

No. 23-112

In the
Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,

Petitioners,

v.

KEN PAXTON,

Respondent.

**On Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit**

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Whether Texas House Bill 1181 should be reviewed with rational-basis review scrutiny or strict scrutiny?

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SUMMARY OF ARGUMENT

We contend that strict scrutiny should be applied to the Texas House Bill 1181 as its conditions abridge adults' fundamental right to free speech under the First Amendment, impose content-based discrimination, and pose security risks that create a chilling effect that deters adults from accessing these websites.

The First Amendment prohibits laws from burdening protected speech and compelling disclosure statements. Texas H.B. 1181 implicates the First Amendment rights of adults and online platforms by mandating age verification on platforms containing over one-third of obscene speech. This unconstitutionally burdens adults' legitimate access to sexual material. It causes a chilling effect that deters adults from following through with age verification because it complicates access and poses security and privacy concerns. Moreover, the use of government-issued identification and public and private transactional data to verify age exposes the user's identity and personal preferences, creating great privacy concerns. Additionally, the law compels websites to disclose health risks, violating the constitutional protections against compelled speech and undue government interference.

Furthermore, if strict scrutiny is applied, the Texas law will fail because H.B. 1181 is not narrowly

tailored, as it demonstrates both over-inclusivity and under-inclusivity in several areas, including its content threshold, limited scope, lack of necessary distinctions, practical shortcomings, and its potential to cause harm to minors. Moreover, it does not employ the least restrictive means, disregarding superior, less intrusive alternatives such as parental controls and filtering systems, and unduly burdens the rights of individuals outside the targeted demographic.

ARGUMENT

I. Texas House Bill 1181 warrants review under strict scrutiny standards.

A. Texas H.B. 1181 violates the First Amendment.

The restrictions applied in Texas H.B. 1181 unconstitutionally burden adults' access to protected speech by mandating age verification for platforms with over one-third obscene content. This chills adults' access to lawful material, which may constitute a majority of the site's content. Additionally, it raises privacy and security concerns, and compels websites to disclose health risks, violating protections against compelled speech.

a. It is well established that the speech H.B. 1181 intends to cover is constitutionally protected for adults. Although the Texas law utilizes the Miller test to differentiate restricted material, it modifies the conditions of the test to apply to sexual content that is deemed harmful with regards to minors. Tex. Civ. Prac. & Rem. Code § 129B.001(2023). Therefore the bill's sweep goes beyond obscene material, which is indisputably unprotected under the First Amendment, and impermissibly imperils a substantial amount of non-obscene speech that does enjoy First Amendment protection. Due to the fact that other statutes under Texas law already criminalize obscenity, prohibiting

minors' access to obscene material via an age verification system is altogether redundant. Respondents may argue that the H.B. 1181 only restricts obscene material. However, Texas conceded that "adults should still be able to access every bit of the materials" when asked whether "the state take[s] the position that the adults should be able to access all of th[e] material" covered by H.B. 1181, or instead "that some of th[e covered material] is obscene." Official Recording at 13:35-14:00, <https://bit.ly/4c5B42K>. Therefore, speech that is lawful for adults will inevitably be restricted under H.B. 1181, which is a flagrant violation of the First Amendment. As this Court has ruled elsewhere "[the] standard the Government must meet" to restrict that speech "should be clear: The standard is strict scrutiny." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

b. As long as the speech in question is lawful, the First Amendment prohibits laws from infringing on all protected speech; it cannot selectively favor or restrict certain types of protected speech over others. If it does it engages in content-based discrimination, which this court has repeatedly ruled triggers examination under the highest degree of scrutiny. Recently, this principle has been affirmed by various cases, concerning violent video games in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), outdoor signs in

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), and sexual material on the internet in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) and on television in *Playboy*. It is well established that no “one idea is as good as any other,” *Id.*, 529 U.S. at 818. The nature of the value of speech is inherently subjective, so “what is one man’s amusement, teaches another’s doctrine.” *Winters v. New York*, 333 U.S. 507, 510 (1948). Either way, it would be “difficult to distinguish” between high-value and low-value speech and it would be legally dangerous under existing First Amendment jurisprudence for them “to try,” as established in *Brown*. Sexual content cannot be restricted more than violent speech, for example, because ultimately, they are both forms of protected speech and therefore enjoy equal protection. The non-obscene “portrayal of sex ... in art, literature, and scientific works” has never been considered as “sufficient reason to deny material the constitutional protection of freedom of speech and press.” *Roth v. United States*, 354 U.S. 476, 487 (1957).

c. The bill burdens protected speech by inadvertently causing a chilling effect through imposing access barriers and introducing privacy and data security risks, deterring users from undertaking the burdensome process required to exercise their right to access lawful speech. The bill states that the means of verification must consist of government-sanctioned identification or public and

private transactional data. This poses a significant security concern as adults who provide their identifying information risk identity theft and data breaches that could result in the leaking of sensitive personal information. This precipitates a chilling effect in which the inconvenience caused by the age verification system coupled with the fear of privacy and security breaches deters adults from lawfully viewing sexual content. ExpressVPN Digital Privacy Advocate Lauren Hendry Parsons noted potential privacy concerns that arise with uploading personal information through required age-verification methods. Meghan McIntyre, *Many Pornography Websites Aren't Complying with New VA Age Verification Law*, Virginia Mercury (Aug. 23, 2023), <https://tinyurl.com/3nc6n6mm>. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) established the principle that forced disclosure of personal information, such as membership lists, can create a chilling effect on the exercise of First Amendment rights by deterring individuals from associating with organizations or engaging in protected activities. The Electronic Frontier Found. (EFF) Cert. Amicus Br. 6 states that submitting identifying information poses great risks for “inadvertent disclosures, leaks, or hacks.” Furthermore, leaked data could potentially “reveal intimate desires and preferences” which could ultimately lead to judgement and disapproval from others, potentially leading to mistreatment and

ostracization. *Free Speech Coalition v. Colmenero*, 689 F. Supp. 3d 373 (W.D. Tex. 2023). In this sense, age verification risks trampling on the fundamental privacy rights of individuals at the heart of the 1st Amendment.

Moreover, requiring age verification through the submission of identifying information risks encouraging minors to obtain fake IDs, so it necessitates the cross-checking of identification against government or third-party databases to verify authenticity. While Tex. Civ. Prac. & Rem. Code § 129B.002(b) mandates that adult websites must not “retain any identifying information” of users, H.B. 1181 does not prevent these websites from interacting with third-party databases, which may include entities with questionable security practices or even malicious actors.

The district court observed that the law’s deletion requirements explicitly exclude “data in transmission,” meaning that intermediaries facilitating the exchange of personal information between websites and verification services are not obligated to delete this data. This loophole creates significant risks, as third-party entities could potentially misuse or mishandle the information, including selling it to advertisers, sharing it with government agencies, or even exposing it to cybercriminals. These risks amplify concerns over

surveillance, identity theft, and unauthorized tracking, contributing to a chilling effect where individuals avoid accessing legal content due to fears of compromising their privacy and security. These risks parallel concerns raised in *NAACP v. Patterson*, where the Supreme Court recognized that the fear of exposure or misuse of sensitive information can have a chilling effect on individuals' willingness to exercise their constitutional rights.

d. Strict scrutiny is applicable on the grounds that the Texas law unduly burdens adults' First Amendment rights. The Tex. Penal Code §§ 43.21-43.23 criminalizes obscenity for adults. As previously established, H.B. 1181 does not target obscene content, but material that is obscene for minors. However, a law that aims to prohibit children from accessing material that is not protected for minors is still subject to strict scrutiny if the law burdens adults' access to the same content. As this Court stated in *Reno*, "[T]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)). By applying heavy unconstitutional burdens on adults in order to protect children, this law risks "[burning] the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957)

In this case, the Fifth Circuit contended that strict scrutiny was inapplicable because H.B. 1181 imposed burdens on speech rather than outright banning it. However, the Supreme Court has consistently held that the application of strict scrutiny does not rely on a total prohibition of speech. Instead, strict scrutiny has been applied in cases involving restrictions on specific types of speech. The Court has affirmed that “[t]he Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” *Playboy*, 529 U.S. at 812. The significant content-based restrictions and violations imposed by H.B. 1181 warrant the application of strict scrutiny, consistent with precedents in cases where certain material was banned, such as *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); and *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). The reasoning underlying the invalidation of these bans should similarly apply to the present case.

The respondents insist that *Ginsberg v. New York*, 390 U.S. 629 (1968) establishes that children and adults do not enjoy the same First Amendment rights as that ruling held that states may prohibit the sale of explicit magazines to minors. However, *Ginsberg* is inapplicable to this case because it did

not impose significant burdens on adults. The restrictions do not burden adults purchasing sexual material to the same degree as online age verification. Verification as outlined in *Ginsberg* was typically performed by asking for proof of age, such as an ID, in person at the point of sale. This is a straightforward process with minimal associated privacy or security risks. Unlike modern digital age verification systems, the *Ginsberg* context did not involve substantial chilling effects that could deter lawful access to protected materials. The Court in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), declined to extend *Ginsberg* to other contexts, such as banning violent video games for minors. The narrow scope and minimal adult impact in *Ginsberg* demonstrate its limited applicability to the broader and more burdensome restrictions at issue here.

e. In addition to burdening speech, Texas H.B. 1181 also compels speech by mandating that websites with one-third harmful content display health warnings. In *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018), the court establishes that disclosure requirements unconstitutionally compel speech. This is affirmed by *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), where courts established that laws requiring social media platforms to disclose content moderation decisions violate the First Amendment by interfering

with editorial discretion, thereby forcing platforms to express viewpoints they would prefer to exclude, and subjecting such laws to strict scrutiny.

Moreover, these mandated health warnings “stigmatize and condemn” adult users by painting adult patrons as unwell and needing psychiatric treatment. See Tex. Civ. Prac. & Rem. Code § 129B.004 (capitalization altered); p. 8, *supra.*, which leads to reduced access of these sites for adults who do not wish to be targeted and criticized for their behavior. In this way, the Texas law is, by design, intended to deter even adults from accessing these sites.

B. H.B. 1181 constitutes a content-based regulation.

When "the daily politics cries loudest for limiting what may be said," courts must evaluate speech regulations under "strict categorical rules" *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Content-based restrictions, defined as laws that “target speech based on its communicative content” *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015), demand heightened scrutiny. Under this standard, any law that singles out constitutionally protected sexual expression qualifies as a content-based restriction on speech. Laws that constitute

content-based regulations must be subject to strict scrutiny because the act of targeting speech based on its content is presumptively unconstitutional unless the law is able to hold under stringent criteria. The Texas law “attempts to regulate expression,” so it must meet “rigorous constitutional standards.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

H.B. 1181 singularly targets online platforms providing “sexual material harmful to minors.” Tex. Civ. Prac. & Rem. Code §§ 129B.001(6), 129B.002(a)., thus drawing a facial distinction between forms of speech, placing the law squarely in the category of content-based regulations as established by *Reed v. Town of Gilbert*. This is virtually identical to the restrictions that prompted strict scrutiny in *Ashcroft*, as well as in *Reno*, *Playboy*, and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

However, the respondent may interpret the bill as content-neutral and instead classify it as a conduct-based regulation. The District Court and the Fifth Circuit had differing views on what form of regulation the bill enacts. Although the District Court categorized it as a content-based regulation, the Fifth Circuit classified it as a conduct-based regulation because the law regulates the act of restricting minors’ access to material deemed

harmful, rather than directly prohibiting or regulating the material itself.

Yet, the content-based nature of the law is undeniable. In *Reed v. Town of Gilbert*, the court held that any law that explicitly draws distinctions based on subject matter is inherently content-based, emphasizing that although the intent behind the bill may be to target non-speech related goals, the regulation still applies according to the content of the material. Moreover, *Reed* stresses that laws must be analyzed based on their practical effects on speech. Even if the respondents interpret the Texas law as a conduct-based regulation, the bill unavoidably regulates content due to its chilling of lawful access of protected speech targeted explicitly on the basis of its content. Intent is secondary to outcome, so although the respondents can frame the Texas bill as a law that regulates minors' conduct, as long as speech is still implicated, the bill is still considered a content-based restriction. As such, "it can stand only if it satisfies strict scrutiny." *Playboy*, 529 U.S. at 813. Regulations that threaten the rights of expression must be "presumed invalid" because of its "constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft*, 542 U.S. at 660.

II. Under strict scrutiny, Texas HB1181 will

fail to meet the rigorous standards set forth by the review.

A. Although the government has a compelling interest in protecting minors, the petitioners prevail regardless.

The state asserts that protecting minors from harmful material constitutes a compelling government interest, a principle recognized in *Ginsberg*. However, the Supreme Court has consistently emphasized that even laws pursuing compelling interests must be grounded in evidence and demonstrate that it is narrowly tailored to achieve its objective without unduly infringing upon constitutional rights. In *Sable*, the Court accepted the government's "compelling interest in protecting the physical and psychological well-being of minors." Yet, the Court invalidated the law regardless because it "was not sufficiently narrowly drawn ... to serve those interests without unnecessarily interfering with [the] First Amendment freedoms" of adults. *Id.*

Furthermore, such laws must employ the least restrictive means to achieve their goals. The court reinforced that principle in *Playboy*, in which a law mandated that cable-television operators hosting channels dedicated to sexual material that was not obscene for adults to broadcast late at night or completely block their channels. Here, the court also

conceded the government's interest in protecting "the home" from "unwanted, indecent speech." Yet, after recognizing the merits of less restrictive alternatives, such as "a regime in which viewers could order signal blocking on a household-by-household basis," the Court overturned the law. *Id.* at 807, 826-27.

B. The restrictions are not narrowly tailored to fulfilling the government's compelling interest.

H.B. 1181 does not satisfy the requirement of being narrowly tailored, as it exhibits both over inclusivity and under inclusivity in various respects, including its content threshold, its narrow focus, its lack of necessary distinctions, its flaws that hamper feasibility, and its potential to inflict harm on minors.

a. H.B. 1181's one-third content threshold is both overinclusive and underinclusive. It is a seemingly arbitrary number, lacking in any empirical basis or justification, that neither effectively protects minors nor avoids infringing upon protected speech. First, ratios are proportional to the size of the platform, so when applied to a smaller platform, one-third constitutes a negligible amount. Despite that, it would still be obligatory to apply an age-verification system. On the other hand, a large platform could have a considerable amount of content

deemed “harmful to minors” that greatly exceeds the amount of content present in the smaller platform, yet still fall below the threshold. The result is that the smaller website’s content is restricted by the age-verification system while minors can still access the larger platform, which contains a far more substantial amount of harmful content. This shows that there are cases in which one-third of a site consists of a significant amount of harmful content that children would be utterly unprotected from. Thus H.B 1181 is massively under-inclusive.

Second, consider a scenario in which a larger platform’s harmful content crosses the one-third threshold and therefore faces restrictions under H.B. 1181. Two-thirds, a super-majority, of the site’s unobjectionable and constitutionally protected content would be restricted as well. This introduces substantial overbreadth because it disproportionately captures a wide range of speech that falls outside the bill's intended scope of protecting minors from harmful material. Again, the ratios are scalable, so just as one-third is a fluctuating amount that is dependent on the size of the platform, two-thirds is as well. When it comes to smaller platforms, two-thirds protected speech could be an inconsequential amount of content. However, there are incredibly vast sites in which two-thirds would constitute an appalling amount of protected speech that would be restricted. This begs the question of whether such a restriction

is a gross violation of First Amendment rights because the one-third content threshold fails to account for the nuances of platform size, audience composition, and the actual impact on protected speech versus harmful material. The scalability of the ratio amplifies both its under-inclusivity and overbreadth, resulting in uneven application and unintended consequences.

Courts have long struck down laws with substantial overbreadth where the “law is overly broad under the First Amendment in regulating based on content.” *United States v. Stevens*, 559 U.S. 460 (2010). This ruling involved a law that banned the depiction of animal cruelty but also included lawful practices such as hunting and animal slaughter. H.B. 1181 similarly bars material that is constitutionally protected. Here, the one-third threshold creates a system where a vast proportion of non-harmful material is swept into the regulatory framework, including content with clear educational, literary, artistic, or political value. As the Petitioner’s Merit Brief, *Free Speech Coalition, Inc. v. Paxton*, No. 23-1137 (U.S. filed Oct. 23, 2023) notes “a website that contains 65% core political speech and 35% sexually suggestive content would be 100% subject to H.B. 1181’s restrictions. That is paradigmatic over-inclusivity.” The result is a chilling effect that stifles lawful expression and restricts public access to differing viewpoints, contrary to the principles

enshrined in the First Amendment.

Therefore, the bill's arbitrary one-third content threshold does not effectively address its stated goal of protecting minors. Its under-inclusive nature allows minors to access a significant amount of harmful content on large platforms that fall beneath the threshold, while its over-inclusivity suppresses an overwhelming amount of non-harmful speech on platforms that exceed it. The inherent contradictions in this framework demonstrate that the law is not narrowly tailored.

b. Moreover, the law also abridged children's First Amendment rights. Although adults' speech is significantly chilled, it is still possible for them to access protected material if they choose to follow through with the age-verification system. On the other hand, it completely prohibits children from being able to access the remainder of content on a restricted website, "all of which might have educational or artistic value." Amicus Curiae Brief in Support of Petitioner, Free Speech Coalition, Inc. v. Paxton, No. 23-1122 (U.S. filed May 16, 2024).

As soon as the amount of harmful material passes the one-third threshold, the bill ceases to treat protected content as distinct from sexually explicit content unprotected for children, effectively restricting both equally. Again, the larger the site, the

greater the amount of implicated protected content. This is incredibly over-inclusive. The wholesale prohibition of minors' access to entire websites based on limited harmful content denies minors the opportunity to engage with content that could be potentially beneficial. As opposed to website-based age verification systems, content filtering can be applied selectively to specific content, rather than blocking entire websites. Therefore, the bill fails to be narrowly tailored in achieving its objective of protecting children, as it is overinclusive.

c. Additionally, the law is not narrowly tailored as it fails to distinguish between content considered harmful for different age groups within the broad category of "minor." By defining minors monolithically as individuals "younger than 18 years of age," H.B. 1181 groups all minors into a single, undifferentiated category, neglecting the nuances of age. It does not detail any distinctions between children and adolescents nearing adulthood. By doing so, it is both massively over-inclusive and under-inclusive. If the statute errs on the side of covering all material that would be deemed harmful to the youngest minor, "virtually all salacious material" would be restricted due to the fact that "most sexual content is offensive to young minors." *Free Speech Coalition v. Colmenero*. This begs the question of whether such material would also be deemed offensive to adolescents. Older minors are

generally seen as having greater cognitive abilities and exposure to diverse content, which warrants different legal standards than those applied to younger children. In *Board of Education v. Pico*, 457 U.S. 853 (1982), The Court recognized the need to balance protecting younger children while respecting the intellectual freedoms of older students, suggesting that blanket policies may fail to account for age-based distinctions.

The Texas bill states that restricted content must be, when taken as a whole, lacking in “serious literary, artistic, political, or scientific value for minors.” However, content that may lack redeeming value for younger minors might provide ample value for minors at a developmental stage where more knowledge has been accumulated and greater cognitive abilities have been developed.

Moreover, the list of content that the bill intends to cover is not exhaustive when it comes to addressing material that would be harmful to the youngest minors either, thus failing to sufficiently protect them. While H.B. 1181 restricts a specific category of sexual material involving explicit body parts such as “a person's pubic hair, anus, or genitals or the nipple of the female breast,” physical acts including “sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, [and] exhibitions,” and behaviors like

“touching, caressing, or fondling,” there are still forms of sexual content that could be considered harmful to the youngest minors but are not covered by the bill’s definition. Content that involves sexually suggestive behavior or innuendo, even if explicit acts are not shown, could be harmful to younger minors. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court emphasized that even “indirect” sexual content can be inappropriate for certain audiences, particularly minors, as it can still be seen as having a “corrupting influence” (438 U.S. 726, 1978). Therefore, the bill is not only over-inclusive, but under-inclusive as well due to its inability to satisfy the needs of both older adolescents and younger minors. By applying the same standards to vastly different developmental stages, this lack of nuance leads to restrictions that are disproportionate and constitutionally vulnerable, therefore failing to narrowly tailor its conditions to the goal of protecting children.

d. H.B. 1181 has a narrow focus on sexually explicit material while neglecting other forms of content that are potentially harmful to minors, such as depictions of violence, extreme language, or other forms of explicit imagery. This lack of comprehensiveness raised similar concerns in *Brown v. Entertainment Merchants Association* but with an inverted focus. In *Brown*, the Court struck down a California law that prohibited the sale of

violent video games to minors. The law was criticized for targeting violence while excluding other categories of potentially harmful content, such as sexual material or extreme language, which under California law were subject to separate regulation.

Justice Scalia noted that such selective targeting of one form of content, without addressing others, raised constitutional concerns because it imposed an inconsistent standard and lacked a compelling justification. On the other hand, H.B. 1181 exclusively targets sexual content without addressing violence, extreme language, or other graphic depictions that might also be harmful to minors. Therefore, the bill is under-inclusive and not narrowly tailored in its goal of protecting minors.

e. Nor can the government realistically enforce H.B. 1181 due to the size and complexity of the digital landscape, demonstrating that the law is under-inclusive and fails to narrowly target the goal it aims to address. It has been shown that 12% of all websites are pornographic, and 266 new pornographic websites are released online on a daily basis. David H. Freedman, *The Internet Porn Epidemic: By the Numbers*, *The Week* (Dec. 17, 2015), <https://tinyurl.com/4d5y3zhr>. The law cannot reasonably impose restrictions on every site that exceeds the content threshold yet does not apply an age-verification system, so it will inevitably overlook

a large number of non complying websites.

After Virginia's age verification statute went into effect in July, only one website has complied with the law as of August 15th. Meanwhile, 54 websites remained entirely unrestricted. Meghan McIntyre, *Many Pornography Websites Aren't Complying with New VA Age Verification Law*, *Virginia Mercury* (Aug. 23, 2023), <https://tinyurl.com/3nc6n6mm>.

Moreover, even sites that the government is able to discover and penalize for refusing to apply the age restriction may simply reappear under a new domain name due to the fact that when "a publisher is actively trying to avoid the filter, simply changing the name of the file or the server is often enough to avoid the block." See Internet Society, *Internet Society—Perspectives on Internet Content Blocking: An Overview* 19 (Mar. 2017).

Additionally, the bill does not include a method of quantifying content on an online platform. It would be simple to discover that a website hosting predominantly harmful content does not apply the age-verification system, but if a website is barely past the one-third threshold yet does not comply with the bill's conditions, it could easily be disregarded by the government if there is no effective system in place to measure online content. Therefore, the bill is massively under-inclusive because it will inevitably

fail to regulate the behavior of a large and rapidly increasing number of sites that contain material deemed “harmful to minors,” and, not to mention, even non-complying sites that the bill is able to catch can easily resurface.

f. Additionally, the law is vastly under-inclusive because the prevalence of overseas websites hosting over one-third content deemed harmful to minors exposes the bill’s failure to effectively regulate all implicated websites because many such sites may operate from countries with no interest in cooperating with U.S. laws. *The Almost Invisible Men and Women Behind the World’s Largest Porn Sites, The Next Web* (Oct. 17, 2019), <https://tinyurl.com/5fvjkuu7>. A significant number of websites hosting such material are not based in the United States and may consequently avoid the bill’s jurisdiction due to the lack of effective international enforcement mechanisms. This is an inherent flaw of the age verification system because “[Website-based age verification] does not prevent minors from having access to foreign harmful material” as it is only able to regulate “pornography posted to the Web from America.” *Ashcroft*, 542 U.S. at 666–667.

U.S. courts generally cannot extend jurisdiction to foreign websites unless they have sufficient ties to the U.S. or purposefully target U.S. users. For example, the Foreign Corrupt Practices

Act (FCPA) has provisions that may extend jurisdiction to foreign entities if their conduct has substantial effects on U.S. commerce or markets. Specifically, the FCPA targets international corruption by U.S. companies or foreign firms involved in U.S. trade and regulates actions that impact U.S. interests, regardless of the location of the defendant's activities (15 U.S.C. § 78dd-1). Because websites hosting material deemed harmful to minors have no direct connection to the U.S.'s interests, nor have sufficient effects on U.S. commerce, there are no grounds for enforcement overseas.

Even if these websites have U.S. users, enforcing compliance with laws like H.B. 1181 can be nearly impossible without significant international cooperation. The U.S. has no direct control over these websites unless they specifically comply with U.S. regulations or have physical operations within the country. According to the Executive Director of the Free Speech Coalition, “the actual legal jeopardy that an international company might face, especially since it would be like a private lawsuit from an individual, is not terribly high compared to what a U.S. company would face if sued by a person in [the U.S.]” Meghan McIntyre, *Many Pornography Websites Aren't Complying with New VA Age Verification Law, Virginia Mercury* (Aug. 23, 2023), <https://tinyurl.com/3nc6n6mm>. Because of this, websites that were originally based in the U.S. can

avoid H.B. 1181 regulations by simply hosting their content abroad Amicus Curiae Brief in Support of Petitioner, Free Speech Coalition, Inc. v. Paxton, No. 23-1122 (U.S. filed May 16, 2024). Therefore, H.B. 1181 is massively under-inclusive because it fails to address jurisdiction of foreign entities and also provides a gateway for platforms based in the U.S. to evade the bill, thus failing to regulate minors' access to a significant portion of sites hosting material "harmful to minors."

Moreover, even if foreign website operators are inclined to comply with the bill, they will encounter great difficulty in doing so and, as a result, may misclassify content, leading to both over-inclusivity and under-inclusivity. Content that is deemed "harmful to minors" is highly variable depending on the community. This is even outlined in the bill, which modifies the phrasing of the Miller Test by stating that "the average person" must apply "contemporary community standards" in order to determine whether the material "is designed to appeal to or pander to the prurient interest" and qualifies as "patently offensive with respect to minors." Tex. HB1181 (2024). *Ginsberg* emphasizes that the regulation of material harmful for children can differ based on the audience. The Court held that the concept of obscenity for children "may vary according to the group to whom the questionable material is directed or from whom it is quarantined."

390 U.S. at 636. Therefore, foreign website operators will undoubtedly have difficulty in discerning material that is considered harmful to minors in accordance with Texas community standards.

Moreover, the bill requires that the material must not have any “serious literary, artistic, political, or scientific value for minors.” This will invariably cause discrepancies in judgement. For example, the political landscape of different countries may differ drastically from each other. Sexual material that provides niche political commentary that is only relevant to the U.S. might go over the heads of foreign website operators unfamiliar with American political discourse, resulting in the potential restriction of such material. This would be over-inclusive. The same holds true if content that has political value in the eyes of foreign operators might be considered utterly irredeemable in the U.S.; the website operators would neglect such content, resulting in under-inclusivity. This creates “a patchwork of First Amendment rights,” leading to prevalent contradictions throughout the execution of the bill. *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 678 (2024) (Thomas, J., dissenting from summary grant, vacatur, and remand. If foreign entities over-censor to err on the side of caution, they may infringe on lawful speech if this censorship results in a fulfillment of the one-third threshold. Then, an age-verification system would be applied, chilling

speech of value. Conversely, under-censorship could fail to meet the bill's stated goals, exposing minors to harmful material. Therefore, the bill is not narrowly tailored to achieve its goal. And, mind you, all of this is based on the assumption that foreign website operators would even bother to comply with the bill in the first place.

g. Texas H.B. 1181 does not include any provisions guarding against circumvention methods, rendering the bill unfeasible. The bill strictly applies to those in Texas, so websites must implement geolocation methods to approximate the user's location, which is typically done by collecting the user's Internet Protocol (IP) address. However, widely available and easily accessible Virtual Private Networks (VPNs) can easily circumvent geolocation and allow minors' access to harmful material. A VPN acts on the user's behalf, so the website will geolocate in accordance with the IP address of the VPN's server. A minor in Texas could simply use a VPN to appear to be located in an area outside of this bill's jurisprudence, thus completely bypassing the age verification requirement. Shweta, *What a VPN Hides (And What It Doesn't)*, Forbes (Oct. 19, 2023), <https://tinyurl.com/bdhfw583>.

Additionally, such tools are easily downloaded onto browsers and often advertised. Surveys show that VPNs are widely used, with 77% of people using

them for personal reasons. Chauncey Crail, *VPN Statistics And Trends In 2024*, Forbes (Feb. 29, 2024), <https://tinyurl.com/yhuat44y>. Given the popularity of these tools and their wide availability, H.B. 1181's failure to address these circumvention methods is a significant oversight.

Following the bill's introduction, there was a significant surge in VPN searches, with a 1,500% increase. This rise indicates that individuals, including minors, are actively seeking out tools to circumvent the bill's age verification measures. Nadeem Sarwar, *Pornhub Shutdown In Texas Sends Users Scrambling For VPN Access*, *SlashGear* (Mar. 15, 2024), <https://tinyurl.com/5ebbh87n>. Moreover, Virginia, which has already enacted similar age-verification statutes, became the state with the highest number of searches for "VPN" or "virtual private network" of all states from June 29 through July 5, the length of time after which the bill went into effect. Additionally, the Public Relations Manager of NordVPN stated that there was a 14% increase in VPN downloads in Virginia and a representative from ExpressVPN said that their website's traffic from Virginia increased by 15% within that same time period. Meghan McIntyre, *Many pornography websites aren't complying with new Va. age verification law*, *Virginia Mercury* (Aug. 23, 2023), <https://tinyurl.com/3nc6n6mm>.

This trend demonstrates that minors can effortlessly bypass geolocation-based restrictions, making the law under-inclusive because it cannot sufficiently protect minors from harmful material. Without addressing the widespread use of circumvention tools like VPNs, H.B. 1181 cannot meet its goal of protecting minors from harmful material. Therefore, the law fails to meet the rigorous standards of being narrowly tailored, as it leaves significant loopholes unaddressed and undermines its own enforcement capacity.

h. Besides VPNs, The Onion Router (Tor) network is one of the most prominent circumvention methods that would be capable of bypassing the bill. However, Tor would expose minors to security risks and harmful material. The Tor network masks the user's location through relaying encrypted information, thus the website will only be able to view the IP address of the final relay. Lee Mathews, *What is Tor and Why Do People Use It?*, *Forbes* (Jan. 27, 2017), <https://tinyurl.com/2eewvhan>.

The Texas law's age verification requirement "may well simply encourage greater numbers of consumers to access pirated pornographic content via other, unregulated, channels." Majid Yar, *Protecting children from Internet pornography? A critical assessment of statutory age verification and its enforcement in the UK*, 43 *Policing: An International*

Journal 183, 191–192 (2019). By using browsers that preserve minors’ anonymity, minors are led to platforms on the dark web, which do not adjust their databases to remove criminalized sexual imagery. Beyond sexually explicit material, the dark web also hosts a plethora of other forms of illegal, unregulated harmful content. It is estimated that approximately 60% of the sites on the dark web host illicit material. See *Pietro Ferrara et al., The Dark Side of the Web—A Risk for Children and Adolescents Challenged by Isolation during the Novel Coronavirus 2019 Pandemic*, 228 J. Pediatrics 324, 325.e2 (2021).

The UK government has already considered this issue when implementing their age-verification requirements, remarking that minors “may be pushed towards using Tor (dark web) and related systems to avoid [age verification] where they could be exposed to illegal and extreme material that they otherwise would never have come into contact with.” Yar at 192 (brackets in original) (citation omitted). See Neil Thurman & Fabian Obster, The regulation of internet pornography: What a survey of under 18s tells us about the necessity for and potential efficacy of emerging legislative approaches, *13 Policy & Internet* 415, 415 (2021). Due to the potential of inflicting harm on minors as a by-product of this bill, “the cure” may prove to be “worse than the disease.” Amicus Curiae Brief in Support of Petitioner, *Free Speech Coalition, Inc. v. Paxton*, No. 23-1122 (U.S.

filed May 16, 2024). This shows that, by inadvertently causing harm, the bill fails to narrowly target its goal of protecting children.

i. Ultimately, the speech targeted by H.B. 1181 is protected speech for adults, and Texas conceded that “adults should still be able to access every bit of the materials.” So, without taking into account the technicalities detailed previously, H.B. 1181 will invariably fail to achieve its goal of protecting minors without significantly burdening the speech of adults as a result of the chilling effect caused by the age-verification system. There is no way, shape, or form, in which the bill can be considered a narrowly tailored law because the rights of adults to lawfully access protected material will be implicated regardless of the situation because the bill will undoubtedly restrict protected content, as Texas has admitted in oral argument.

This case closely mirrors the issues addressed in *Ashcroft v. ACLU* because H.B. 1181 is nearly identical to the COPA law that was invalidated, yet it is even more overbroad as it targeted more speech, included fewer privacy and security protections, and did not address other channels that minors may access to view harmful material. Because this case is a fortiori of *Ashcroft*, the Court should, at a minimum, apply the same principles from that decision.

C. H.B. 1181 fails to employ the least restrictive means to further its interest in protecting minors.

The bill imposes significant restrictions by encumbering protected speech for adults based on the tentative determination that even a third of the content is deemed "harmful to minors." This creates an undue obstacle for adults seeking lawful access to material they are entitled to view. More effective and less restrictive alternatives, which have been endorsed by the Court in various precedents, exist.

The Fifth Circuit in this case argued that the application of rational-basis review was necessary to ensure that states could provide some level of protection for children against harmful sexual material. However, the Court has recognized several alternative methods that are more effective and less restrictive in safeguarding children, while simultaneously respecting the rights of adults.

The issue in *Playboy* closely parallels the present case, as both laws impose substantial restrictions on, but do not outright prohibit, adults' access to sexual material. In *Playboy*, the limitation was in the form of confining the broadcast of harmful material to certain hours (10 pm to 6 am), whereas H.B. 1181 mandates that websites implement age verification systems. Both cases impose a burden on

speech but do not entirely eliminate adults' access to such material. In *Playboy*, although the restriction was not a full ban, the Court declined to apply a lower level of scrutiny, affirming that "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans," as both are forms of speech suppression. *Playboy*, 529 U.S. at 812.

When less restrictive alternatives were identified—such as allowing households to individually order content restrictions—the Court invalidated the law, recognizing the availability of more effective means of regulation. Similarly, less restrictive alternatives to H.B. 1181 have been identified, and thus, the Court should overturn the Texas law in favor of more effective methods to protect minors.

In other cases, the Court has noted that less restrictive alternatives such as parental controls and filtering systems were a better fit for limiting content that children can see without burdening access from adults. In *Reno*, the court upheld the preliminary injunction against a law that “prohibit[ed] the knowing transmission of obscene or indecent messages to any recipient under 18 years of age.” The recipient's age, mirroring the requirements of the Texas bill, is determined through an age verification system that similarly burdens adults' speech. The

Court ruled that imposing a “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

The government failed to provide a satisfactory explanation as to why a less restrictive alternative, such as content tagging, would be ineffective in protecting minors. Consequently, the law was struck down. This reasoning aligns with established precedents in which courts have invalidated laws that impose undue burdens on speech when less restrictive alternatives can achieve the same objectives effectively.

a. The Court in *Ashcroft v. ACLU* acknowledged that blocking and filtering software would serve as a more effective means of protecting children because the lack of extraterritorial enforcement was a significant flaw of website-based age verification, whereas “a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America.” *Ashcroft*, 542 U.S. at 666–667.

Another critical flaw of website-based age verification is its vulnerability to circumvention methods. In contrast, when filtering systems are in place, users are unable to bypass these restrictions

through the use of deceptive practices like fake IDs or circumvent them using VPNs or Tor. *Brief of the International Centre for Missing and Exploited Children as Amicus Curiae in Support of Petitioners, Free Speech Coalition v. Paxton*, No. 23-1122 (U.S. filed Sept. 23, 2024).

Additionally, content filtering can be applied selectively to specific content, rather than blocking entire websites that may include not only adult material but also harmless, age-appropriate content that a child may legitimately wish to access. As established earlier, the prohibition of minors' access to entire websites in H.B. 1181 is vastly over-inclusive.

Furthermore, the law's requirements to delete data do not apply "for the data in transmission"—so "any intermediary between the commercial websites and the third-party verifiers will not be required to delete the identifying data." *Colmenero*, 2023 WL 5655712, at *16. Content-filtering systems lessen the security concerns of age verification as it is unnecessary for a third-party to be implicated in the transmission of user information.

Moreover, age verification systems that "identify users at the source: by their device, or account on the device, and allow access to age-restricted materials and websites based on that

identification.” are largely endorsed by leaders in the adult film industry. See Age Verification in the News, PornHub Blog (Mar. 14, 2024), <https://tinyurl.com/y4pcuju8>. This demonstrates that individuals in the industry are generally willing to comply with these standards, as they do not harm the industry's overall revenue. The standards strike a reasonable balance by protecting minors from sexual content without placing undue burdens on adults seeking access to such material.

Aside from the adult film industry, civil liberties groups such as ACLU also favor filtering systems over website-based age verification, recognizing that “the installation of filtering software on minors’ devices” is the preferred alternative. See *Press Release, ACLU, Free Speech Coalition and Partners Urge Supreme Court to Strike Down Unconstitutional Texas Law Burdening Adult Access to Sexual Content*, ACLU 20 (Apr. 12, 2024), <https://tinyurl.com/3mn4aadk>.

b. Finally, the government should not have the primary right to influence, raise, and educate children. Instead, parents should be empowered to control what their children are exposed to, as established in *Mahanoy Area School District v. B.L.*, 594 U.S. 180 (2021). *Troxel v. Granville*, 530 U.S. 57 (2000) further affirms that parents have a fundamental right to make decisions concerning the

upbringing of their children and that any state action infringing on this right must meet a high standard of justification.

The court endorses parental control systems, which “support parental authority” and “provide parents the information needed to engage in active supervision.” *Playboy Entertainment Group*, 529 U.S. at 815, 826. Parental controls are settings that allow administrative-level users, such as parents, to establish restrictions on the content and activities accessible to the user. *See Parental Controls*, FTC Consumer Advice (Sept. 2011), <https://tinyurl.com/2nsemz5c>.

Parental controls are proven to be more effective than website-based age-verification because the possibility of circumvention is nullified, as only parents are able to bypass the controls. Moreover, these systems “allow parents to determine the level of access that their children should have, and it encourages those parents to have discussions with their children regarding safe online browsing.” *Colmenero*, 2023 WL 5655712, at *18.

By employing content filtering systems on devices that can be carried out by parents, the burden on adults’ access to protected content is largely alleviated because they “give parents [the] ability [to monitor what their children see] without subjecting

protected speech to severe penalties.” *Ashcroft*, 542 U.S. at 670. These filtering systems can be made accessible by implementing them in devices by default and verifying the users age at the time of purchase or securely in the device. This enables a one time verification process, rather than a case-by-case age verification, reducing the risk of revealing intimate information and preferences.

The Fifth Circuit failed to acknowledge that the methods employed in H.B. 1181 are not the sole effective means of protecting minors, overlooking less restrictive alternatives to achieve the goal of safeguarding minors from harmful sexual content. Content filtering and parental controls present a viable, more effective, more secure, and less burdensome alternative to website-level age verification.

Conclusion

We pray that the Court should send the case back to the Fifth circuit to apply strict scrutiny in its review of H.B. 1181 and consequently determine that the law fails strict scrutiny.

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