No. 23-1122

IN THE

Supreme Court of the United States

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

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

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

BRIEF OF AMERICAN BOOKSELLERS FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., AUTHORS GUILD, INC., COMIC BOOK LEGAL DEFENSE FUND, AND FREEDOM TO READ FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* CURIAE[1]

American Booksellers for Free Expression, Authors Guild, Inc. Association of American Publishers, Inc., Comic Book Legal Defense Fund, and Freedom to Read Foundation respectfully submit this brief as *amici curiae* in support of Petitioners.

Amici's members (also referred to herein as "Amici") write, create, publish, produce, distribute, sell, advertise in, lend, and manufacture books, magazines, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.

While the Texas statute at issue here is addressed to what are often colloquially referred to as "adult porn websites," the mode of analysis presented by the Fifth Circuit, if sustained, would have far reaching implications for bookstores, libraries, publishers, authors and, mainstream websites represented by Amici. Therefore Amici believe that it is particularly important to present the perspective of mainstream creators, producers, distributors and retailers when, as in this case, an important First Amendment issue arises involving speech that some may view as being outside of the mainstream.

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the- preparation or submission of this brief. No person other than *amici curiae* their members, their counsel, or Media Coalition Inc. (a 51-year-old trade association of which some of the *amici* are members) made a monetary contribution to its preparation or submission.

Counsel of record for the parties in this case received timely notice of the intention of Amici to file this brief in accordance with Rule 37.2.

Amici include:

• American Booksellers for Free Expression ("ABFE"). ABFE is the free speech initiative of the American Booksellers Association ("ABA"). ABA was founded in 1900 and is a national not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA represents 2,178 bookstore companies operating in 2,593 locations. ABA's members are key participants in their communities' local economy and culture. ABFE's mission is to promote and protect free expression, particularly expression within books and in literary culture, through legal advocacy, education, and collaboration with other groups with an interest in free speech.

• Association of American Publishers, Inc. ("AAP"). AAP is a not-for-profit organization that represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP's membership includes approximately 130 individual members, who range from major commercial book and journal publishers to small, nonprofit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP's members publish a substantial portion of the general, educational, and religious books produced in the United States in print and digital formats, including critically acclaimed, award-winning literature for adults, young adults, and children. AAP represents an industry that not only depends upon the free exercise of rights guaranteed by the First Amendment, but also exists in

service to our Constitutional democracy, including the unequivocal freedoms to publish, read, and inform oneself.

• Authors Guild, Inc. ("Guild"). The Guild was founded in 1912 and is a national non-profit association of more than 14,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists, and other writers of non-fiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field. The ability to write on topics of their choosing and to have their work available through bookstores and libraries is vital to their ability to make a living in their chosen profession.

• Comic Book Legal Defense Fund ("CBLDF"). CBLDF is a nonprofit organization dedicated to protecting the legal rights of the comic arts community. With a membership that includes creators, publishers, retailers, educators, librarians, and fans, the CBLDF has defended dozens of First Amendment cases in courts across the United States and let important educational initiatives promoting comics literacy and free expression.

• The Freedom to Read Foundation ("FTRF"). FTRF was established to foster libraries as institutions that fulfill the promise of the First Amendment; support the rights of libraries to include in their collections, and

make available to the public, any work they may legally acquire; establish legal precedent for the freedom to read of all citizens; protect the public against efforts to suppress or censor speech; and support the right of libraries to collect, and individuals to access, information that reflects the diverse voices of a community so that every individual can see themselves reflected in the library's materials and resources.

SUMMARY OF ARGUMENT

This Court's longstanding precedent is clear: content-based restrictions on First Amendment-protected materials are subject to strict scrutiny. In particular, a law that "'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another [as Texas Law HB 1181 would] is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purposes that the statute was enacted to serve.'" *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

Despite that clarity, the Fifth Circuit in this case, in a radical deviation from the caselaw of this Court, at least four other Circuits and at least one state's highest court,[2]

2. In this Court, *see, e.g., Ashcroft,* 542 U.S. at 666; *United States v. Playboy Ent. Group,* 529 U.S. 803 (2000); *Reno,* 521 U.S. at 882; *Sable Commc'ns of Cal. Inc. v. FCC,* 492 U.S. 115, 126 (1989). In federal Circuit Courts, *see, e.g., ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied* 555 U.S. 1137 (2009); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003); *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999); *PSINet Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) *rehearing den.* 372 F.3d 371 (4th Cir. 2004). In state court, *see Tattered Cover, Inc. v. Tooley*,

held that when a content-based restriction on adults arises collaterally in connection with restrictions on access by minors to sexually frank material, constitutionality would be determined based on the far less demanding rational basis test. The application of the rational basis test rather than strict scrutiny for content-based laws would have far-reaching implications for bookstores, libraries, mainstream, websites, and more. This Court should grant certiorari.

ARGUMENT

I. The Fifth Circuit's Application of Rational Basis Rather Than Strict Scrutiny Conflicts With This Court's Precedent and Would Have Far-Reaching Implications for Bookstores, Libraries, and Mainstream Websites

A. The Application of Rational Basis Rather Than Strict Scrutiny to Review Content-Based Laws That Burden the Protected Speech of Adults and Older Minors Conflicts With This Court's Precedent

Under this Court's precedents, the proper test for evaluating the constitutionality of content-based laws that burden the protected speech of adults and older minors[3] under the auspices of protecting minors is strict

696 P. 2d 780 (Colo. 1985). *See also Cyberspace Commc'ns, Inc. v. Engler,* 55 F. Supp. 2d 737 (E.D. Mich. 1999), *order aff'd and remanded*, 238 F.3d 420 (6th Cir. 2000) (unpublished).

3. Whether the unconstitutional restriction applies to older minors depends on whether the applicable state court defines "harmful to minors" in the restriction to mean all minors aged

scrutiny, not rational basis. *See, e.g., Ashcroft,* 542 U.S. at 666; *Playboy Ent. Group*, 529 U.S. 803; *Reno*, 521 U.S. at 882; *Sable Commc'ns of Cal. Inc.,* 492 U.S. at 126. "Each of these cases recognized the government's compelling interest in protecting children from obscene materials but nevertheless evaluated the laws at issue under strict scrutiny because the law infringed constitutionally protected speech or imposed distinctions based on content." *Free Speech Coal., Inc. v . Paxton*, 95 F.4th 263, 289 (5th Cir. 2024) (Higginbotham, J., dissenting in part and concurring in part). By applying a rational basis test to Texas' law restricting broad swaths of protected speech on the Internet, the Fifth Circuit has upended this Court's previous rulings upholding preliminary injunctions against such restrictions when they fail to employ the least restrictive means.

B. Texas Law HB 1181 Substantially Restricts Protected Speech of Older Minors and Adults, and is Therefore Subject to Strict Scrutiny

Like other laws that have attempted to limit the speech of minors with a sweeping regulation, HB 1181 impermissibly burdens the protected speech of older minors and adults**.**

HB 1181 requires that a website operator who "knowingly and intentionally publishes or distributes

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8-17 or to mean only a legitimate minority of older adolescents. *Compare Shipley, Inc. v. Long*, 359 Ark. 208, 215, (Ark. 2004) *with Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168, 176 (Va. 1988).

material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors, shall use reasonable age verification methods . . . to verify that an individual attempting to access the material is 18 years of age or older." § 129B.002(a). The Texas law applies to "commercial entities" that "operate[] an Internet website." Tex. Civ. Prac. & Rem. Code §§ 129B.002(a), 006(b)(1). It also expressly exempts search engines and the media. § 129B.005(b). The definition of "sexual material harmful to minors" substantially tracks the definition laid out in *Miller v. California*, 413 U.S. 15, 24 (1973).

Because it targets specific protected speech and identifies particular speakers, HB 1181 is clearly a content-based regulation. "Content based regulations are presumptively invalid," *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992) citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, (1991) (Kennedy, J., concurring in judgment); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972), "and the government bears the burden to rebut that presumption." *United States v. Stevens,* 559 U.S. 460, 468 (2010) (internal quotations omitted). Accordingly, HB 1181, and laws like it, must (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve that interest, and (3) be the least restrictive means of advancing that interest to survive the correct mode of constitutional scrutiny. *Sable Commc'ns of Cal. Inc.*, 492 U.S. at 126 (acknowledging the federal government's compelling interest in protecting

the "physical and psychological well-being of minors" but nevertheless requiring the statute be "narrowly drawn").

In *Reno v. ACLU*, this Court recognized that "sexual expression which is indecent but not obscene is protected by the First Amendment" and "the government cannot pursue its interest in protecting minors through "an unnecessarily broad suppression of speech addressed to adults." 521 U.S. at 874-875. HB 1181 does just that. By regulating all content that is without value *to minors*, HB 1181 goes well beyond regulating obscene content. It thus places substantial burdens on adults' and older minors' access to broad swaths of expression that is constitutionally protected. As the district court in this case stated, "[b]ecause most sexual content is offensive to young minors, the law covers virtually all salacious material. This includes sexual, but non-pornographic, content posted or created by Plaintiffs." *Free Speech Coal., Inc. v. Colmenero*, No. 1:23-CV-917-DAE, 2023 WL 5655712 at *9 (W.D. Tex. Aug. 31, 2023), *aff'd in part, vacated in part sub nom. Free Speech Coal., Inc.*, 95 F.4th 263. The district court in this case accordingly found the defects in the statute too numerous to survive strict scrutiny: HB 1181 is both severely underinclusive because of its exemptions, and overly restrictive, among other things. *Free Speech Coal., Inc.*, 2023 WL 5655712 at *27, 33, 39. Moreover, it forces adults to identify themselves through a commercial age verification system to access protected content, burdening adults who wish to remain anonymous when exercising their First Amendment rights, or who have concerns about the privacy and security of the age verification system, as well as those who do not have government identification.

HB 1181 limits speech that is not obscene as to adults and older minors based on both its content and the identity of the speaker. It disfavors certain speakers (namely, adult websites), while exempting, for example, search engines. Once the one-third trigger is met, the law burdens all speech on a website by forcing adults to surrender their personal information to access any content on the site.

For the aforementioned reasons, HB 1181 should be analyzed under the strict scrutiny standard.

C. *Ginsberg*, on Which the Fifth Circuit Relied, Does not Address Laws That Burden Adults' Access to Protected Speech

Ginsberg v. State of New York, on which the Fifth Circuit relied when applying rational basis review, involved a challenge asserting a *minor's* right to access certain materials. 390 U.S. 629 (1968). It did not involve a law that also infringed the constitutionally protected speech of adults and older minors the way the age verification provision in HB 1181 does. *See id.* *Ginsberg* is clearly distinguishable from this case, and from the many other cases applying strict scrutiny to similar laws. *See id.* The Fifth Circuit has wrongfully relied on *Ginsberg* to dismiss decades of subsequent precedent. *See Free Speech Coal., Inc.*, 95 F.4th 263.

In contrast to laws imposing age verification requirements, or even the display restrictions in bookstores and libraries struck down or upheld with narrowing provisions by multiple courts after being sued

by Amici,[4] *Ginsberg* dealt with a section of New York's penal code that restricted minors' access to materials deemed harmful to them. *See Ginsberg*, 390 U.S. at 631-33. Specifically, the law prohibited one-on-one sales, such as the event at issue in that case – the sale of a "girlie" magazine to a minor by a luncheonette in Bellmore, New York. HB 1181, on the other hand, affects all potential users of the website. "Therefore, *Ginsberg's* justification for rational basis review—that minors have more limited First Amendment rights than adults—has no purchase here, as we are dealing with a challenge to an adult's ability to access constitutionally protected materials on the ubiquitous internet, not over-the-counter magazine sales in a drug store." *Free Speech Coal.*, 95 F.4th at 293 (Higginbotham, J., dissenting in part and concurring in part); *See also Am. Booksellers*, 919 F.2d at 1501 ("*Ginsberg* did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them.").

Insisting that HB 1181 is not like the many laws burdening the protected speech of adults that courts have struck down or modified under a strict scrutiny standard, the Fifth Circuit twists itself in knots to discard the long line of precedents that control this case.

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4. *See e.g., Am. Booksellers,* 919 F.2d at 1501; *Fayetteville Pub. Libr. v. Crawford Cnty., Arkansas*, No. 5:23-CV-05086, 2023 WL 4845636 (W.D. Ark. July 29, 2023); *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819 (E.D. Ark. 2004); *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W. 2d 520 (Tenn. 1993); *Am. Booksellers Ass'n, Inc.*, 236 Va. 168.

In justifying its heavy reliance on *Ginsberg*, the Fifth Circuit wrongly concluded that *Ashcroft v. ACLU* does not apply. *Free Speech Coal.*, 95 F.4th at 273-275. In *Ashcroft*, which even the Fifth Circuit admitted involved a "very similar" law to HB 1181, *id.*, this Court rejected the age verification provisions of the Children's Online Protection Act ("COPA") because those provisions deterred adults' access to sexually explicit, but constitutionally protected, material, far beyond the interest of protecting minors. In so doing, the *Ashcroft* court reiterated the applicability of strict scrutiny to content-based laws: "'[w]hen plaintiffs challenge a content-based speech restriction, the Government has the burden to prove that the proposed alternatives will not be as effective as the challenged statute.'" *Free Speech Coal.*, 95 F.4th at 274, quoting *Ashcroft*, 542 U.S. at 657. Moreover, as the Fifth Circuit described below, this Court in *Ashcroft*, finding "that COPA probably failed the narrow tailoring component of strict scrutiny, sent the case back down for trial." *Id.* at 273.

Yet while the Fifth Circuit accepts that *Ashcroft* reviewed the "very similar" statute at issue under strict scrutiny, it nonetheless concluded (1) that the *Ashcroft* Court did not hold that strict scrutiny was the "appropriate tier of scrutiny" and (2) that the application of strict scrutiny is inconsistent with *Ginsberg v. New York*. *Free Speech Coal.*, 95 F.4th at 274. Neither of these explanations passes muster. In fact, when the *Ashcroft* case was remanded for trial, the age verification provisions in COPA did not survive. Rather, the Third Circuit upheld the District Court's determination that the age verification mechanism "would involve high costs and also would deter

users from visiting implicated Web sites," and concluded that "[i]t is clear that these burdens would chill protected speech and thus that the affirmative defenses fail a strict scrutiny analysis." *Mukasey*, 534 F.3d at 197 (emphasis added).

The Fifth Circuit similarly dismisses this Court's 2000 decision in *United States v. Playboy Ent. Grp., Inc.*, stating that "*Playboy* cannot surmount the rock that is *Ginsberg*"— a case decided 32 years before *Playboy*. *Free Speech Coal.*, 95 F.4th at 275. In *Playboy*, this Court held that forcing adult TV channels to block access or scramble content during certain hours to protect kids from access was unconstitutional. 529 U.S. 803. The Fifth Circuit compared the relative burdens on speech in that case with those imposed by HB 1181 and distinguished HB 1181's age verification requirement from *Playboy*'s video scrambling, noting that once an adult satisfies an age verification standard, that adult can enter a site, but that, pursuant to the law at issue in *Playboy*, videos would remain scrambled for everyone during certain hours of the day. *Free Speech Coal.*, 95 F.4th at 275. Yet that is a distinction without legal consequence regarding the applicable standard, as both laws substantially burden the ability of adults and older minors to access protected speech. Both – like the long line of cases addressing laws that burden content – should be evaluated under strict

scrutiny.

D. HB 1181 Affects Mainstream Websites, Bookstores, Libraries, and More

Although HB 1181 was touted as a law targeting pornographic websites[5] and obscenity,[6] it directly restricts many other sites that may host constitutionally-protected content that could be harmful to young minors but not to older minors and adults. Amici publishers', authors' and booksellers' literary, artistic, political and scientific works, some of which may be deemed harmful to minors, may also be affected. Since the law targets websites that "distribute" content that is "harmful to minors," a website operated by a bookstore selling books with sexual themes that are protected as to adults and older minors would be required to implement age verification mechanisms if that material comprised one-third of the site. The same would be true for content distributed by authors and publishers

5. *See, e.g., Attorney General Ken Paxton Sues Two More Pornography Companies for Violating Texas Age Verification Law*, Texas Attorney General (March 21, 2024) https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-two-more-pornography-companies-violating-texas-age-verification-law ("In Texas, companies cannot get away with showing porn to children.").

6. *See, e.g.*, *Attorney General Ken Paxton Wins After Pornography Companies Sued Texas Over Age Verification Requirements*, Texas Attorney General (March 8, 2024) https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-wins-after-pornography-companies-sued-texas-over-age-verification ("HB 1181 requires purveyors of obscene materials online to institute reasonable age-verification measures to safeguard children from pornography.").

on their websites. This "harmful to minors" material encompasses contemporary fiction, literary classics, young adult fiction, and health books. For example, books that are frequently challenged for sexual content include "Beloved" by Toni Morrison, "Forever" by Judy Blume, "Let's Talk About It: The Teen's Guide to Sex, Relationships, and Being Human" by Erika Moen, "Looking For Alaska" by John Green, "The Handmaid's Tale" by Margaret Atwood, and "It's Perfectly Normal" by Robie Harris.[7]

Importantly, moreover, the law does not distinguish between older and younger minors, so a 17-year-old would be treated the same way as an 8-year-old for the purposes of determining what is harmful to them. This overbroad statute would catch all of these books in its net if the sexual content in them was harmful to the youngest of minors. The federal district court in *Shipley, Inc. v. Long*, 454 F. Supp.2d 819 (E.D. Ark. 2004), for example, recognized a similar problem regarding a 2003 Arkansas law prohibiting the display of materials that were harmful to minors: "material which is only harmful to the youngest

7. For further frequently challenged books, *see*

- *Top 100 Most Frequently Challenged Books: 2010-2019*, Am. Libr. Ass'n (Sept. 9, 2020), https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/decade2019 (last visited May 10, 2024);
- *Top 13 Most Challenged Books for 2022*, Am. Libr. Ass'n (Mar. 26, 2013) (choose "Top 13 Most Challenged Books for 2022" from the dropdown) https://www.ala.org/bbooks/frequentlychallengedbooks/top10/archive (last visited May 10, 2024); and
- *PEN America Index of School Book Bans – 2022-2023*, PEN Am. https://pen.org/2023-banned-book-list/ (last visited May 10, 2024).

of the minors may not be displayed by Plaintiffs even though such material would not be harmful to adults or older minors. The statute therefore effectively stifles the access of adults and older minors to communications and material they are entitled to receive and view." 454 F. Supp. 2d at 829-830. The 2023 *Fayetteville* case dealing with a similar provision regarding making available materials that are "harmful to minors" echoed that issue:

> [T]he only way librarians and booksellers could comply with the law would be to keep minors away from any material considered obscene as to the youngest minors—in other words, any material with any amount of sexual content. This would likely impose an unnecessary and unjustified burden on any older minor's ability to access free library books appropriate to his or her age and reading level.

2023 WL 4845636, at *15. The District Court in this case noted the same problem with HB 1181: "A website dedicated to sex education for high school seniors, for example, may have to implement age verification measures because that material is 'patently offensive' to young minors and lacks educational value for young minors." *Free Speech Coal.*, 2003 WL 5655712, at *11.[8]

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8. As noted by the court in *Fayetteville Pub. Libr.* 2023 WL 4845636, at *16:

> Some courts grappling with these same issues saved their respective variable obscenity statutes from invalidity by construing 'harmful to minors' narrowly, just as the Virginia Supreme Court did [in *Am. Booksellers Ass'n, Inc., 236 Va. 168*]. *See, e.g., Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d

II. Because the Fifth Circuit's Decision Creates a Direct Circuit Split, and Because Allowing That Decision to Stand Would Eviscerate Meaningful Guardrails on Laws That Burden Constitutionally Protected Speech of Amici and Others, This Court Should Grant Certiorari

A. The Fifth Circuit's Application of Rational Basis Review Conflicts Directly With the Law in Multiple Circuits and At Least One State Supreme Court

In addition to departing radically from this Court's precedent, the Fifth Circuit's use of the rational basis standard to review the constitutionality of laws such as HB 1181 that regulate content in a manner that burdens the speech of adults in the name of protecting children creates a direct conflict with the holdings of at least four other federal courts of appeals, and at least one state Supreme Court.

These courts, including Second, Third, Fourth, and Tenth Circuit Courts of Appeals and the Colorado Supreme Court, have instead applied strict scrutiny in evaluating laws primarily directed at access by minors that regulate speech more broadly on both the Internet

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520, 528 (Tenn. 1993) (limiting interpretation of state statute to mean material 'harmful to minors' was only what was considered obscene to a 17-year-old minor); *Am. Booksellers Ass'n v. Webb*, 919 F.2d 1493, 1508–09 (11th Cir. 1990) (finding that Georgia courts would interpret their own variable obscenity statute with reference to what is 'harmful' to a reasonable 17-year-old minor, thus saving the statute from overbreadth).

and brick and mortar locations:

- *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003) (Vermont statute criminalizing distribution of material harm to minors through the Internet failed **strict scrutiny** and violated the dormant Commerce Clause);

- *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. den*. 555 U.S. 1137 (2009) (affirmed decision that Children's Online Protection Act could not withstand **strict scrutiny**, and, thus, was an unconstitutional content-based restriction on speech);

- *PSINet Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) *rehearing den.* 372 F.3d 671 (4th Cir. 2004) (Virginia statute criminalizing dissemination of material harmful to minors over the Internet failed **strict scrutiny**);

- *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999) (New Mexico statute that made it a misdemeanor to use a computer system to engage in communication with a minor regarding sexual conduct failed **strict scrutiny**); and

- *Tattered Cover, Inc. v. Tooley*, 696 P. 2d 780 (Colo. 1985) (access law that prohibited the sale or display of certain materials to children, failed **strict scrutiny**).

- *See also Cyberspace Commc'ns, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *order aff'd*

and remanded, 238 F.3d 420 (6th Cir. 2000) (unpublished) (amendments to Michigan internet statute that added criminal prohibitions against using computers or the Internet to disseminate sexually explicit materials to minors failed **strict scrutiny**).

B. Leaving in Place Caselaw Applying Rational Basis Review Would Open the Floodgates for Laws That Significantly Burden the Constitutionally Protected Speech of Amici and Others

Changing the well-established standard for evaluating content-based restrictions that burden protected speech in the name of protecting minors, as the Fifth Circuit does, would generate consequential repercussions far beyond its immediate unconstitutional impact on websites with sexually expressive content. If legislatures must only demonstrate that laws they enact are rationally related to the government's legitimate interest in protecting minors (from sex, violence and other topics), they will be free to adopt restrictions that heavily burden the protected speech of adults and older minors.

The wide-ranging effects of the Fifth Circuit's ruling, and the need to grant certiorari, are evidenced by considering a statute reviewed by the Fourth Circuit in a decision with which this the Fifth Circuit decision below directly conflicts, *PSINet Inc.*, 362 F.3d 227. That law prohibited display on the Internet, in a manner accessible to minors, of "any description or representation, in whatever form," *PSINet, Inc.,* 362 F.3d at 231 (quoting Virginia Code section 18.2-390(6)) that is harmful to

minors—thus including in its broad sweep a substantial amount of constitutionally protected non-obscene material, such as speech relating to health, arts, sex education, and other information that may be deemed to have value for adults, although not minors. In a case brought by Amici, the Fourth Circuit struck it down under strict scrutiny. *PSINet Inc.*, 362 F.3d 227. Yet under the Fifth Circuit's decision upending the established standard for reviewing such laws, the government would have had a strong argument that the law rationally achieved its stated purpose of protecting minors. Such laws, if allowed to stand under a less-demanding rational basis standard, would directly impact the ability of the wide range of writers, artists, publishers, distributors, and retailers that Amici represent to write, create, publish, produce, distribute, lend, and sell books and literary works of all types, including materials that are scholarly, journalistic, educational, entertaining, artistic, or scientific.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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