No. 23-1122

IN THE

Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,

Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

Texas's brief in opposition underscores how starkly this case "begs for resolution by the high court." Pet. App. 163a (Higginbotham, J., dissenting). The State concedes that "the question presented here is important," Opp. 12, and implicates the "recognized constitutional right" of adults to access protected speech, Opp. 20. And Texas endorses the Fifth Circuit's holding that H.B. 1181's content-based burdens on adults' access to protected speech are subject to only rational-basis review—even though this Court applied strict scrutiny to materially identical burdens in *Ashcroft v. ACLU*, 542 U.S. 656 (2004). It is difficult to imagine a clearer example of a lower court deciding "an important federal question in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c)—and "decisions of … sister circuits" too, Pet. App. 163a (Higginbotham, J., dissenting); Sup. Ct. R. 10(a).

Texas tries to obscure this case's certworthiness in various ways, all without substance. The State principally contends that *Ashcroft* and related decisions have been overtaken by technology. *E.g.*, Opp. I, 2, 14-20. But precedents cannot be discarded simply because technology evolves; like the constitutional protections they apply, this Court's decisions are meant to endure, at least until this Court says otherwise. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). Nor did the Fifth Circuit base its application of rational-basis review on technological change; it departed from this Court's precedent by declaring *Ashcroft*'s decision not to apply rational-basis review a "startling omission[]." Pet. App. 17a. The district court, which did consider evidence regarding technological developments since

Ashcroft, found that they cut *against* the State—because online privacy and security concerns have multiplied while alternatives to age verification have proliferated and improved. *Id.* at 122a-135a.

Texas's reliance on this case's posture, Opp. 12-14, is equally unavailing. There is nothing tentative about the decision below. The Fifth Circuit reversed the district court on purely legal grounds and held unequivocally that the record contains "far more than what is necessary to" uphold H.B. 1181's age-verification provision under rational-basis review. Pet. App. 26a-27a. This Court often grants First Amendment cases in less crystalized postures—including in *Ashcroft* itself. *See* pp. 8-9, *infra* (collecting examples).

Far from treating the decision below as preliminary, Texas has filed actions to enforce H.B. 1181 against petitioners and other websites, causing some to leave the State. Opp. 10, 19. Those real-world consequences reinforce the urgent need for review. A government's boast that it has driven out providers of disfavored—but constitutionally protected—speech should always trigger loud alarms. *Cf. NRA v. Vullo*, 602 U.S. __ (2024). And while Texas inveighs against "the pornography industry," Opp. 1, the legal rule it defends "would have far reaching implications for bookstores, libraries publishers, authors, and[] mainstream websites," American Booksellers Amicus Br. 1. The Court should grant review to decide the exceptionally important question whether content-based speech burdens like those imposed by H.B. 1181 are truly subject to mere rational-basis review.

ARGUMENT

A. Texas Fails To Refute The Fifth Circuit's Departure From This Court's Precedent

1. This Court "has unswervingly applied strict scrutiny to content-based regulations that limit *adults'* access to protected speech," even if those restrictions are designed to limit *minors'* access to content deemed inappropriate for them. Pet. App. 54a (Higginbotham, J., dissenting) (emphasis added); *see Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Ashcroft*, 542 U.S. at 665-66. Texas does not—and cannot—dispute that unbroken line of precedent.

Texas nevertheless defends the Fifth Circuit's holding that mere rational-basis review applies to H.B. 1181's age-verification provision because the law aims to regulate "the distribution *to minors* of materials obscene *for minors*." Pet. App. 8a; *see* Opp. 26-30. But if that reasoning were right, then *Sable*, *Playboy*, *Reno*, and *Ashcroft* would all be wrong, because each applied strict scrutiny to regulations that did likewise. Pet. 16-22. That is especially clear for *Reno* and *Ashcroft*, which applied strict scrutiny to Internet restrictions that made age verification an affirmative defense—and thus prohibited distributing specified content without age verification, as H.B. 1181 does.

The Fifth Circuit sought to overcome that precedential barrier by driving through it, asserting that *Ashcroft* does not govern because it allegedly "contains startling omissions"—namely its failure to read *Ginsberg v. New York*, 390 U.S. 629 (1968), to compel

a lower level of scrutiny. Pet. App. 17a. That remarkable assertion "functionally overrule[s] this Court," Foundation for Individual Rights and Expression (FIRE) Amicus Br. 14—a forbidden approach in our system of "vertical *stare decisis*," *Ramos v. Louisiana*, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring in part).

Texas proffers that this Court applied strict scrutiny in *Ashcroft* only because the party defending the law (Attorney General Ashcroft) acquiesced. Opp. 27-28 (citing Pet. App. 17a-19a). Nothing in the Court's decision supports that strained thesis, which Texas concedes "may seem strange." *Id.* The *Ashcroft* Court did not "assume, without deciding, that" a particular "level of scrutiny" applied. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Nor did it suggest that it was deferring to the parties' presentation of the arguments. *Cf. Haaland v. Brackeen*, 599 U.S. 255, 279-80 (2023). To the contrary, every indication is that *Ashcroft* decided strict scrutiny was required. Not only did the Court apply strict scrutiny, 542 U.S. at 670, but so did Justice Breyer's dissent, joined by Chief Justice Rehnquist and Justice O'Connor, *id.* at 677. Eight Justices thus applied strict scrutiny, while Justice Scalia dissented on the substantive ground that strict scrutiny should not apply. *Id.* at 676. It defies credulity to suggest, Opp. 27-28, that the Court addressed the level of scrutiny so extensively only for the sake of parroting the parties' position.

2. Texas alternatively tries to defend the application of rational-basis review to H.B. 1181's age-verification provision on grounds that the Fifth Circuit did not credit. Opp. 28-29. Texas asserts that H.B. 1181 "function[s] very differently" from the statute at issue

in *Ashcroft* because H.B. 1181 imposes civil rather than criminal penalties and compels age verification rather than prescribing it as a defense to an outright ban. Opp. 29. But the Fifth Circuit disagreed, Pet. App. 16a, and this Court has held squarely that a government's "content-based burdens must satisfy the same rigorous scrutiny as its content-based bans," whatever the nature of the burden imposed, *Playboy*, 529 U.S. at 812.

Texas also contends that changes in technology since *Reno* and *Ashcroft* warrant lesser scrutiny for H.B. 1181. Opp. 14-20. But Texas cites no case in which this Court has held the level of constitutional scrutiny varies (let alone plummets from the highest tier to the lowest) based on technological evolution. To the contrary, this Court has repeatedly held that the protections of the First Amendment, like those of other constitutional provisions, endure as technology evolves. *See, e.g.*, *Packingham v. North Carolina*, 582 U.S. 98, 104-05 (2017); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

Nor did the Fifth Circuit adopt Texas's argument based on technological change. And the district court—in factual findings unchallenged by Texas on appeal—determined that technological developments render strict scrutiny all the more warranted. Pet. App. 122a-135a. The court found that the "risks of compelled digital verification are just as large, if not greater, than those in *ACLU v. Ashcroft*" given the intensified privacy and security risks. *Id.* at 127a; *see* Electronic Frontier Foundation Amicus Br. 15, 19 (elaborating harms from "data breach after data breach"). And the court found that alternatives to age

verification—particularly content-filtering technology, which parents can install on their children's electronic devices—have grown more effective and "tailored" to Texas's objective. Pet. App. 132a-133a; *accord* International Centre for Missing and Exploited Children (ICMEC) Amicus Br. 5 ("Content-filtering … is also a more effective means of protecting children from harmful content online.").

3. Texas's reliance on changes in technology also clashes with its claim that this case is governed by the Court's 1968 decision in *Ginsberg*, which predated the Internet's birth, let alone its evolution. Opp. 23-24. Like the Fifth Circuit, Texas emphasizes that *Ginsberg* remains good law, *id.* (citing Pet. App. 10a), but no one disputes that; the question is what law *Ginsberg* reflects. As explained in the petition and by Judge Higginbotham, *Ginsberg* establishes that states can restrict minors' access to sexual content in ways they cannot restrict minors' access to most other forms of speech. Pet. 26; *see* Pet. App. 54a-56a. That is why this Court cited—and ultimately distinguished—*Ginsberg* in holding that states cannot restrict minors' access to violent video games without satisfying strict scrutiny. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793-99 (2011).

Texas and the Fifth Circuit read *Ginsberg* for the far broader proposition that states can necessarily adopt measures to limit the distribution of sexual content to minors—even if they burden the rights of adults to access constitutionally protected speech. Opp. 23-24; Pet. App. 8a-10a. It does not appear that any other court has even hinted at that position in the half-century since *Ginsberg* was decided. That is for good reason. The law in *Ginsberg* did not impose any

burden on adults; it merely banned sales to minors, which is why the defendant there argued that *minors'* rights should be expanded. 390 U.S. at 633-35; *see* Pet. 17. This Court therefore had no occasion to address the proper level of scrutiny for laws that burden adults. *See* FIRE Amicus Br. 9-10. The Court has instead answered that question in its many decisions following *Ginsberg*, which prescribe strict scrutiny for laws that burden adults' access to sexual material, *see* pp. 2-3, *supra*, while making clear that narrowly tailored laws can satisfy that standard, *see Ashcroft*, 542 U.S. at 672-73. That approach gives full effect to *Ginsberg* alongside adults' First Amendment rights—contrary to the decision below.[1]

B. Texas Fails To Refute The Fifth Circuit's Departure From Other Circuits

The decision below also conflicts with the decisions of other circuits that have applied strict scrutiny to materially indistinguishable laws. Pet. 30-32.

Texas asserts that those decisions "depended on how the law applied to *then-extant* technology." Opp. 15. But technological status makes no difference to the conflict over the governing legal question that begs for this Court's review: how *Ginsberg* is properly

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[1] Strict scrutiny also applies here because H.B. 1181 embodies speaker-based discrimination: it targets providers of constitutionally protected online adult content while exempting many other providers of identical content, including search engines and social media sites where it abounds. Pet. 28. Texas offers no response to that defect, and its opposition confirms that suppressing the speech of the "pornography industry" is the statute's purpose. Opp. 1.

read from 1968 forward and whether *Ashcroft* misstated the standard of review the day it was decided. On that question, there is a classic circuit conflict. Pet. App. 163a & n.2 (Higginbotham, J. dissenting).

C. Texas Identifies No Valid Impediment To Review Of The Exceptionally Important Decision Below

1. Texas argues that this case's preliminary-injunction posture weighs against certiorari. Opp. 12-14. That contention is misplaced. Although this Court exercises caution before granting some cases in an interlocutory posture—for example, where there are substantial questions about remedy, *see* Opp. 12-13 (citing *Abbott v. Veasey*, 580 U.S. 1104 (2017)), or jurisdiction, *see* Opp. 13 (citing *Wrotten v. New York*, 560 U.S. 959 (2010))—no such concerns loom here.

To the contrary, the Fifth Circuit's decision is as final as a preliminary-injunction decision can be. The majority below not only held that H.B. 1181's age-verification provision is subject to rational-basis review—which "almost all laws" survive, *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008)—but also stated that the record contains "far more than what is necessary" to uphold the provision. Pet. App. 26a-27a. Nor does Texas identify any age-verification issues that remain to be decided.[2]

This Court regularly grants review in comparable postures, including to consider the purely legal issue

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[2] Texas asserts that the Fifth Circuit "anticipates further factual development," Opp. 14 (citing Pet. App. 34a n.63), but the cited passage refers to the *health-warnings* provisions of H.B. 1181, *not* the age-verification provision.

of the appropriate level of First Amendment scrutiny. *See, e.g.*, *NetChoice, LLC v. Paxton*, 144 S. Ct. 477 (2023); *NIFLA v. Becerra*, 585 U.S. 755 (2018); *Brown*, 564 U.S. at 790; *cf.* Amicus Br. of Texas et al., *Trump v. Hawaii*, 585 U.S. 667 (2018) (No. 17-965) (urging the Court to review a preliminary injunction). Texas's admonition is especially hard to credit when the most recent and relevant precedent in this area—*Ashcroft*—likewise came to the Court in a preliminary-injunction posture. Pet. 32.

2. While delaying review will have no practical benefits, it will impose irreparable practical harms. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Texas is enforcing H.B. 1181's age-verification requirement against petitioners and other websites, and it has driven some out of the State. Opp. 10, 19. That further confirms that no one views the Fifth Circuit's decision as tentative, and it illustrates the stark real-world consequences of postponing review.

Texas and petitioners are not the only ones with a stake in this Court's timely review. As amicus ICMEC explains, enforcement of H.B. 1181 has troubling unintended consequences for children, including driving them to "less regulated, more dangerous websites" on the dark web. ICMEC Amicus Br. 3. In addition, at least 17 other states have enacted laws virtually identical to H.B. 1181,[3] and "[l]awmakers nationwide are watching H.B. 1181's journey through the courts closely." FIRE Amicus Br. 24. Texas cites those laws as reason to favor percolation, Opp. 21, but the circuits are already split over the controlling legal rule—

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[3] Free Speech Coalition, *Verification Bill Tracker*, https://bit.ly/3VuAkPe.

and the conflict spans states that have recently adopted similar laws, Pet. 34. In short, there is no good reason to wait for review, and many compelling reasons to proceed now.

D. Texas Fails To Justify The Fifth Circuit's Decision On The Merits

Finally, the Fifth Circuit's decision is wrong on the merits and worthy of review for that reason too. It is a first principle of free-speech law that "content-based laws are subject to strict scrutiny." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) (citation omitted); *see, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010). This Court has repeatedly applied strict scrutiny to laws that do what H.B. 1181 does—facially burden the rights of adults to access constitutionally protected content while trying to limit the ability of minors to access the same. *See* p. 3, *supra*. Neither the Fifth Circuit nor Texas identifies any case in which any court has ever applied mere rational-basis review to such a law.

Tellingly, Texas's lead defense of H.B. 1181 does not rely on the Fifth Circuit's decision but on the separate contention that petitioners' websites contain constitutionally unprotected obscenity. Opp. 22. That assertion is factually wrong and legally nonresponsive. Texas already has laws prohibiting obscenity, which petitioners are not challenging and the State is not enforcing here. Pet. 6; *see* Pet. App. 6a n.7. H.B. 1181 reaches beyond such unprotected speech and restricts content that is deemed obscene *for minors*—but *protected for adults*. Indeed, Texas expressly conceded at oral argument in the Fifth Circuit that

"adults should still be able to access every bit of the materials" at issue under H.B. 1181.[4]

Texas makes a half-hearted argument that H.B. 1181 could survive strict scrutiny. Opp. 32-33. Although a law narrowly tailored to protect minors could do so, this law cannot. Pet. App. 160a. As the district court explained without refutation, there is "zero evidence that the legislature even considered the law's tailoring or made any effort whatsoever to choose the least-restrictive measure." *Id.* at 135a. The result is that H.B. 1181 is *both* "severely underinclusive" *and* "overly restrictive," thereby making it highly unlikely the age-verification provision can survive strict scrutiny. *Id.* at 112a-113a, 122a-124a.

Ultimately, Texas's main hope for affirmance was aptly diagnosed by the district court at the outset of this litigation: that this Court "may revisit its precedent." Pet. App. 109a. This Court's prior decisions properly and resoundingly apply the First Amendment's full protection to the speech at issue here. The "history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *Playboy*, 529 U.S. at 826. If those precedents are to be revised, that is a job for this Court, not the Fifth Circuit.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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[4] Official Recording at 13:35-14:00, available at https://bit.ly/4c5B42K.

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