Ashcroft and
11 reached a different conclusion.

12 And the last thing I'll say, you know,
13 I -- I've mentioned to several Justices why
14 we've argued for something like intermediate
15 scrutiny before. As I said to Justice Barrett,
16 I think there was force to that if we were
17 writing on a blank slate. The reason I think we
18 haven't argued for rational basis review is
19 because that would lead to results that I think
20 even my friends from Texas would be hard-pressed
21 to defend.

22 Banning the speech entirely would be a
23 rational basis of keeping it away from children.
24 Even just in the realm of age verification,
25 requiring the -- you to register with the state

1 to get a special card to get this material and
2 to keep records of who is viewing what might be
3 a rational way of keeping it away from children.
4 But those are very hard laws to defend, and I
5 think that's another reason why we've shied away
6 from arguing that Ginsberg means rational basis
7 in this space.

8 JUSTICE ALITO: I -- I want to go back
9 to your assertion that if we thought that the
10 Fifth Circuit applied the wrong standard of
11 review, we would be required to cause the
12 preliminary injunction issued by the district
13 court to spring back into effect.

14 Why would that be true? The question
15 before us is whether we should reverse a
16 decision that stays that preliminary injunction.
17 So would we not have the power to reverse the
18 decision insofar as it said that rational basis
19 was the proper standard of review but leave it
20 in place because we thought, hypothetically,
21 that this law would satisfy even strict
22 scrutiny? Would that be beyond our power?

23 MR. FLETCHER: Just to get the
24 procedural posture exactly right, I don't think
25 what's before you is a decision on the stay.

1 What's before you is the Fifth Circuit's final
2 decision reversing the preliminary injunction --

3 JUSTICE ALITO: Correct. All right.

4 MR. FLETCHER: -- in -- in this part.

5 JUSTICE ALITO: Correct. Yes.

6 MR. FLETCHER: And so, if you -- if
7 you vacate that decision, I think normally it
8 would return the case, the appeal, to the Fifth
9 Circuit, and the ball would be in the Fifth
10 Circuit's court in the first instance.

11 JUSTICE ALITO: Well, it would be --
12 be -- it would return the case to the Fifth
13 Circuit on the terms that we thought -- were
14 appropriate --

15 MR. FLETCHER: And -- and --

16 JUSTICE ALITO: -- in returning it to
17 the Fifth Circuit.

18 MR. FLETCHER: And -- and, again, I'm
19 not -- I don't suggest the Court lacks the power
20 to, if it wanted, to grant some sort of a
21 relief -- a stay itself. I -- I -- I'm sure
22 that there's a way for the Court to do that. If
23 the Court wanted to provide guidance in its
24 opinion, including very prescriptive guidance,
25 I'm sure the Fifth Circuit would follow that

1 guidance in deciding what the status quo ought
2 be while the litigation continues.

3 JUSTICE ALITO: All right. Just so
4 that I have them freshly in -- fresh in mind,
5 you mentioned certain matters that you thought
6 would be important to clarify under state law
7 to -- in making a judgment about whether this
8 law satisfies strict scrutiny. Could you just
9 tick those off again for me?

10 MR. FLETCHER: Sure. There are three.

11 One is the one-third requirement and
12 whether that compels age-gating of material that
13 is protected even as to minors if it's on a site
14 that is otherwise covered.

15 The second question is the permitted
16 methods of age verification and, in particular,
17 whether the sorts of biometric methods that are
18 highlighted in the amicus briefs comply with
19 Texas law.

20 And the third is the question about,
21 when Texas law refers to "obscene as to minors,"
22 which minors are we talking about. Are we
23 talking about even the youngest minors, or are
24 we talking about all minors such that material
25 that is only appropriate to older minors is

1 prohibited?

2 JUSTICE ALITO: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice

4 Sotomayor?

5 JUSTICE SOTOMAYOR: I -- I'm not sure

6 I understand your first point --

7 MR. FLETCHER: Mm-hmm.

8 JUSTICE SOTOMAYOR: -- so what do --

9 could you go through that again?

10 MR. FLETCHER: Sure. So I think one

11 of the points that Petitioners make is that the

12 Texas law requires age-gating of a website if

13 more than one-third of the material on that

14 website is sexual material that's harmful to

15 minors.

16 JUSTICE SOTOMAYOR: Yes.

17 MR. FLETCHER: And Petitioners say

18 that means we have to age-gate material even

19 if -- or age-gate a website even if up to

20 two-thirds of the material is constitutionally

21 protected even as to minors. And they say that

22 means that the statute isn't narrowly tailored

23 and that it restricts speech unnecessarily.

24 I understand my Texas -- my friends

25 from Texas -- although, of course, the general

1 can correct me -- to say the Texas law doesn't
2 necessarily mean that and that a website might
3 be able to comply by age-gating only the
4 material that is harmful sexual material and
5 obscene as to minors and not limiting minors'
6 access to the other protected material.

7 I think it's -- the law is easier to
8 defend if you accept a construction along those
9 lines.

10 JUSTICE SOTOMAYOR: All right. With
11 respect to the privacy -- or the -- the
12 permitted methods of ID, counsel for Petitioner
13 says that the more secure methods -- I don't
14 even know what Yoti is -- but the more secure
15 methods are prohibited by this law.

16 Do you think that that -- that is
17 ambiguous?

18 MR. FLETCHER: I don't know the answer
19 to that.

20 JUSTICE SOTOMAYOR: Mm-hmm.

21 MR. FLETCHER: And I defer to the
22 parties on that. I -- I think, as -- counsel
23 for Petitioners said, the Texas law seems to say
24 that you need to have a commercially reasonable
25 method that -- that relies on public or private

1 transactional data.

2 And I think the question would be --
3 although, again, I welcome correction on this --
4 whether something that requires -- that relies
5 on biometric, face recognition, voice
6 recognition, something like that, satisfies that
7 requirement. And we just haven't --

8 JUSTICE SOTOMAYOR: That's what --

9 MR. FLETCHER: -- taken a position on
10 that.

11 JUSTICE SOTOMAYOR: So, to the extent
12 that what -- whatever methods are found to be
13 permitted under Texas law, if they have greater
14 risk to the user, that would be part of the
15 calculus?

16 MR. FLETCHER: I do think the concerns
17 for the user are part of the calculus, yes.

18 JUSTICE SOTOMAYOR: All right. Thank
19 you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: Mr. Fletcher, I want
22 to talk to you about the life on a blank slate.

23 So pretend that the precedents don't
24 exist for a moment. I -- I do want to come back
25 and ask you about the precedents, but pretend

1 that they don't.

2 And -- and make it really blank.

3 Like, it doesn't seem to me that you're required
4 to say: Well, we first argued it in a
5 non-strict scrutiny way, because, obviously, you
6 argued it in that way. You were defending
7 federal statutes. That was the most natural way
8 to defend them.

9 So I want to take out the fact that
10 your first argument was the not-strict-scrutiny
11 argument --

12 MR. FLETCHER: Mm-hmm.

13 JUSTICE KAGAN: -- and -- and really
14 say as you're standing here on a blank slate.
15 It seems to me that there are possible
16 spill-over dangers either way.

17 MR. FLETCHER: Yeah.

18 JUSTICE KAGAN: One is the spill-over
19 danger of you relax strict scrutiny in one place
20 and all of a sudden strict scrutiny gets relaxed
21 in other places.

22 The other is the spill-over danger of
23 you treat a clearly content-based law as not
24 requiring strict scrutiny, and all of a sudden
25 you start seeing more content-based restrictions

1 that don't have to satisfy strict scrutiny.

2 And I just want to ask you, like, how
3 you weigh those dangers and -- and, you know --
4 you know, I -- I read you as saying: It's just
5 got to be the case that states can do some
6 regulation in this area. And the question is:
7 How does that happen? Does it happen by
8 notching down the strict scrutiny standard, or
9 does it happen by saying, for some reason, which
10 we'll figure out how to articulate, this --
11 this -- this set of restrictions comes outside
12 it?

13 MR. FLETCHER: Yeah. So you read me
14 correctly. And I think writing completely on a
15 blank slate, I genuinely think there would have
16 been two reasonable ways to deal with this
17 problem.

18 It really is a unique feature in the
19 First Amendment where you have the same speech
20 that's protected as to some people and not
21 protected as to others. And, in fact, everyone
22 agrees the government has a compelling interest
23 in restricting access to that speech based on
24 its content. It's a special, I think, unique
25 problem.

1 One way to approach it would have
2 been, as you say, to say something less than
3 strict scrutiny even though it's content-based.

4 Another approach, the one I'm
5 advocating here, would be to say strict scrutiny
6 applies a little bit differently. I would
7 resist the idea that it's watering it down. I
8 think it would be to say the regular strict
9 scrutiny standard just applies differently
10 because of the special features here.

11 As a matter of first principles,
12 I'm -- I'm not trying to duck the question.
13 I'm -- I'm genuinely saying I think either of
14 those would have been sort of equally workable.
15 But we're not writing on a blank slate, so this
16 is fighting the hypo a little bit, but I think
17 this is what tips the scales.

18 JUSTICE KAGAN: No, it's the -- it's
19 the next question I was going to ask, which is,
20 you know: What about Ashcroft and all our other
21 decisions makes you think that they're simply
22 not distinguishable in the way one might want to
23 distinguish them?

24 MR. FLETCHER: I -- I mean, I think
25 Ashcroft is particularly hard because that was a

1 law that looked in terms almost exactly like the
2 law at issue here.

3 I take Justice Barrett's point that
4 there, age verification was an affirmative
5 defense rather than part of the law, but the
6 substantive requirements that the law imposed,
7 in effect, were basically exactly the same.

8 And also, I think just the -- the
9 logic of the Court's opinions leading up to that
10 in the earlier line was defining sexual material
11 that is harmful to children, this category of --
12 of material that kids can be prohibited from
13 seeing.

14 That, the Court said over and over
15 again, was a content-based restriction. And I
16 think that then starts to bring in -- and this
17 gets to my -- complete my answer to your earlier
18 question about why I'm more worried about I
19 think it was the second category of spill-over
20 effects than the first.

21 That starts to bring in not just this
22 particular corner of the First Amendment law but
23 also this Court's cases like City of Austin and
24 Reed and all of the other places where the Court
25 has laid down this is what it means to have a

1 content-based law.

2 And I worry a little bit that if you
3 start now trying to carve back on Ashcroft and
4 those other cases, you would have spill-over
5 into those broader areas of First Amendment law,
6 whereas recognizing, as we've suggested, that
7 strict scrutiny functions differently here is
8 very limited to this particular corner of the
9 law.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: I -- I guess I -- I
14 just want to follow up on -- on -- on Ashcroft
15 just a little bit, and you seem to think that's
16 the major impediment.

17 MR. FLETCHER: The most direct one,
18 sure.

19 JUSTICE GORSUCH: Yeah. That was a
20 PI, right --

21 MR. FLETCHER: Mm-hmm.

22 JUSTICE GORSUCH: -- where the
23 government didn't contest the level of scrutiny?
24 It had given up by then, as you point out.

25 MR. FLETCHER: Mm-hmm.

1 JUSTICE GORSUCH: What do we -- does
2 that help?

3 MR. FLETCHER: So I don't -- I
4 think -- it was a PI, and I think the Court was
5 very self-consciously tentative in some parts of
6 its analysis, especially the application of
7 strict scrutiny towards the tail end of the
8 opinion.

9 I don't think the Court was tentative
10 about what the relevant level of scrutiny was.
11 And I read it to say at 660, 665, 670: We've
12 got a content-based restriction of speech, and
13 so strict scrutiny applies.

14 JUSTICE GORSUCH: Also an incomplete
15 factual record, which it repeatedly emphasized
16 too, right?

17 MR. FLETCHER: Completely agreed and I
18 think all the more reason why I think lower
19 courts have gone overboard in treating its
20 application of strict scrutiny as controlling
21 even now 20 years later. But I would put the
22 standard of scrutiny in a somewhat different
23 category.

24 JUSTICE GORSUCH: What do you think
25 about Justice O'Connor's concurrence in Reno?

1 MR. FLETCHER: I think there's a lot
2 of force to her ideas. I -- I take her idea to
3 be a lot like Justice Kagan's, like this is a
4 thing that states have been able to do in the
5 physical world, and there ought to be a way to
6 translate that same idea into the world of the
7 Internet.

8 We very much agree with that. We have
9 not advocated for the same standard that she
10 advocated for there because we view the Court's
11 precedents as requiring a different and higher
12 standard. But, in terms of the thrust of her
13 logic and her concerns about what states ought
14 to be able to do, we agree.

15 JUSTICE GORSUCH: Do you agree with
16 the principle there that if there's a compelling
17 government interest, there must be some way in
18 the world presently to effectuate that interest?

19 MR. FLETCHER: I think there's a lot
20 of force to that. I hesitate to say that's
21 always true in every circumstance because --

22 JUSTICE GORSUCH: In this -- in -- in
23 this area, right?

24 MR. FLETCHER: But, in -- in -- in
25 this area, yes.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Just to follow up
4 on Justice Gorsuch and Justice Alito's questions
5 about, if we vacated, exactly what the state of
6 play is.

7 MR. FLETCHER: Mm-hmm.

8 JUSTICE KAVANAUGH: There was a stay
9 before --

10 MR. FLETCHER: Yeah.

11 JUSTICE KAVANAUGH: -- the decision.
12 So is a PI in effect or not in effect after our
13 mandate issues?

14 MR. FLETCHER: I would think that
15 absent further action -- and, again, we're just
16 an amicus here, and so I don't want to speak for
17 the parties --

18 JUSTICE KAVANAUGH: Yeah.

19 MR. FLETCHER: -- if there's something
20 that I'm missing. But I would think that absent
21 further action from the Fifth Circuit, if this
22 Court vacates the Fifth Circuit's decision and
23 remands and its mandate issues, the result would
24 be that the preliminary injunction would come
25 back into effect.

1 JUSTICE KAVANAUGH: Okay.

2 MR. FLETCHER: But, if I were
3 defending the law, before that happened, I would
4 renew my previously granted motion for a stay
5 pending appeal and I would make arguments about
6 why a stay ought to be entered pending the Fifth
7 Circuit's further consideration.

8 JUSTICE KAVANAUGH: Okay. And do you
9 think a stay should be issued?

10 MR. FLETCHER: We haven't taken a
11 position on that because it's bound up in some
12 degree with some of the uncertain questions
13 about what the Texas law means.

14 JUSTICE KAVANAUGH: But you -- I mean,
15 the Court's going to have to make a
16 likelihood-of-success determination, and as
17 Justice Kagan said earlier, you've been looking
18 and thinking about this for a long time. You
19 don't have a likelihood-of-success assessment?

20 MR. FLETCHER: We don't, no.

21 JUSTICE KAVANAUGH: Okay. On Ashcroft
22 II, how do you think we should handle
23 specifically the application of the strict
24 scrutiny standard? Should we just say that's
25 overtaken by events? It's no longer valid?

1 Tell us how you think we should phrase that.

2 MR. FLETCHER: Yeah. You mentioned
3 stare decisis earlier in your question to my
4 friend. I don't think the court's application
5 of scrutiny is a holding -- a -- a legal holding
6 of the sort that's entitled to stare decisis
7 effect. I read it as self-consciously very
8 tentative. The court emphasizes we're on a PI,
9 it's abuse of discretion, we have a record
10 that's five years old. At page -- at the last
11 couple of pages of the opinion, the court says
12 nothing that we're saying forecloses even the
13 district court and the Third Circuit in this
14 very case from concluding that strict scrutiny
15 is satisfied.

16 And I think the Court can say, given
17 that, it's obviously true that nothing in that
18 part of the opinion forecloses courts from
19 deciding 20 years later, with the benefit of 20
20 years more experience, that strict scrutiny is
21 satisfied by laws that share some of the same
22 features as the law at issue there.

23 JUSTICE KAVANAUGH: Then one question
24 on how you would apply strict scrutiny.

25 It seems to me one of the tricky parts

1 of that, because everyone agrees compelling
2 interest, is then you say in your brief
3 appropriate tailoring, which I think is a good
4 phrase.

5 One thing that concerns me is
6 oftentimes someone will say, well, there's a
7 less restrictive alternative. I think it's
8 really important to make clear that any less
9 restrictive alternative has to serve the
10 compelling interest or important interest if
11 it's intermediate --

12 MR. FLETCHER: Yeah.

13 JUSTICE KAVANAUGH: -- to the same
14 degree.

15 MR. FLETCHER: Yeah.

16 JUSTICE KAVANAUGH: Am I right in
17 saying that?

18 MR. FLETCHER: I think you're right in
19 saying that. I think Reno and Ashcroft said
20 that. And I do agree that's important.

21 JUSTICE KAVANAUGH: Okay. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: And those are the

1 sort of things that the Fifth Circuit could say
2 on remand and, in fact, would, right? In -- in
3 other words, they would go through the record
4 and they would try to assess whether the
5 district court got it right with respect to
6 other alternatives and that sort of thing?

7 MR. FLETCHER: Yes.

8 JUSTICE JACKSON: And that's why the
9 government is saying why don't you remand it
10 instead of us trying to take on that kind of
11 burden?

12 MR. FLETCHER: Yeah. In deference to
13 the Court's usual practice. It's a court of
14 review, not of first view. Here, there are some
15 uncertainties about the law that we think are
16 additional reasons for the Court not to wade
17 into it now. So, yes, exactly.

18 JUSTICE JACKSON: With respect to the
19 technology question that came up earlier, I
20 guess I'm just trying to figure out which way it
21 cuts, that we've now advanced in technology. I
22 could see that it cuts both ways.

23 On the one hand, we have a -- a new
24 set of circumstances that allow for minors to
25 get this material very easily and it's

1 ubiquitous. But I think Petitioners' argument
2 is that the technology really heightens the
3 risks and burdens on adults who are trying to
4 access this material if they have to do a
5 biometric -- scan or they have to do certain
6 kinds of things that are very -- you know,
7 impinging on privacy in the way that technology
8 now allows.

9 Is that -- so it's not clear to me
10 that just the fact that we have new technology
11 is all -- is running in favor of allowing this
12 law to stand as is.

13 MR. FLETCHER: So I agree with that,
14 that technology doesn't necessarily just cut in
15 one direction and you'd want to ask both of
16 those questions. What I'd say about technology
17 and the burden is two observations, one factual
18 and one a little bit more legal.

19 The factual observation is I do think
20 that the world now includes more options to
21 verify your identity than existed in Ashcroft
22 II, that are more broadly used. I think one of
23 the things that gives us some confidence in this
24 is that it's being used in the gambling industry
25 and buying alcohol and wine. It's just a -- a

1 much more common part of society. And I think
2 that can give courts more confidence in saying
3 this is a -- an appropriate method of age
4 verification.

5 The second one is just a legal point.
6 I think there's some tendency from my friends on
7 Petitioners' side and the district court to say
8 that the relevant burden is: Will people be
9 chilled from doing this? And I think burdens on
10 privacy are important, but I think the Court
11 should ask those questions objectively, not
12 subjectively.

13 There might be people who are
14 embarrassed to show an ID to buy an adult
15 magazine or to take something out of the blinder
16 rack in the store. That's not enough. The
17 question is, is the burden that's being imposed
18 on speech, objectively speaking, excessive or
19 unnecessary?

20 JUSTICE JACKSON: Okay. And one
21 question, I -- I noticed that your brief didn't
22 say anything about whether the facial nature of
23 this -- Petitioners' challenge affects the
24 analysis. And I know there's a small part of
25 Respondent's brief that goes into it. And I

1 presume, in thinking about it, that that's
2 because the distinction between facial and as
3 applied really doesn't have any bearing on the
4 question of the level of scrutiny.

5 Is that right?

6 MR. FLETCHER: That's exactly right,
7 that as -- before deciding whether or not the
8 law is facially invalid, you have to figure out
9 what are the relevant standards, as the Court
10 did in NetChoice. And that's the question we
11 take to be squarely presented to this Court now,
12 and that's why we focused on that and not how
13 the answer to that might cash out on a facial
14 versus as-applied basis.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Nielson.

19 ORAL ARGUMENT OF AARON L. NIELSON

20 ON BEHALF OF THE RESPONDENT

21 MR. NIELSON: Mr. Chief Justice, and
22 may it please the Court:

23 Petitioners don't dispute that their
24 websites are not meant for children, that they
25 harm children, and that children are watching.

1 The Court faced the same situation with
2 broken -- brick-and-mortar stores and applied
3 rational basis to a law limiting adult content
4 to adults.

5 This case is the digital version of
6 Ginsberg. Three cases prove the point.
7 Ginsberg itself applies rational basis where a
8 store can only avoid liability by making "a
9 reasonable bona fide attempt to ascertain the
10 true age of [customers]." Sable applies
11 rational basis where speakers must separate
12 their audience before speaking a message obscene
13 to some but not all. And in Ashcroft II, the
14 Court didn't apply rational basis because
15 Congress, limited by 1990s technology, went well
16 beyond Ginsberg and Sable. To understand
17 Ashcroft II, you have to understand Ashcroft I
18 and look how at the Court in Ashcroft I treated
19 Sable.

20 Age verification today, however, is
21 simple, safe, and common, including
22 non-identifying means. Petitioners' view of
23 Texas's law is contrary to Texas's view of
24 Texas's law and the Fifth Circuit's view of
25 Texas's law.

1 Regardless, if strict scrutiny applies
2 here, Texas would have to satisfy strict
3 scrutiny to keep kids out of strip clubs. This
4 Court's cases do not require that. Neither do
5 history, tradition, or common sense. In all
6 events, even if heightened scrutiny applies,
7 Texas easily satisfies it, especially facially.
8 We've tried content filtering for decades, and
9 the problem has only gotten worse.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: The -- Ginsberg
12 sounds simple, but in the tech cases we've had
13 recently, we're talking about hundreds of
14 millions of members to certain sites, billions
15 of visits, multibillions, if not trillions, of
16 exchanges.

17 How do we determine what burden --
18 assuming we agree with you, and I think most
19 people do, that they -- kids are to be
20 protected, how much of a burden is permissible
21 on adults' First Amendment rights?

22 MR. NIELSON: Well, so long as
23 Sable -- so long as Ginsberg is part of this
24 Court's canon, any burden less than the burden
25 at issue in Ginsberg necessarily must be okay.

1 JUSTICE THOMAS: So how does that
2 translate in a world in which you're not talking
3 about one-on-one transactions but billions of
4 transactions?

5 MR. NIELSON: Yeah, that cuts in favor
6 of Texas. One of the important parts of modern
7 age verification technology is that you can do
8 it without identification at all. The Fifth
9 Circuit was clear that under Texas law biometric
10 scanning is okay. In other words, you know,
11 I -- there's no ID or anything like that. It's
12 just a face scan.

13 If that's too much, I would point the
14 Court to the brief of the Age Verification
15 Providers Association. You can do a hand scan.
16 There's all sorts of things you do that have no
17 identifying information.

18 JUSTICE THOMAS: Yeah, but you're
19 talking about rational basis. And you would
20 think that rational basis would permit quite a
21 high burden on the First Amendment rights of
22 adults versus strict scrutiny.

23 MR. NIELSON: Yeah. So this is where
24 I think it's important to understand the scope
25 of Ginsberg. Ashcroft II is precedent. We're

1 not fighting that. Ginsberg, as I read it, is
2 saying, so long as what you are doing is
3 verifying that this person is a kid, that's
4 rational basis. If you start doing other stuff
5 beyond that, then you're in the world of
6 Ashcroft II. That --

7 JUSTICE JACKSON: What if verifying
8 that this person is a kid took the form of a law
9 that the state says what we'd like to have is
10 everyone who comes in here needs to present a
11 copy of their passport, a copy of their birth
12 certificate, and an affidavit from their
13 biological parent?

14 MR. NIELSON: Yeah.

15 JUSTICE JACKSON: Is that also
16 rational basis in terms of the burden that it
17 imposes on adults?

18 MR. NIELSON: No, Your Honor.

19 JUSTICE JACKSON: Why not?

20 MR. NIELSON: Because that's far in
21 excess of what the Court recognized in Ginsberg.

22 JUSTICE JACKSON: But the Court in
23 Ginsberg wasn't analyzing the means by which age
24 verification was being -- was occurring. You
25 see, my -- my hypothetical is turning on, fine,

1 if the Court is allowing for age verification,
2 how far can a state go in terms of burdening
3 adults showing how old they are?

4 MR. NIELSON: Yeah.

5 JUSTICE JACKSON: And -- and it seems
6 to me that you're conceding that at some point,
7 a state would not be able to require an adult to
8 jump through a million hoops to prove their age.
9 And if that's the case, isn't that the work of
10 strict scrutiny?

11 I mean, I thought that what strict
12 scrutiny was doing was assuring that the burden
13 that's being imposed is one that is necessary
14 because we understand that adults would
15 ordinarily have access to -- to this material.
16 We appreciate the state's interest in protecting
17 children, but we're not going to let the state,
18 you know, impose, like, a thousand things that
19 would make it really, really hard for adults
20 when there are other alternatives to protect
21 children.

22 I thought that was, like, the whole
23 point of the strict scrutiny analysis.

24 MR. NIELSON: Yeah. So there are two
25 precedents that the Court has to give weight to

1 both of them: There's Ginsberg and there's
2 Ashcroft II.

3 JUSTICE JACKSON: I understand. But
4 you're reading Ginsberg to suggest that the
5 Court is -- has blessed every kind of age
6 verification that a state could require of an
7 adult. To the extent that Ginsberg, you say, is
8 focused on minors and states protecting minors
9 and the fact that their -- the burden on --
10 it -- it falls on adults to prove their age is
11 really not a big deal, I'm just testing your
12 contention that a state looking at Ginsberg
13 could do something very, very burdensome in
14 order to protect minors.

15 MR. NIELSON: Yeah. What I'm trying
16 to say, I'm not suggesting that you could do
17 anything under this, and I know that because of
18 Ashcroft II. There are two cases, both of which
19 are precedents of this Court, both of which have
20 meaning.

21 JUSTICE JACKSON: But -- but wouldn't
22 rational basis allow you to do anything? I
23 mean, the state would say it's rational that we
24 have a parent's affidavit because people can lie
25 about their age, and what we want is to make

1 sure that minors are protected.

2 MR. NIELSON: And Ashcroft II says, at
3 some point, you've gone beyond Ginsberg.
4 Ginsberg we know -- unless we're writing
5 Ginsberg out of the law, if it's -- the burden
6 is no greater than showing an ID in Ginsberg,
7 that's not strict scrutiny.

8 JUSTICE KAGAN: Well, I think what the
9 question really --

10 MR. NIELSON: Yup.

11 JUSTICE KAGAN: -- was, like, what is
12 that point? What is the point at which you
13 cross over the Ginsberg/Ashcroft line in your
14 view?

15 MR. NIELSON: Yeah. So this is where
16 I think you can't understand Ashcroft II without
17 understanding Ashcroft I. And in Ashcroft I,
18 the fight between the plurality and the rest of
19 the Court was, hey, does Sable mean that it
20 applies whatever the technology is, in other
21 words, whatever the burden, if you can't do it,
22 who cares, or does the -- or does Sable mean
23 that it has to be technologically and reasonably
24 possible?

25 The Court disagreed about that. I

1 don't know what the answer is, where the Court
2 is on that extension of Sable.

3 I do know that Ginsberg is a holding
4 of this Court that says, so long as the burden
5 is, you know, showing an ID, that doesn't
6 trigger strict scrutiny. We are less than
7 that -- I don't know the exact line.

8 JUSTICE KAGAN: Can I --

9 JUSTICE KAVANAUGH: In your --

10 JUSTICE KAGAN: -- can I ask you,
11 General -- and this is -- I'm shifting ground
12 some, but you've now heard Mr. Fletcher's three
13 concerns or three --

14 MR. NIELSON: Yeah.

15 JUSTICE KAGAN: -- questions about
16 your law.

17 MR. NIELSON: Yeah.

18 JUSTICE KAGAN: I think you heard them
19 twice, so you probably --

20 MR. NIELSON: I wrote them down.

21 JUSTICE KAGAN: -- I mean -- okay.
22 How does -- how does Texas's law fare given
23 those three concerns? Are those genuine
24 concerns? Do you pass them or fail them?

25 MR. NIELSON: Yeah. They are not

1 genuine concerns.

2 First, the one-third requirement -- I
3 have two points on that. That's how states
4 generally define sexually oriented businesses.
5 Illinois says you're an adult bookstore if
6 25 percent of your content. That's how San
7 Francisco defines whether you're an adult
8 bookstore. So that's point one just generally.

9 But specific to this statute, I urge
10 the Court to look at the language. One-third
11 requirement applies to whether they have to
12 satisfy whether the law kicks in, but it's not
13 referring to the content at issue. I'm looking
14 at the language here in Section 129B.002. The
15 key words are "the material." Is that referring
16 back to all the material on the website or the
17 sexually harmful material to minors?

18 No Texas court has had an opportunity
19 to look at this. This is a facial
20 pre-enforcement challenge. But our reading of
21 that is it's going to be limited to the sexually
22 harmful material.

23 JUSTICE KAGAN: Okay. Number two?

24 MR. NIELSON: Number two is the
25 permitted methods, biometric. We have a holding

1 from the Fifth Circuit on this. This is at
2 Petition Appendix 11A. Biometric scanning is
3 fine under Fifth Circuit law -- under Texas law.
4 We agree with that. That's in our brief. That
5 is the position of the Attorney General's
6 Office.

7 And number three is obscene as to
8 minors. Again, two points. This was the fight
9 or one of the fights at issue in Ashcroft I.
10 The Court said we followed the same language.
11 And the Court said that was fine in Ashcroft I.
12 But our reading, again, in Texas, I'll tell you
13 Texas courts read statutes carefully. They
14 follow the text of the statutes.

15 I am looking at our definition of
16 sexually material harmful to minors. That's
17 Section 129B.001.

18 The third part is we define minors as
19 those under 18. "Taken as a whole, lacks
20 serious literary, artistic, political, or
21 scientific value for minors." In other words,
22 that includes up to people -- people who are 17.
23 So their idea that --

24 JUSTICE KAGAN: So, if I understand
25 you correctly as to those three, as to number

1 two and number three, you say: Well, even if
2 that's a legit concern, our law is -- is okay
3 with respect to it?

4 MR. NIELSON: Yes, Your Honor.

5 JUSTICE KAGAN: And then I don't think
6 that that's quite your answer with respect to
7 number one. Is that right or is that wrong?

8 MR. NIELSON: No. I think we're fine
9 with number one. My point is that even if I'm
10 wrong about how Texas law works, we're still
11 okay because then we're like Illinois and San
12 Francisco, but I don't think I'm wrong about how
13 Texas law works.

14 JUSTICE KAGAN: I see.

15 MR. NIELSON: If you take the content
16 and you put it behind an age screen, we're not
17 counting that.

18 JUSTICE KAVANAUGH: Your --

19 JUSTICE ALITO: So if you -- no --

20 JUSTICE KAVANAUGH: Keep -- go ahead
21 because you're --

22 JUSTICE ALITO: Just to clarify with
23 respect to point one, so if a particular website
24 has some hard-core pornography that is obscene
25 as to minors and then it has, you know, videos

1 of somebody reading Lady Chatterley's Lover or
2 something like that, does -- can the -- the
3 latter be segregated?

4 MR. NIELSON: So I have to argue with
5 one hand behind my back because no Texas court
6 has an opportunity to look at any of this. I'm
7 just giving you my reading of the statute based
8 on what I know about Texas courts, and the
9 answer would be yes, it could be segregated.

10 JUSTICE SOTOMAYOR: But no Court has
11 said that yet?

12 MR. NIELSON: Correct. And that's
13 part of the problem. I know the Court has had
14 some unhappiness with these facial
15 pre-enforcement challenges. This should be
16 Exhibit 1 in the case against them.

17 JUSTICE SOTOMAYOR: This law doesn't
18 protect someone or -- or says you can't retain
19 this information. The other side in its brief
20 argues that that doesn't mean you can't sell
21 it --

22 MR. NIELSON: Yeah.

23 JUSTICE SOTOMAYOR: -- or give it
24 away.

25 MR. NIELSON: Yeah. So some responses

1 to that. One, I don't know if that's even
2 technologically possible. I don't know how you
3 send the information without having at least
4 instantaneously retained it. That doesn't make
5 any sense to me.

6 Also --

7 JUSTICE SOTOMAYOR: Well, you have to
8 receive it to make a choice. Someone is
9 receiving it to make a choice. And, presumably,
10 the law says, after you've made the choice is
11 this an adult or a child, you've got to delete
12 it.

13 MR. NIELSON: Correct.

14 JUSTICE SOTOMAYOR: All right. But,
15 in that interim when I receive the information,
16 before I make the choice, I could just give it
17 away to another entity. My name when I visit a
18 website, unless I've prohibited the -- website
19 from doing that, my viewing history, everything
20 is automatically transferred to other people.

21 MR. NIELSON: Yeah. So let's say that
22 I'm wrong about that. Again, I don't know the
23 technology.

24 JUSTICE SOTOMAYOR: Well, that's the
25 point --

1 MR. NIELSON: I -- I don't know how
2 you do it.

3 JUSTICE SOTOMAYOR: -- which I don't
4 know.

5 MR. NIELSON: But I -- I win anyway.
6 So this is why it's important.

7 JUSTICE SOTOMAYOR: That's once you
8 get to a trial and somebody figures this out.

9 MR. NIELSON: I -- I -- I'm saying
10 that under the Fifth Circuit's view of the law,
11 which this Court did not grant cert to review,
12 biometric scanning is okay. So there's no
13 identifying information for it to even turn
14 over. So it wouldn't make sense -- so, even if
15 you transferred it, you're not transferring
16 identifying information.

17 And even if you did have identifying
18 information, it's -- no one does it. I --
19 again, I'd point to the brief of the Age
20 Verification Associations --

21 JUSTICE SOTOMAYOR: You -- we're
22 talking in a vacuum because I don't know the
23 record. I -- I do understand --

24 MR. NIELSON: Yeah.

25 JUSTICE SOTOMAYOR: -- that biometrics

1 sort of looks at a face. Mr. Fletcher said it
2 looks at a hand or someone said --

3 MR. NELSON: Yeah.

4 JUSTICE SOTOMAYOR: -- it looks at a
5 hand. I have no idea how it works.

6 But I do know that DNA evidence can be
7 picked up from the paper I just touched. And I
8 don't know if biometric information can be used
9 to create other things. I don't know any of
10 this. None of us do.

11 So the question is, before any judge
12 can determine whether this law and the extent of
13 its burden or lack thereof, someone has to
14 determine that, doesn't it?

15 MR. NIELSON: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: That's my only
17 point.

18 MR. NIELSON: Sorry, can I have just
19 one -- one --

20 JUSTICE KAVANAUGH: And on --

21 MR. NIELSON: I'm sorry.

22 JUSTICE KAVANAUGH: Keep going.

23 MR. NIELSON: Just one more second.

24 The last point about all of that is, of course,
25 the Petitioners get to choose who the age

1 verification provider is. So, if they don't
2 like the age verification provider's policies
3 about that, well, they can stop that too. It's
4 within their power. They have self-help
5 measures.

6 JUSTICE KAVANAUGH: I -- I think,
7 earlier, when you were discussing Ginsberg, you
8 said Ginsberg applies to age-verification
9 requirements, and, thus, age-verification
10 requirements get rational basis review and
11 that's how you distinguish. But then you said
12 not if they're too burdensome, which doesn't
13 sound anymore like rational basis review. But
14 I'm actually not interested in whether we call
15 it intermediate scrutiny --

16 MR. NIELSON: Mm-hmm.

17 JUSTICE KAVANAUGH: -- or strict
18 scrutiny or rational basis for purposes of this
19 question.

20 Is the statement of principle, First
21 Amendment principle, that you're seeking at a
22 broad level age verification requirements are
23 permissible so long as they're not overly
24 burdensome on adult access?

25 MR. NIELSON: Yes. Yes, Your Honor.

1 That's how I understand those cases.

2 JUSTICE KAVANAUGH: And those are the
3 exact adverbs and adjectives, "overly
4 burdensome," or do you have a preferred
5 statement?

6 MR. NIELSON: I mean, I guess I would
7 say so long as it's incidental to verifying age.
8 Again, I don't know what "overly burdensome"
9 means.

10 JUSTICE KAVANAUGH: That's a little
11 different. Exactly. Okay.

12 MR. NIELSON: Yeah.

13 JUSTICE KAVANAUGH: And then you have
14 to look at how much burden is there on the adult
15 access, which I think you've conceded -- not --
16 "conceded" is the wrong word, but just
17 acknowledged that that is going to necessarily
18 be part of the inquiry because you've said a few
19 times, if it's more than the Ginsberg burden,
20 you know, at some point, it may cross into too
21 much.

22 MR. NIELSON: Correct, Your Honor,
23 because we are trying to reconcile Ashcroft II
24 and Ginsberg.

25 JUSTICE KAVANAUGH: And you've con- --

1 and, again --

2 MR. NIELSON: Yeah, I don't think I
3 conceded, but --

4 JUSTICE KAVANAUGH: Yeah, you
5 haven't -- I'm not using the word "conceded"
6 now. You acknowledge that a law, for example,
7 that Mr. Fletcher identified that just banned
8 all pornography on the idea that that would
9 serve the interests of preventing children from
10 accessing it, that's --

11 MR. NIELSON: That that's --

12 JUSTICE KAVANAUGH: -- impermissible?

13 MR. NIELSON: Correct. That's the
14 second part of Sable.

15 JUSTICE KAVANAUGH: Right. And then,
16 also to Justice Jackson, if the requirements for
17 age verification were so onerous and unnecessary
18 that they burdened adult -- really prevented
19 many adults from accessing constitutionally
20 protected speech as to adults, you also
21 acknowledge that would be impermissible?

22 MR. NIELSON: Yes, Your Honor,
23 because, again, that's how we read Ashcroft II.

24 JUSTICE KAVANAUGH: Yeah.

25 JUSTICE JACKSON: But, Mr. Nielson,

1 why --

2 JUSTICE BARRETT: Mr. Nielson, are you
3 saying that it's like a carveout from content
4 discrimination? Because, you know, you heard my
5 interchange with Mr. Fletcher, you know, and --
6 and also with your friend on the other side when
7 I was trying to -- to see if there was a way,
8 just exploring how do we think about Ashcroft
9 II. And, you know, there is some content
10 discrimination here, right, because you do have
11 to look at the content to decide whether the
12 age-verification requirement applies.

13 So I take your answer to Justice
14 Kavanaugh when you say no, no, no, no, no, it
15 wouldn't be what Mr. Fletcher said, that if
16 rational basis review applied, they could ban
17 the whole category, because that would be a
18 rational way of protecting adult -- protecting
19 children. You say that's not the case because
20 we look at Ginsberg and it's just age
21 verification.

22 MR. NIELSON: Yes, Your Honor.

23 JUSTICE BARRETT: So is this like an
24 age-verification carveout? Like, it's --
25 content discrimination doesn't trigger strict

1 scrutiny if we're talking about age
2 verification? Is that the argument?

3 MR. NIELSON: I guess there's two
4 conceptual ways to understand it. I'm not sure
5 what Ginsberg -- which one they did. I mean,
6 one is, if it's just gatekeeping, as long as
7 you're allowed to have two different groups, you
8 have to have some way to tell the difference
9 between the two. And if it's just incidental,
10 the gatekeeping, that doesn't itself trigger
11 strict scrutiny. That's one theory of Ginsberg.

12 The other theory of Ginsberg is that
13 just looking at identification just isn't a
14 constitutionally cognizable burden. That would
15 fit in with the Crawford line of cases for
16 voting. That would fit with the American
17 Library Association, where they say going to the
18 librarian, that's embarrassing. That's just not
19 a constitutionally cognizable burden.

20 JUSTICE KAGAN: But, if I --

21 JUSTICE KAVANAUGH: But you've said --

22 JUSTICE KAGAN: -- understand you
23 correctly, you are saying -- and this is -- goes
24 back to Justice Jackson's hypothetical -- that
25 when the burden gets too great, right, when, you

1 know, they're asking you to do all these
2 unreasonable things --

3 MR. NIELSON: Mm-hmm.

4 JUSTICE KAGAN: -- right, that's the
5 point at which, if I understand you correctly --
6 tell me if I don't -- it -- it -- it flips into
7 not rational basis review but into heightened
8 review, strict scrutiny?

9 MR. NIELSON: Correct, Your Honor.
10 That's how we read Ashcroft II.

11 JUSTICE KAGAN: Okay. So, I -- I
12 mean, that is a little bit peculiar, isn't it?
13 I mean, it's -- it's -- it's obviously the case
14 that the extent of the burden should matter a
15 lot in the constitutional analysis, but it
16 usually matters when you're applying whatever
17 standard you're applying. It doesn't usually,
18 you know, push you -- like, oh, the burden is
19 really -- this -- this -- this -- this burden
20 is -- you know, it's very hard to make this
21 age -- to meet this age-verification
22 requirement, so, because that's true, it pushes
23 you into a different standard of scrutiny.

24 I -- I don't know if I can think of
25 anything like that in our law.

1 MR. NIELSON: Yeah, I agree. That is
2 a curious effect of reconciling Ginsberg and
3 Ashcroft II.

4 JUSTICE KAVANAUGH: But it's just
5 inherent in having an age -- you know, one
6 category that can't access and one -- another
7 category of people that can, and you have to
8 have some mechanism, as you just said, for
9 determining it.

10 But I think, in reply to Justice
11 Jackson and Justice Kagan, you've said yes,
12 it -- it could get too burdensome. In other
13 words, even age verification -- I think Justice
14 Kagan was just saying this. Even age
15 verification could get too burdensome if you did
16 things like a passport or something like that?
17 I mean, you --

18 MR. NIELSON: -- correct, Your Honor.
19 Again, there's --

20 JUSTICE KAVANAUGH: And I don't --

21 JUSTICE JACKSON: But is it --

22 JUSTICE KAVANAUGH: Again, whether you
23 call it --

24 MR. NIELSON: Yeah.

25 JUSTICE KAVANAUGH: -- whatever you

1 call it --

2 JUSTICE JACKSON: But I think what you
3 call it is important, I think.

4 (Laughter.)

5 JUSTICE KAVANAUGH: Well, I'm just
6 going to ask, whatever you call it, it can't get
7 too burdensome, right?

8 MR. NIELSON: Yeah. So --

9 JUSTICE KAVANAUGH: Yeah.

10 MR. NIELSON: -- I mean, the north
11 star here is, so long as Ginsberg has some
12 meaning, so long as the burden is not greater
13 than the burden in Ginsberg, rational basis
14 applies.

15 JUSTICE JACKSON: But, Mr. Nielson,
16 the burden was not the issue in Ginsberg.
17 That's my -- my -- my only problem --

18 MR. NIELSON: Yeah, yeah.

19 JUSTICE JACKSON: -- with what you
20 have said is that I took Ginsberg to be
21 establishing the initial principle that you
22 start with, that it's okay to treat minors
23 differently than adults, period, that that's the
24 holding of Ginsberg.

25 It wasn't talking about the extent to

1 which figuring that out was going to burden
2 adults and how much the -- the adults' First
3 Amendment rights were impinged by operating that
4 principle. It was the first case to establish
5 in this context that minors don't have the same
6 rights as adults to access this material.

7 Then we go on in other cases, in the
8 cases that Justice Sotomayor raises, to -- to
9 evaluate, okay, now that we know that we can
10 separate these two categories of people, you're
11 absolutely right that we have to have some way
12 of doing that.

13 But these other cases are about how
14 burdensome the way of doing that is and to what
15 extent -- I mean -- and you seem to be agreeing
16 that there's a point at which the burden that
17 you're imposing on adults are going to be too
18 much. And my only point about the standard
19 mattering is that I thought the work of rational
20 basis review and strict scrutiny was to evaluate
21 whether this is too burdensome, that we say,
22 because the adults have a certain scope of First
23 Amendment rights, you can only impose a burden
24 that is the least restrictive way of reaching
25 your compelling interest.

1 So we don't need a new set of
2 principles or tests. We have a test. The test
3 is strict scrutiny. And Mr. -- the government
4 says, Mr. Fletcher says, there might be a way in
5 which this actually satisfies that.

6 MR. NIELSON: Yeah. So that test
7 can't be right, and the reason why it can't be
8 right is it would mean that if a state wants to
9 stop kids from going into a strip club, they
10 have to satisfy strict scrutiny.

11 JUSTICE JACKSON: No, because the --
12 the kids going into a strip club poses no burden
13 on adults. Why -- why -- that was going to be
14 my other question for you. Why would, you know,
15 saying a kid can't go into the strip -- club
16 pose any burden on an adult who wanted to?

17 MR. NIELSON: If we said you need to
18 look at IDs if you have somebody you can't tell
19 they're an adult or not to go into a strip
20 club --

21 JUSTICE JACKSON: So we apply strict
22 scrutiny?

23 MR. NIELSON: You would apply strict
24 scrutiny to that.

25 JUSTICE JACKSON: And then we say is

1 this the least restrictive means? And you say
2 yes. Fine. You can do it.

3 MR. NIELSON: That is not at all --
4 consistent with our tradition and history. As I
5 understand strict scrutiny -- again, I know
6 there's different views on this. As I
7 understand strict scrutiny, the idea is this is
8 generally not okay, but sometimes we'll make an
9 exception if there's really extraordinary
10 reasons for it.

11 But, in our history, we have always
12 said kids can't come and look at this stuff. So
13 it seems not correct to me as a historical
14 matter to say, well, actually, it's always been
15 presumptively unconstitutional, but on this one
16 thing, well, we've done it forever, strict
17 scrutiny somehow has always been satisfied.

18 JUSTICE BARRETT: Mr. Nielson, I want
19 to take you to the questions that Justice Kagan
20 was asking Mr. Fletcher about the dangers. I
21 just want you to --

22 MR. NIELSON: Yeah.

23 JUSTICE BARRETT: -- to posit this.
24 This is all just pretend.

25 Let's imagine that you should win,

1 that Texas should win. And Justice Kagan asked,
2 if that were so, you know, if there is a way
3 that states should be able to regulate -- and
4 the federal government should be able to
5 regulate this, we have to decide how our First
6 Amendment precedent might accommodate that.

7 And Justice Kagan identified for
8 Mr. Fletcher two options. One would be to say
9 that this can satisfy -- this kind of regulation
10 can satisfy strict scrutiny, and the other might
11 be to say, in this context, intermediate
12 scrutiny makes more sense. I just want to take
13 rational basis --

14 MR. NIELSON: Yeah.

15 JUSTICE BARRETT: -- off the table.

16 MR. NIELSON: Yeah.

17 JUSTICE BARRETT: What do you think
18 about that? Mr. Fletcher told us what he
19 thought about the dangers that would lie in
20 either approach.

21 MR. NIELSON: Yeah. So I am very
22 worried not about this law. I think we're going
23 to pass strict scrutiny. I hope that that is
24 where the Court is, that this law passes strict
25 scrutiny. I am worried about my strip club

1 example or any other sexually oriented
2 businesses. If we start saying that the
3 standard is strict scrutiny, I hope this Court
4 says, oh, that's okay, it passes strict
5 scrutiny.

6 But there's a whole bunch of law on
7 strict scrutiny, and a whole bunch of different
8 judges across this country are going to apply
9 it. There's a bunch of cases that say fatal in
10 fact. And we're going to have a lot of PIs and
11 a lot of emergency litigation. That's a
12 problem. A real --

13 JUSTICE KAGAN: But that wouldn't be
14 true necessarily if we wrote the kind of opinion
15 that Mr. Fletcher had in mind, right? Because
16 then you would say: This is the kind of strict
17 scrutiny we're talking about. This is what will
18 pass it. You know, take us seriously.

19 MR. NIELSON: So that's within the
20 control of this Court for that language to be.
21 I hope, if such opinion gets written, it is
22 very, very clear that we shouldn't get these PIs
23 like this.

24 JUSTICE ALITO: General Nielson, let
25 me see if this is consistent with what you're

1 saying.

2 Whenever -- if a law prohibits or
3 regulates a type of speech that is not entitled
4 to any constitutional protection, the content of
5 the speech does have to be examined at the
6 outset to determine whether it falls within that
7 category. And the fact that that preliminary
8 examination is necessary does not mean that the
9 law is content-based and, therefore, subject to
10 strict scrutiny.

11 MR. NIELSON: Yes, Your Honor.

12 JUSTICE ALITO: So what that may
13 suggest is that this -- while this preliminary
14 examination does not render the law
15 content-based, so long as it is not too
16 excessive, then strict scrutiny is not
17 triggered.

18 But, if it crosses a certain point and
19 it becomes too burdensome so that it is more
20 than is reasonably necessary to make that
21 threshold determination about whether the speech
22 is constitutionally protected, then you go into
23 another level of -- of scrutiny.

24 MR. NIELSON: Yes, Your Honor. And I
25 think that Ginsberg is consistent with that

1 view.

2 JUSTICE JACKSON: What about
3 Packingham?

4 JUSTICE SOTOMAYOR: The problem is
5 that the speech here is not just about obscene
6 speech, which is not subject to any rational
7 basis scrutiny only because it's -- I'm not even
8 thinking rational basis -- because obscene
9 speech is illegal for adults or minors, correct?

10 MR. NIELSON: It can be -- it can be
11 made illegal, yes, Your Honor.

12 JUSTICE SOTOMAYOR: It can be made
13 illegal. Not automatically, but it's not
14 protected speech. Obscene speech is not
15 protected speech.

16 MR. NIELSON: Exactly, Your Honor,
17 yes.

18 JUSTICE SOTOMAYOR: The problem is
19 that this law doesn't protect -- doesn't make
20 illegal just obscene speech, it makes illegal
21 obscene and indecent speech that might affect
22 children. But adults can view indecent speech,
23 correct?

24 MR. NIELSON: Yes, Your Honor, but not
25 if children are there.

1 JUSTICE SOTOMAYOR: No, I don't --
2 let's not quibble. Not when children are there.

3 But you now have to look further than
4 determining whether something's obscene. You
5 have to figure out whether it's indecent for
6 children, correct?

7 MR. NIELSON: Yes, Your Honor, I think
8 so.

9 JUSTICE SOTOMAYOR: Yeah. So it's not
10 merely checking to see if something doesn't have
11 curse words or some fighting words or something
12 like that. You're actually asking adults to not
13 look at something until they do something else,
14 something that's legal for them to look at.

15 MR. NIELSON: Yes, Your Honor. And
16 I'm saying that so long as Ginsberg has any
17 meaning --

18 JUSTICE SOTOMAYOR: Counsel, you keep
19 saying Ginsberg, all right? I look at the
20 Court's decision. The facts are that a
21 bookseller was criminally -- found criminally
22 liable for selling -- I think it was to a
23 16-year-old. The age doesn't matter right now.
24 But an underage child.

25 And "[his] attack" -- and this is the

1 Court saying -- "is not that New York was
2 without power to draw the line at age 17.
3 Rather, his contention is the broad proposition
4 that the scope of the constitutional freedom of
5 expression secured to a" child -- "to a citizen
6 to read or see material concerned with sex
7 cannot be made to depend upon whether the
8 citizen is an adult or ... minor."

9 And the Court -- "he ... insists that
10 the denial to minors under 17 of access to
11 material[s] condemned by ... [the law], insofar
12 as that material is not obscene for persons" of
13 age -- of "17 ... or older, constitutes an
14 unconstitutional deprivation of protected
15 liberty."

16 So it wasn't the age verification that
17 was at issue in Ginsberg at all. The Court had
18 no reason to address it. The claim there and
19 what the Court was speaking to as involving
20 rational basis was whether obscene, indecent
21 materials could be made -- had to be made
22 accessible to kids under 17.

23 MR. NIELSON: Yeah, I --

24 JUSTICE SOTOMAYOR: So I -- I -- I --
25 I'm having a -- I mean, we can all read

1 Ginsberg, but do you have any language in
2 Ginsberg that even addresses the
3 age-verification issue?

4 Point me to one line in the entire
5 petition, other than describing the law --

6 MR. NIELSON: Yeah.

7 JUSTICE SOTOMAYOR: -- that talks
8 about the burden of the age verification.

9 MR. NIELSON: Look at the very last
10 paragraph of the opinion. That's when they're
11 discussing whether Mr. Ginsberg had notice about
12 his obligations were under the statute.

13 The Court was very clear -- to be
14 sure, that was framed as a due-process-type
15 claim. It was very clear that they said: No,
16 you know --

17 JUSTICE SOTOMAYOR: It was a due
18 process.

19 MR. NIELSON: Well, they said very
20 clear: You know what you're supposed to do.

21 I would also point to the language
22 from the brief that Justice Alito already
23 mentioned earlier.

24 I've not heard of a court limiting a
25 case to less than its facts. And, there, he

1 raised the argument, saying: If this happens,
2 I'm not going to be able to sell it to adults.
3 And the Court said, essentially, rational basis.
4 That's how I read it.

5 JUSTICE SOTOMAYOR: Thank you,
6 counsel.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas, anything?

9 Justice Alito?

10 Anything further, Justice Sotomayor?

11 Justice Kagan?

12 Justice Gorsuch?

13 JUSTICE GORSUCH: One -- one quick
14 question on Ashcroft. It crossed the line in
15 your view because -- and I want you to fill in
16 the blank.

17 And -- and one possibility, of course,
18 might be that the law there made it illegal to
19 post, that is, to even create, to disseminate
20 the information, with the age verification being
21 only an affirmative defense.

22 MR. NIELSON: Yes, that is one of
23 them. There's three points on this. Again,
24 Ashcroft doesn't -- Ashcroft II doesn't say what
25 the burden was.

1 JUSTICE GORSUCH: Yeah.

2 MR. NIELSON: So you have to, like,
3 read into it.

4 One is that. That was clear from
5 the -- from the opinion and Justice Stevens's
6 concurrence. That's a big problem.

7 Another problem, if you go back to the
8 district court, was, to do this, you had to have
9 databases of credit cards. This is not the law
10 in Texas. You can't keep the data. So there
11 are no databases.

12 And the third is, again, to go back to
13 Ashcroft I, because you can't separate
14 communities under 1990s technology, if you send
15 it out to the world, this is the whole world, it
16 effectively meant some places, content that's
17 not even obscene as to minors would be behind
18 age screens, and that's a burden that is not
19 existing here.

20 We know for a fact that they can
21 segregate by -- by geography. When Texas's law
22 went into effect, Pornhub left Texas. They're
23 still operating in Louisiana with age
24 verification. So we know that that's no longer
25 true.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Just to follow up
5 on Justice Alito's formulation, which I thought
6 was helpful.

7 So the rule then, age-verification
8 requirements, generally permissible, but they
9 can become too excessive, to use his
10 formulation. Or I think you and I discussed
11 "or can become overly burdensome."

12 And then --

13 MR. NIELSON: Yeah, and that's why I
14 used "incidental."

15 JUSTICE KAVANAUGH: Right. And if so,
16 impermissible, but, otherwise, they're generally
17 permissible and common-sensical.

18 I think that's the basic framework
19 you're --

20 MR. NIELSON: Yes, Your Honor.

21 JUSTICE KAVANAUGH: Okay. And then
22 just maybe to piggyback on Justice Gorsuch, this
23 law is not too excessive or overly burdensome
24 because -- and fill in the blank.

25 MR. NIELSON: Because it's less than

1 in Ginsberg, and we know that because you don't
2 even have to provide identifying information.

3 So, in Ginsberg, if there was a
4 marginal case, you couldn't tell if it was a kid
5 or an adult, you had to look at the ID.

6 You don't have to do that under
7 Texas's law. So whatever -- however you read
8 Ginsberg, we are less than that.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: Mr. Nielson, there's
13 been some discussion about what happens to the
14 PI if we vacated and remanded to the Fifth
15 Circuit. Can you just say what you -- your view
16 on that is?

17 MR. NIELSON: Yeah. So the view of
18 Texas is, if this Court were to vacate the Fifth
19 Circuit's decision, then the Fifth Circuit's
20 stay would go back into effect because it was
21 only the Fifth Circuit's decision that took out
22 the stay. That would take a separate order.

23 Now I know that the other side is
24 going to fight me on that one, so we probably
25 would do what Mr. Fletcher suggests and go back

1 to the Fifth Circuit for clarification.

2 I ask, you know, if anything else,
3 that the language is clear to the Fifth Circuit
4 that it knows it can reinstitute the stay. That
5 gets lost in translation. Sometimes, when you
6 get a decision from this Court, they're like:
7 Oh, I guess -- I guess we can't do that anymore.
8 We don't want to get sum rep'd. We respect the
9 Court.

10 If that were to happen, I urge the
11 Court, please let the Fifth Circuit know. But
12 our view is that because it was this decision
13 that the Court is reviewing that vacated the
14 Fifth Circuit's stay, the stay would then spring
15 back to life.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: Yeah. Your last
19 colloquy with Justice Alito suggests that your
20 argument is that rational basis review applies
21 to state laws that serve merely to screen
22 certain people from accessing online -- content
23 that they have no constitutional right to
24 access, or at least it could be sort of thought
25 of in that way.

1 And I guess -- I mean, neither party
2 cited this case in their briefs, but I wonder
3 whether this would run afoul of Packingham. I
4 don't know if you're familiar with that case,
5 but it's one in which we looked at convicted sex
6 offenders who were trying to access social media
7 websites, a state law precluding that, and we
8 applied heightened scrutiny even though it sort
9 of raised the same kind of dynamic that you say
10 rational basis review would apply to.

11 So I -- I -- I think we would have to
12 try to figure out how the standard or the
13 principle that Justice Alito articulated would
14 be consistent with that case as well.

15 MR. NIELSON: Yeah. I confess I've
16 probably thought I read every one of this
17 Court's recent First Amendment cases, preparing
18 for today's argument. I did not read
19 Packingham. I -- I don't know, Your Honor. But
20 I do know that that's -- we are in the exact
21 same context as in Ginsberg. So whatever the
22 scope of Ginsberg, we fall within it.

23 JUSTICE JACKSON: And -- and -- and it
24 turns in a way on whether or not we agree that
25 Ginsberg was speaking to the burden or speaking

1 to the age requirement, as opposed to making the
2 sort of initial determination that minors can't
3 be treated -- or minors can be treated
4 differently than adults?

5 MR. NIELSON: Yeah, I -- I trust Your
6 Honor on that one.

7 JUSTICE JACKSON: Yeah.

8 MR. NIELSON: I would also say the
9 other way that you could think about Ginsberg,
10 of course, is that an ID requirement is just not
11 a constitutionally cognizable burden at all,
12 which would be consistent with some of this
13 Court's other cases and not fall within the
14 Packingham --

15 JUSTICE JACKSON: Well, the Fifth
16 Circuit didn't hold that, right? That that
17 would be --

18 MR. NIELSON: No, Your Honor.

19 JUSTICE JACKSON: The Fifth Circuit at
20 least saw that the First Amendment was
21 implicated by this, and, in fact, I thought they
22 thought it was a content-based restriction but
23 that Ginsberg still applied to sort of have a
24 different rule in this situation.

25 MR. NIELSON: All I'm saying is that

1 you can conceptualize Ginsberg in multiple ways.
2 We are okay in -- under all of them. But, if
3 there are problems that way, I would urge the
4 Court just to think, well, look at the -- the
5 voting ID cases and that sort. We are okay
6 under those line of cases too.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Rebuttal, Mr. Shaffer?

11 REBUTTAL ARGUMENT OF DEREK L. SHAFFER

12 ON BEHALF OF THE PETITIONERS

13 MR. SHAFFER: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 Let me start with Ginsberg if I may.
16 We've talked a lot about the fact that that
17 opinion was addressing only the rights of minors
18 as invoked there. I would just also note it was
19 not an across-the-board age-verification
20 mandate. It was not operating in a context
21 where you had a way to screen out minors from
22 specific content. And it didn't say, if more
23 than one-third of a store is inappropriate for
24 minors, minors have to be kept out of the store.
25 This law differs in all of those respects.

1 The question about let's wipe away for
2 the moment, Justice Kagan, the precedents that
3 this Court has laid down for decades about
4 sexually indecent speech that's inappropriate
5 for minors via electronic media and via the
6 Internet. Let's wipe it away for a moment. I
7 strongly urge this Court to stick with strict
8 scrutiny as the applicable standard of review
9 when we're talking about content-based burdens
10 on speakers.

11 This Court has an area of law that is
12 clear, that is well understood, that is
13 reliable, that will withstand mounting and
14 varied attacks because we all know when strict
15 scrutiny applies. It applies here. And I would
16 urge the Court to stick with it even if we
17 forget about the on-point precedents for the
18 moment. There are -- there are principles that
19 I think are important, reliable principles that
20 will serve us well going forward, yes, in this
21 context, but also in others.

22 And so that brings me, Justice Kagan,
23 your question about what about 20 other laws
24 that, by some views, may look a lot like
25 Texas's? I can tell Your Honors this is the

1 worst of them. This is the worst of the laws.
2 It has the health warnings where Texas is
3 telling these targeted speakers and their users
4 that pornography is, among other things,
5 contributing to prostitution, child
6 exploitation, child pornography. You have a
7 hostile regulator who's saying to adults, you
8 should not be here.

9 You have no consideration whatsoever
10 of content filtering as the number one
11 alternative that this Court had called out. You
12 have age verification that just, respectfully,
13 does not answer the description that Texas's
14 amici are offering and that Mr. Nielson is
15 collapsing to today, which is age verification
16 different from what the plain terms of the law
17 would permit. And you have none of the
18 protections that you would expect from a
19 responsible regulator who's -- concerned about
20 adults' interests here.

21 You don't have enforceable rights for
22 them. You do not have privacy protection. You
23 do not have confidentiality of information. You
24 do not have the government saying we cannot pry
25 open this information and use it against you.

1 All of that, Your Honors, you should
2 await a state or the federal government doing
3 its work, showing its homework, having something
4 other than the ill-tailored law that you have
5 here and a blank legislative record that tells
6 you nothing about why Texas would have arrived
7 at a law that looks like this unless it was out
8 to chill adults and chill speakers when it comes
9 to expression that is clearly protected as to
10 adults.

11 And I want to offer the Ashcroft law
12 if I may as a point of comparison. We think
13 that this is the a fortiori case, Your Honors.
14 There, the Court was looking at federal
15 legislation on a well-developed, comprehensive
16 legislative record where you could see what
17 Congress was doing and why it was doing it. And
18 it was a serious, genuine effort to regulate,
19 Justice Kavanaugh, as we were discussing, to
20 protect kids from all of the content that was
21 deemed inappropriate for minors regardless of
22 its source.

23 Texas's law is not fit for that
24 purpose for reasons that have gone conceded, I
25 think, effectively by Texas and by its amici,

1 and you can find in a well-substantiated set of
2 findings from the district court about how
3 under-inclusive this law is.

4 Your Honors have room and -- and --
5 and I understand sympathy for a state that is
6 trying to do its job to regulate in this area
7 conscientiously. And I want to assure you,
8 Justice Barrett, when we talk about scrutiny
9 that is strict in theory and fatal in fact -- I
10 was lucky enough to learn constitutional law
11 from Gerry Gunther -- that resonates. None of
12 us is suggesting that in this context strict
13 scrutiny is fatal. It is not. It should not
14 be. We've conceded that there is a compelling
15 interest here.

16 The question will always be, has
17 government tried to arrive at a less restrict --
18 it -- it -- it -- has it tried to do this in a
19 way that is not unduly burdening adults and is
20 truly protecting kids? Once this law answers to
21 strict scrutiny at is -- as it has long been
22 understood, I do think, respectfully, this
23 becomes an easy case.

24 The last point. From -- from
25 Mr. Fletcher, and I agree with so much of what

1 he says, he talked about tradition as a
2 guidepost here. And I would just note the
3 tradition that we have on the Internet, on the
4 Internet. Yes, Justice Kagan, we've come a long
5 way from -- from when we were first talking
6 about the Internet and had to explain what it
7 was. But Reno and Ashcroft have been absolutely
8 fundamental to how the Internet has developed as
9 a free medium of -- of expression, as our modern
10 public square. And -- and the tradition on the
11 Internet is to say that it will be free and that
12 it is incumbent upon parents to screen out
13 content that is inappropriate for their kids.
14 That's where the law should stay.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 The case is submitted.

18 (Whereupon, at 12:19 p.m., the case
19 was submitted.)
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Official

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