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

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, REASON FOUNDATION, AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty.

Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. *See, e.g.*, Brief of FIRE, National Coalition Against Censorship, The Rutherford Institute and First Amendment Lawyers Association as *Amici Curiae* in Support of Petitioner and Reversal in *National Rifle Association of America v. Vullo*, No. 22-842 (Jan. 16, 2024); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, 600 U.S. 66 (2023).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

FIRE represents plaintiffs in lawsuits across the United States seeking to vindicate First Amendment rights without regard to the speakers' political views. These cases include matters involving state attempts to regulate speech online. *See, e.g.*, *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023); *NetChoice, LLC v. Bonta*, No. 23-2969, 2024 WL 3838423 (9th Cir. Aug. 16, 2024); *see also* Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *NetChoice, LLC v. Paxton*, No. 22-555 (2024); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *Murthy v. Missouri*, No. 23-411 (2024). FIRE regularly acts to protect the First Amendment rights of adults and minors by challenging laws that restrict access to protected speech online. *E.g.*, *Zoulek v. Hass*, No. 2:24-cv-00031-RJS-CMR (D. Utah); *Students Engaged in Advancing Texas v. Paxton*, No. 1:24-cv-949-RP (N.D. Texas).

FIRE has an interest in preserving the robust protection for freedom of expression secured by this Court's First Amendment jurisprudence. To guarantee the rights of speakers and audiences—both online and off—FIRE fights efforts to evade the exacting standards that safeguard our constitutional liberties.

Reason Foundation (Reason) is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of

law. Reason advances its mission by publishing the critically acclaimed Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org. To further Reason's commitment to "Free Minds and Free Markets," Reason has participated as *amicus curiae* in numerous cases raising significant legal and constitutional issues, including cases implicating free expression and social media platforms. *See, e.g.*, Brief of Reason Foundation et al. as *Amici Curiae* in Support of Petitioners, *Moody v. NetChoice, LLC*, No. 22-277 (2024); Brief of Reason Foundation et al. as *Amici Curiae* in Support of Respondents, *NetChoice, LLC v. Paxton*, No. 22-555 (2024); Brief of Reason Foundation as *Amicus Curiae* Supporting Respondent, *Gonzalez v. Google*, 598 U.S. 617 (2023). Reason also has an interest in this case as a speaker because it uses social media to reach nearly 1 million followers with unique content created for social media.

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprising approximately 200 attorneys who routinely represent businesses and individuals that engage in constitutionally protected expression. FALA's members practice throughout the United States and Canada in defense of the First Amendment and, by doing so, advocate against governmental forms of censorship. Since its founding, FALA attorneys have been at the vanguard of protecting

erotic speech. Member attorneys frequently litigate the facial validity of speech-restrictive legislation, often by way of anticipatory challenges that arise when a law is newly enacted and has not yet been enforced—and often involving preliminary injunctions. In fact, many of the Court's recent pre-enforcement First Amendment cases were either argued by FALA attorneys or involved the participation of FALA attorneys in some capacity. *See, e.g.*, *Ashcroft v. Free Speech Coalition, Inc.*, 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act argued by FALA member and former president H. Louis Sirkin); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act). Some of these cases are central to the matter before the Court. In addition, FALA has a tradition of submitting *amicus* briefs to the Court on issues pertaining to the First Amendment. *See, e.g.*, *City of Littleton v. Z.J. Gifts D-4, LLC*, 2004 WL 199239 (Jan. 26, 2004) (*amicus* brief submitted by FALA); *United States v. 12,200-ft Reels of Super 8mm Film*, 409 U.S. 909 (1972) (order granting FALA's motion to submit *amicus* brief).

FALA is concerned about all forms of governmentally imposed suppression of First Amendment protected activities with an emphasis on free expression and association. Legislation that restricts the right to anonymously engage in First

Amendment activities necessarily restrains those activities and is therefore detrimental to a free exchange of opinions and information. It is for that reason that FALA joins this brief.

SUMMARY OF ARGUMENT

This Court has consistently required the government to meet a heavy burden when it regulates lawful adult speech in the name of protecting minors. Despite this clarity, Texas enacted—and the United States Court of Appeals for the Fifth Circuit overturned a preliminary injunction to uphold—a law that burdens adult access to protected speech online. Other states have already followed suit or are primed to do so.

In a string of rulings dating back decades, this Court has made clear that when the government seeks to prevent minors from accessing lawful sexual content, "the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). Imposing a "burden on adult speech is unacceptable," this Court held, "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); *see also United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (same); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (same).

For generations this Court's conclusion has been unmistakable: Statutory burdens on adult access to adult content must satisfy strict scrutiny. And that conclusion makes the same intuitive sense today as it did in the many previous cases that embraced it. After all, a statute singling out lawful sexual expression is a content-based speech restriction. As such, it is "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. A content-based speech restriction poses such a grave threat to expressive rights that "it can stand only if it satisfies strict scrutiny," which requires the government to employ the least restrictive means of serving its objectives. *Playboy*, 529 U.S. at 813.

But the Fifth Circuit disagrees. Contrary to this Court's well-settled precedent—and in a sharp split with other circuits—a Fifth Circuit panel somehow held that a Texas law that significantly burdens adult access to lawful adult content warranted only rational-basis review. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 (5th Cir. 2024).

Relying on a strained reinvention of this Court's ruling in *Ginsberg v. New York*, 390 U.S. 629 (1968), the panel effectively read *Sable*, *Reno*, *Playboy*, and *Ashcroft* out of existence. By wishing away the constitutional constraints established in those cases, the Fifth Circuit's decision grants Texas a free hand

to force adult Texans to show their papers and surrender their privacy simply to access content protected by the First Amendment.

The Fifth Circuit got it wrong. With the smoke cleared and mirrors stowed, Texas' law is what it is: a content-based restriction on speech. No reasonable reading of the statute or of the caselaw can justify a contrary conclusion. Because the law imposes a content-based burden on adult access to protected speech, "the answer should be clear": It demands strict scrutiny. *Playboy*, 529 U.S. at 814.

The Fifth Circuit's attempt to excuse its use of a less-exacting standard via a tortured interpretation of this Court's precedent is not only unconvincing, but dangerous.[2] Because if Texas' law is allowed to stand—and with it, the Fifth Circuit's revisionist reading of long-standing First Amendment law—similarly speech-restrictive statutes (and similarly enterprising jurisprudence) will soon proliferate.

[2] This is not the first time in recent memory the Fifth Circuit has strayed far afield from basic First Amendment principles. *E.g., Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2389 (2024) (criticizing Fifth Circuit's "serious misunderstanding of First Amendment precedent and principle.").

California, for example, is close to passing its own version.[3] Seven other states already have.[4]

Keeping children safe is important, no doubt. But the means used to achieve this worthy end matter, and the government must bear the burden of proving their constitutionality. As Justice Thomas wisely warned: "The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." *Playboy*, 529 U.S. at 830 (Thomas, J., concurring).

The First Amendment doesn't permit shortcuts. Texas must prove its statute satisfies strict scrutiny. This Court should direct the Fifth Circuit to require Texas to do so.

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[3] Alan Riquelmy, *California inches toward age verification to view porn websites*, COURTHOUSE NEWS (Apr. 30, 2024), https://www.courthousenews.com/california-inches-toward-age-verification-to-view-porn-websites.

[4] John Hanna and Sean Murphy, *Kansas moves to join Texas and other states in requiring porn sites to verify people's ages*, ASSOCIATED PRESS (Mar. 26, 2024), https://apnews.com/article/internet-pornography-age-verification-states-2ad9939bb95ccc15126419b38067be94 ("At least eight states have enacted age-verification laws since 2022 — Texas, Arkansas, Indiana, Louisiana, Mississippi, Montana, Utah and Virginia, and lawmakers have introduced proposals in more than 20 other states.").

ARGUMENT

I. Texas' Law is a Content-Based Speech Restriction That Requires Strict Scrutiny.

H.B. 1181, the Texas law at issue here, aims to prevent minors from viewing sexual content fully protected for adult audiences. The statute requires all visitors to certain websites—including every adult—to verify their age. Requiring adults to verify their ages before accessing protected content imposes a significant burden on the exercise of First Amendment rights online. By forcing adults to identify themselves in this manner, Texas' statute operates as a content-based restriction on speech.

In doing so it echoes restrictions on access to adult content this Court considered in a series of cases decided decades ago. In assessing the constitutionality of those statutes—each of which imposed similar burdens on adult access to lawful sexual expression—this Court repeatedly and consistently reached the same conclusion: The First Amendment demands strict scrutiny.

The same result is required here. But by misreading this Court's opinion in *Ginsberg*, the Fifth Circuit effectively wrote this Court's subsequent precedents out of existence, breaking sharply with other circuits. This result is untenable.

A. Texas' Law Is a Content-Based Speech Restriction.

Texas's law is a content-based speech restriction by design. Installing a bureaucratic fence around protected speech was the whole point: Texas lawmakers enacted H.B. 1181 to restrict access to lawful adult content because of concerns about "several potential negative impacts stemming from certain adolescents' use of sexually explicit material." H. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. C.S.H.B. 1181, 88th Leg., R.S. (Tex. 2023). By targeting "content from mainstream pornography websites," legislators aimed to prevent alleged harm to "the minds of children." S. Comm. on State Affairs, Bill Analysis, C.S.H.B. 1181, 88th Leg., R.S. (Tex. 2023).

The legislature set out to burden access to certain content, and H.B. 1181 was fashioned to achieve the state's goal. Under the law, websites Texas deems to be at least "one-third" composed of "sexual material harmful to minors" must "verify that an individual attempting to access the material is 18 years of age or older" before allowing that individual to access the site's content.[5] H.B. 1181 § 129B.002(a). To verify the

[5] H.B. 1181 also includes a "disclosure requirement" compelling websites that the State deems to include at least "one-third" "sexual material harmful to minors" to post three warnings on their landing pages, "in 14-point font or larger," about the alleged

age of visitors, the law requires sites to employ "a commercial age verification system . . . using: (A) government-issued identification; or (B) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual." § 129B.003(b)(2).

This mandate imposes a content-based burden on Texans seeking to exercise their First Amendment rights. By requiring adults to identify themselves before they can access the protected content the law singles out for special restriction, the law "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno*, 521 U.S. at 874.

For some adults, the law operates as a de facto ban. For example, Texans who do not possess government identification or whose age or identity are not reliably confirmed by commercial age-verification systems functionally lose the ability to visit sites the state deems covered by the law. And those who value their First Amendment right to anonymity or harbor concerns about the privacy and security of state-mandated age-verification face a similar bar.

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dangers of viewing sexual material. § 129B.004. The Fifth Circuit properly held this provision violates the First Amendment's protection against compelled speech, *Free Speech Coal., Inc.*, 95 F.4th at 279–84, and it is not at issue here.

Courts have consistently recognized these content-based requirements "unduly burden protected speech in violation of the First Amendment." *PSINet, Inc. v. Chapman*, 362 F.3d 227, 237 (4th Cir. 2004) (noting "stigma" around targeted sites could "deter adults from visiting them if they cannot do so without the assurance of anonymity"); *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003) (noting age verification "require[s] that website visitors forgo the anonymity otherwise available on the internet" and bars those "unwilling or unable" to comply with it). Texas' law is no different.

More fundamentally, courts—including this Court—have found time and again that content-based burdens like Texas' H.B. 1181 must withstand strict scrutiny.

B. Content-Based Speech Restrictions Like H.B. 1181 Require Strict Scrutiny.

At its core, the First Amendment stands for the proposition that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984), because they are incompatible with "the premise of individual dignity and choice upon

which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971).

So when states like Texas enact laws or regulations that "target speech based on its communicative content," as does H.B. 1181, such measures are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). These content-based speech restrictions pass constitutional muster "only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*.

In other words, content-based laws like Texas' H.B. 1181 demand strict scrutiny. *Id* at 164. And in an unbroken string of rulings from this Court, strict scrutiny is exactly what these laws have received.

The *Reno* Court, for example, considered the constitutionality of provisions of the Communications Decency Act of 1996 designed, like H.B. 1181, "to deny minors access to potentially harmful speech." 521 U.S. at 874. The Court recognized "the governmental interest in protecting children from harmful materials," to be sure. *Id*. at 875. But the Court also made clear "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Id*. And, because the Act imposed a "content-based

restriction of speech," that inquiry required strict scrutiny. *Id*. at 879.

Concluding that the Act "lacks the precision that the First Amendment requires when a statute regulates the content of speech," the Court declared the provisions unconstitutional. *Id*. at 875. Imposing a "burden on adult speech is unacceptable," the Court reasoned, "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id*. at 874.

In *Playboy*, decided three years later, the Court held another statute passed with the "objective of shielding children" from sexual content to the same exacting standard. 529 U.S. at 814. The law at issue required cable television operators to scramble sexually explicit channels or limit their broadcasting hours to 10 p.m. to 6 a.m. Concluding that "the answer should be clear," the Court left no doubt: "Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny." *Id*. at 813–14.

That the statute did not impose an outright ban did not reduce the showing required of the government. "The distinction between laws burdening and laws banning speech is but a matter of degree," explained the *Playboy* Court. *Id*. at 812. "The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id*.

And four years after *Playboy*, the Court hammered the point home once more. In *Ashcroft*, the Court weighed a First Amendment challenge to the federal Child Online Protection Act (COPA), "the second attempt by Congress to make the Internet safe for minors by criminalizing certain Internet speech." 542 U.S. at 661. COPA targeted websites hosting content "harmful to minors," just as H.B. 1181 does. (H.B. 1181's definition of "harmful to minors" largely tracks that used in COPA.)

Ashcroft presented familiar terrain. Because the Act would "burden some speech that is protected for adults," the Court reiterated its prior rulings in *Reno* and *Playboy*: "When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Id.* at 665. Again, the Court applied strict scrutiny. "To do otherwise," the *Ashcroft* Court reasoned, "would be to do less than the First Amendment commands." *Id.* at 670.

This Court could scarcely have been clearer: Statutory restrictions on adults' access to adult content require strict scrutiny. And federal courts got the message. Citing *Sable*, *Reno*, *Playboy*, and *Ashcroft*, courts have consistently applied strict scrutiny when assessing the constitutionality of laws that, like H.B. 1181, impose content-based burdens or

restrictions on adult access to lawful sexual content. *See, e.g.*, *Am. Booksellers Found.*, 342 F.3d at 102 (Vermont statute regulating online sexual content "burdens protected speech and is not narrowly tailored, and, like the Communications Decency Act struck down in *Reno*, violates the First Amendment."); *PSINet*, 362 F.3d at 234, 239 (applying strict scrutiny and striking down Virginia law imposing age verification on access to adult content online); *ACLU v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008) (applying strict scrutiny and affirming permanent injunction against COPA on remand); *ACLU v. Johnson*, 194 F.3d 1149, 1152, 1156 (10th Cir. 1999) (applying strict scrutiny and affirming preliminary injunction against New Mexico statute regulating dissemination of "harmful to minors" sexual content online); *Am. Booksellers Found. for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078, 1081, 1083 (D. Alaska 2011) (applying strict scrutiny and striking down Alaska law regulating dissemination of "harmful to minors" sexual content online).

These cases are correctly decided. Holding content-based restrictions to strict scrutiny prevents the government from enacting "legislation not reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Sable, *Reno*, *Playboy*, and *Ashcroft* construct an impressive precedential wall against content-based

restrictions on expressive rights—restrictions that "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft*, 542 U.S. at 660. But despite its solidity and scale, this Court's wall of precedent failed to deter the Fifth Circuit.

C. The Fifth Circuit's Ruling Effectively Nullifies This Court's Precedent.

When Texas appealed the district court's grant of a preliminary injunction on Petitioners' First Amendment challenge to H.B. 1181, the Fifth Circuit faced a choice. It could follow this Court's uniform precedent and apply strict scrutiny to Texas' law, a content-based restriction on adult access to protected speech, just as the district court did. *Free Speech Coal., Inc. v. Colmenero*, No. 1:23-CV-917-DAE, 2023 WL 5655712, at *10 (W.D. Tex. Aug. 31, 2023).[6] Or it could functionally purport to overrule this Court.

The Fifth Circuit chose the latter. Even though Texas' law contains "the exact same drafting language previously held unconstitutional" by this Court twenty years ago in *Ashcroft*, *id.* at *13, the Fifth Circuit boldly declared that same language now passes constitutional muster without any intervening

[6] The district court didn't think twice, recognizing it was "not at liberty to disregard existing Supreme Court precedent." *Id.* at *8. Even Texas "largely concede[d] that strict scrutiny applies." *Id.*

change in law or material facts. *Free Speech Coal.*, 95 F.4th at 269. In so doing, the Fifth Circuit bucked this Court's binding precedent, split with its fellow circuits, and—most inexcusably—condoned a state's violation of the First Amendment rights of its residents.

The lynchpin of the Fifth Circuit's gambit is its insistence that *Ginsberg v. New York*, 390 U.S. 629 (1968), controls the constitutional scrutiny H.B. 1181 warrants. "*Ginsberg*'s central holding—that regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review—is good law and binds this court today," proclaimed the panel majority. *Free Speech Coal.*, 95 F.4th at 270. To repurpose *Ginsberg* in this way and to this end is audacious. It is also fatally flawed, and for several reasons.

Most fundamentally, H.B. 1181 does far more than regulate "the distribution *to minors* of speech obscene *for minors*." Just like COPA, the text of which it echoes, H.B. 1181 also regulates the distribution *to adults* of speech protected *for adults*. The law requires all Texans—minors and adults alike—to verify their ages before visiting certain sites. So it inevitably and inescapably imposes a burden upon adult audiences who wish to access lawful adult content. By construing H.B. 1181's reach as limited only to minors, the Fifth Circuit willfully mischaracterized

the law's intrusion upon the First Amendment rights of adult Texans.

This sleight-of-hand is critical to the panel's naked attempt to retroactively expand *Ginsberg*'s applicability. Because once H.B. 1181 is properly understood as not just a regulation on the distribution to minors of speech unprotected for minors, but rather as a regulation on adults accessing protected speech for adults, it moves beyond *Ginsberg*'s purview. *Ginsberg* did not address such a regulation. As Judge Higginbotham, writing in dissent, observed, "the New York statute at issue in *Ginsberg* did not burden the free speech interests of adults, but H.B. 1181 does; H.B. 1181 requires that adults comply with the age verification procedure and view the required health disclosures before accessing protected speech." *Id*. at 293 (Higginbotham, J., dissenting in part and concurring in part). That distinction alone negates *Ginsberg*'s application to H.B. 1181's constitutionality and the appropriate standard of review.

Ginsberg remains good law insofar as it confirms "a state's power to regulate minors in ways it could not regulate adults." *Id*. But when, as here, the government's content-based restriction regulates the First Amendment rights of not just minors but adults, *Ginsberg* gives way to this Court's subsequent holdings in *Sable*, *Reno*, *Playboy*, and *Ashcroft*. Those cases establish a vital shield against governmental

intrusion upon First Amendment rights. And under those decisions, Texas' law "must face strict scrutiny review because it limits adults' access to protected speech using a content-based distinction—whether that speech is harmful to minors." *Id.* at 289.

Stretching *Ginsberg* far beyond its holding, the panel majority then attempted to read *Sable*, *Reno*, *Playboy*, and *Ashcroft* out of existence through a variety of immaterial distinctions and too-clever inferences by omission. For example, the panel first attempts to spin this Court's discussion of *Ginsberg* in *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 786 (2011), as evidence that "to avoid rational-basis review," the *Brown* Court "felt required to distinguish *Ginsberg*." *Free Speech Coal.*, 95 F.4th at 270.

Nonsense. The *Brown* Court invoked *Ginsberg* not for its standard of review, but to illustrate the difference between New York's narrow restriction on distributing obscenity for minors to minors, on the one hand, and California's attempt to "create a wholly new category of content-based regulation" just for children, on the other. *Brown*, 564 U.S. at 794. That distinction simply has no bearing on the degree of constitutional scrutiny due content-based restrictions on adult access to protected speech, and it cannot overcome the clear command issued by this Court in *Sable*, *Reno*, *Playboy*, and *Ashcroft*. Likewise, the fact that "the

Court and its individual Justices have cited *Ginsberg* multiple other times after *Reno* and *Ashcroft II*, albeit for different propositions," is irrelevant. *Free Speech Coal.*, 95 F.4th at 270. That *Ginsberg* remains good law for the legal issues it decided doesn't validate the panel's brazen attempt to repurpose and expand its holding here.

The Fifth Circuit next tries to wave away the burden on adult speech imposed by H.B. 1181's age-verification requirement, arguing that "[i]f the differences between the contemporary world of the Internet and the 1960's world of in-person interaction were sufficient to distinguish *Ginsberg*, the Court would have noted as much in *Reno*." *Id*. at 271.

But it did. The panel simply fails to acknowledge *Reno*'s repeated and explicit recognition of the unique concerns posed by the CDA's regulation of protected adult speech online. *See* 521 U.S. at 868–71. Not only did the *Reno* Court conclude that its prior holdings—including *Ginsberg*—"provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium," it specifically found that nothing in *Ginsberg* or its ilk precluded "the most

stringent review of [the CDA's] provisions." *Reno*, 521 U.S. at 868, 870.[7]

Similar evasions taint the Fifth Circuit's decision.[8] Most gallingly, the panel attempts to cancel *Ashcroft*'s application of strict scrutiny to COPA, a statute "very similar" to H.B. 1181, by arguing the *Ashcroft* Court "did not rule on the appropriate tier of scrutiny for COPA." *Free Speech Coal.*, 95 F.4th at 274. Instead, relying on the parties' *briefs* while ignoring the actual *ruling*, the panel contends *Ashcroft* "merely ruled on the issue the parties presented: whether COPA would survive strict scrutiny." *Id.*

With due respect, this is sophistry. The *Ashcroft* Court left no doubt that in affirming the preliminary injunction against COPA, it was affirming the lower courts' application of strict scrutiny. The Court explained that just as the statute at issue in

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[7] On this point, Judge Higginbotham is again correct. "Lastly, the majority discounts *Reno* on the basis that it did not distinguish the internet from in-person communications, to which I say: read *Reno*." *Free Speech Coal.*, 95 F.4th at 298 (Higginbotham, J., dissenting in part and concurring in part).

[8] These mental gymnastics mix with astonishing factual errors. For example, the panel writes: "Moreover, *Playboy* preceded not only *Entertainment Merchants* but also *Reno*. If we should read *Playboy* as broadly as plaintiffs suggest, it renders *Reno*'s distinguishing of *Ginsberg* inexplicable." *Free Speech Coal.*, 95 F.4th at 276. But as some of us who participated in those cases recall, *Reno* preceded *Playboy* by three years.

Playboy—judged by the *Ashcroft* Court to be the "closest precedent" on point—"could not survive strict scrutiny," the government had similarly failed to carry that burden with COPA. *Ashcroft*, 542 U.S. at 670. "The reasoning of *Playboy Entertainment Group* and the holdings and force of our precedents require us to affirm the preliminary injunction," wrote the majority, because "[t]o do otherwise would be to do less than the First Amendment commands." *Id*.

It beggars belief that in writing those words, the Court somehow avoided or reserved the question of what level of scrutiny the statute warranted. The Fifth Circuit's willful blindness to the contrary is irreconcilable with Justice Scalia's dissent, which made plain he understood the majority to be deciding the appropriate tier of scrutiny: "Both the Court and Justice Breyer err, however, in subjecting COPA to strict scrutiny." *Id*. at 676 (Scalia, J., dissenting). Nevertheless, the Fifth Circuit panel straight-facedly concludes that *Ginsberg* "must take pride of place" because *Ashcroft* "does not control." *Free Speech Coal.*, 95 F.4th at 275.

To complete its revisionist tour-de-force, the Fifth Circuit performs a similar magic trick on *Playboy*. The panel begrudgingly recognizes that "*Playboy* seems to have the clearest language supplying a standard of review: 'As we consider a content-based regulation, the answer should be clear: The standard is strict

scrutiny.'" *Id.* (quoting *Playboy*, 529 U.S. at 814). But the panel nevertheless insists *Playboy* "cannot surmount the rock that is *Ginsberg*." *Id.*

To reach that conclusion, the majority scratches out a distinction: "The law in *Ginsberg* . . . targeted distribution *to minors*; the law in *Playboy* targeted distribution *to all*. That is, once certain an individual is not a minor, H.B. 1181 does nothing further." *Id.* at 276. But that characterization just isn't true. As explained above, H.B. 1181 imposes a burden on adult access to protected speech. Nothing in the law suggests adult users need only verify their age once. And even if it did, that one-time burden on adult access (with an attendant loss of privacy) would remain a burden all the same—to say nothing of the functional ban on those who cannot or will not use age verification measures due to lack of means or privacy concerns. In other words, H.B. 1181, like "the law in *Playboy*," targets distribution to all, not just to minors. *Id.* The panel's syllogism collapses even taken on its own terms.

Ultimately, H.B. 1181 is a straightforward content-based restriction on speech. No reasonable read of the statute or caselaw can justify a contrary conclusion. *Ginsberg* cannot carry the weight the majority below foists upon it, given this Court's consistent conclusions over the decades that followed in *Sable*, *Reno*, *Playboy*, and *Ashcroft*. In wishing

away the constitutional constraints those cases establish, the Fifth Circuit's decision grants Texas a free hand to force adult Texans to show their papers to access protected speech. The First Amendment does not permit such a result, and this Court should act to make sure it never does.

II. To Protect First Amendment Rights in Texas and Nationwide, This Court Must Keep the Starch in Our Constitutional Standards.

Because Texas' law "attempts to regulate expression," it must meet "rigorous constitutional standards." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975). This obligation is not novel. But the Fifth Circuit's dereliction in holding Texas to it is. By failing to subject H.B. 1811 to the rigorous standard the First Amendment demands—strict scrutiny—the Fifth Circuit excused Texas from its constitutional duty "to ensure that legitimate speech is not chilled or punished." *Ashcroft*, 542 U.S. at 666.

The Fifth Circuit's tortured reasoning is not just unconvincing, it is dangerous. This Court requires content-based speech restrictions like H.B. 1181 to satisfy strict scrutiny for good reason: to protect against encroachment upon First Amendment rights. "[W]ere we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape

our unique personalities or to silence dissenting ideas." *Playboy*, 529 U.S. at 818. Strict scrutiny prevents the government from controlling what adults may say, see, and think. Exacting review guards against the First Amendment's erosion; we "avoid these ends by avoiding these beginnings." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

Holding the government to its burden is especially important when lawmakers target "speech that many citizens may find shabby, offensive, or even ugly." *Playboy*, 529 U.S. at 826. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Popular support can never justify state encroachment upon First Amendment freedoms. To the contrary, censorship's enduring political appeal illustrates the essentiality of the First Amendment—and the importance of keeping the starch in our constitutional standards. *See Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.").

The Fifth Circuit's sharp break with precedent is equal parts wishful thinking and hubris, not a "principled and intelligible" departure from this Court's well-established rulings. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). By bucking decades of well-established law, the Fifth Circuit exchanged the "evenhanded, predictable, and consistent development of legal principles" for willful revisionism. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This is not a winning trade; the Fifth Circuit has not "borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266. Abandoning precedent in this way threatens not only First Amendment rights, but "the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827.

The Fifth Circuit's reckless adventurism will have consequences for adults far beyond Texas. Lawmakers nationwide are watching H.B. 1181's journey through the courts closely. Already, at least eight states have laws in effect requiring adults to submit to age verification before accessing protected adult content online, and eleven others considered similar

legislation last year.[9] Bills are advancing throughout the country.[10]

If the Fifth Circuit's open disrespect of this Court's precedents is allowed to stand—and with it, Texas' restriction of online speech to adults—lawmakers nationwide will declare open season on heretofore settled First Amendment law, risking contentious and unnecessary circuit splits and resulting in "a patchwork of First Amendment rights" across the country. *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 678 (2024) (Thomas, J., dissenting from summary grant, vacatur, and remand); *see also Free Speech Coal., Inc. v. Paxton*, No. 23-50627, Order at *2 & n.2, ECF No. 148 (5th Cir. Mar. 29, 2024) (Higginbotham, J., dissenting from denial of motion to stay mandate pending filing and disposition of petition for writ of certiorari) (noting Fifth Circuit's decision "conflicts with Supreme Court precedent and decisions of our

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[9] Elizabeth Nolan Brown, *These States Want You To Show ID To Watch Porn Online*, REASON (May 2024), https://reason.com/2024/04/25/carding-people-to-watch-porn.

[10] *See, e.g.*, Blaise Gainey, *Tennesseans visiting porn sites could soon be required to verify that they are 18 or older*, WPLN NEWS (Apr. 10, 2024), https://wpln.org/post/tennesseans-visiting-porn-sites-could-soon-be-required-to-verify-that-they-are-18-or-older; Andrew Wegley, *Nebraska Legislature advances bill to require age verification for porn sites*, LINCOLN JOURNAL STAR (Mar. 27, 2024), https://journalstar.com/news/state-regional/government-politics/nebraska-legislature-porn-websites-age-verification/article_19fd1446-ec5c-11ee-a64f-eb5906c7004e.html.

sister circuits" and collecting cases). This result is untenable—and avoidable. Requiring the Fifth Circuit to honor longstanding precedent and subject H.B. 1181 to strict scrutiny will keep the First Amendment's safeguards intact.

CONCLUSION

This Court has correctly and consistently recognized the government's undoubted interest in "protecting children from harmful materials." *Reno*, 521 U.S. at 875. But—just as correctly, and just as consistently—it has recognized this interest "does not justify an unnecessarily broad suppression of speech addressed to adults." *Id*. When the government acts to protect minors, it must do so "in a way consistent with First Amendment principles" under its omnipresent obligation to meet "the burden the First Amendment imposes." *Playboy*, 529 U.S. at 827.

Freedom of expression requires vigilant protection, and the First Amendment doesn't permit short cuts. This Court has been clear: "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable*, 492 U.S. at 126. Texas' law burdens the expressive rights of adults, so Texas must prove it survives strict scrutiny. The Fifth Circuit failed to hold Texas to this vital obligation. This Court must now require that it do so.

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