

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 *AMICI CURIAE* ELECTRONIC
FRONTIER FOUNDATION, WOODHULL
FREEDOM FOUNDATION, AND TECHFREEDOM
IN SUPPORT OF PETITIONERS**

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**STATEMENT OF IDENTITY AND INTEREST OF
AMICI CURIAE¹**

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization with more than 30,000 active donors that has worked for over 30 years to ensure that technology supports freedom, justice, and innovation for all people of the world. EFF is dedicated to protecting online users’ free expression and privacy rights and has fought for both in courts and legislatures across the country. EFF has challenged laws that burden all internet users’ rights by requiring online services to verify their users’ age. *See, e.g., ACLU v. Reno*, 929 F. Supp. 824, 825 (E.D. Pa. 1996) (serving as a plaintiff challenging the Communications Decency Act); *ACLU v. Reno*, 31 F. Supp. 2d 473, 480 n.3 (E.D. Pa. 1999) (serving as a plaintiff challenging the Child Online Protection Act). EFF has defended the constitutionality of well-crafted consumer data privacy laws. *See, e.g., In re Clearview AI Litig.*, 585 F. Supp. 3d 1111 (N.D. Ill. 2022); *ACA Connects v. Frey*, 471 F. Supp. 3d 318 (D. Me. 2020).

The Woodhull Freedom Foundation (“Woodhull”) is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull’s name was inspired by the Nineteenth Century suffragette and women’s rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission.

individual through advocacy, education, and action. Woodhull’s mission is focused on affirming sexual freedom as a fundamental human right. Woodhull is particularly concerned with undue burdens imposed on adults by the government when accessing expression involving human sexuality.

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible. TechFreedom opposes government efforts to control online speech. That is precisely why TechFreedom opposes laws that mandate online age verification or (what is functionally the same thing) age estimation. As TechFreedom’s experts have explained in extensive expert commentary on, and analysis of, such laws, age verification/estimation erodes online anonymity and, in consequence, chills free speech and free association. *See, e.g.,* Mike Masnick, *You Can’t Wish Away the First Amendment to Mandate Age Verification*, Techdirt (Sept. 13, 2023), <http://tinyurl.com/mtfhd9dp> (discussing the work of TechFreedom attorney Ari Cohn); Corbin K. Barthold, *Republicans Can’t Decide If They Want Online Privacy or Not*, The Daily Beast (Sept. 5, 2023), <http://tinyurl.com/2s3hr42n>; Corbin K. Barthold, *Closing the Digital Frontier*, City Journal (Mar. 7, 2023), <http://tinyurl.com/d5aree9m> (discussing AB 2273).

SUMMARY OF ARGUMENT

Until the Fifth Circuit’s decision in this case, courts uniformly subjected online age-verification laws like

HB 1181 to strict scrutiny.² Every prior court correctly recognized that online identification mandates—no matter what method they use or form they take—more significantly burden First Amendment rights than restrictions on in-person access to adult materials. Yet the court below did not appreciate the immense differences in the burdens placed on adults’ constitutional rights to access lawful expression and wrongly applied rational basis review under *Ginsberg v. New York*, 390 U.S. 629 (1968).

In doing so, the Fifth Circuit engaged in a flight of wishful thinking, erroneously believing that developments in age-verification technology have somehow mitigated the burdens imposed on adults’ rights to lawfully speak and access speech online. Yet the same constitutional problems that this Court identified in *Reno v. American Civil Liberties Union*, 521 U.S. 884 (1997) when it struck down a federal online age-verification requirement have metastasized. The district court’s findings confirmed that that “[t]he risks of compelled digital verification are just as large, if not greater” than they were before. *Free Speech Coal., Inc. v. Colmenero*, 689 F. Supp. 3d 373, 400 (W.D. Tex. 2023). The Fifth Circuit ignored this reality.

2. See, e.g., *NetChoice, LLC v. Fitch*, No. 1:24-cv-170-HSO-BWR, ___ F. Supp. 3d ___, 2024 WL 3276409 (S.D. Miss. July 1, 2024); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99-102 (2d Cir. 2003); *PSInet v. Chapman*, 362 F.3d 227, 229, 233-34 (4th Cir. 2004); *ACLU v. Johnson*, 194 F.3d 1149, 1152, 1155-58 (10th Cir. 1999); *NetChoice, LLC v. Yost*, No. 24-cv-00047, ___ F. Supp. 3d ___, 2024 WL 555904 (S.D. Ohio Feb. 12, 2024); *NetChoice, LLC v. Griffin*, No. 23-CV-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023).

Although age verification technology looks different today than it did in 1997, those changes have not materially diminished, much less eliminated, the burdens imposed on adults' First Amendment rights. Even if every covered platform in Texas implemented today's most advanced age-verification technology—already a dubious assumption that is not required under the law—HB 1181 would still unconstitutionally chill, and in some instances entirely block, adult access to lawful online speech.

The burdens imposed by HB 1181 are numerous and substantial, each easily triggering strict scrutiny under this Court's First Amendment jurisprudence. Texas' age-verification law unconstitutionally robs people of anonymity, discourages access by privacy- and security-minded users, and blocks some individuals entirely from online access to adult content that remains fully protected by the First Amendment.

This Court should thus reject the Fifth Circuit's decision to uphold the age-verification provisions of Texas HB 1181, apply strict scrutiny, and strike down the law as unconstitutional under the First Amendment.

ARGUMENT

I. REQUIRING ADULTS TO VERIFY THEIR AGES BEFORE SPEAKING AND ACCESSING PROTECTED SPEECH ONLINE IMPOSES DISTINCT HARMS THAT ARE NOT PRESENT WHEN REQUIRING IN-PERSON AGE VERIFICATION.

The Fifth Circuit lacked any basis in law or technology to uphold HB 1181's online age-verification mandate on

the grounds that it creates lesser First Amendment burdens on adults than previous online age-verification schemes. Online age-verification mandates like HB 1181 still impermissibly block adults from content they have a First Amendment right to access, burden their First Amendment right to browse the internet anonymously, and chill data security- and privacy-minded individuals who are justifiably leery of disclosing intensely personal information to online services. The Fifth Circuit’s contrary conclusion that modern online age verification is not “categorically different” from the burdens on adults seeking access to materials at issue in *Ginsberg* required it to ignore this Court’s precedent and the district court’s detailed factual findings. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 271 (5th Cir. 2024).

A. Online Age Verification Impermissibly Blocks Access To Protected Speech For The Millions Of Adults Who Lack The Requisite Proof Of Identification.

Age-verification requirements “serve as a complete block to adults who wish to access adult material [online] but do not” have the necessary form of identification. *PSInet v. Chapman*, 362 F.3d 227, 237 (4th Cir. 2004); *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003) (invalidating age-verification requirement that would make “adults who do not have [the necessary form of identification] . . . unable to access those sites”). Under HB 1181, that could include millions of people who do not have a driver’s license or other government-issued form of identification.

About 15 million adult U.S. citizens do not have a driver’s license, while about 2.6 million do not have any

form of government-issued photo ID.³ Estimates show another 21 million adult U.S. citizens do not have a *non-expired* driver’s license, and over 34.5 million adult citizens have neither a driver’s license nor a state ID card with their current name or address.⁴ These numbers do not include non-U.S. citizens who do not have current government-issued identification, including undocumented immigrants who cannot obtain a state ID or driver’s license.⁵

Texas has not specified what is required to comply with HB 1181’s provision permitting age verification via government-issued ID, leaving adults in the dark as to what form of ID suffices to allow access to constitutionally protected speech. For instance, most document-based age-verification services require a user to submit a non-

3. Jillian Andres Rothschild *et al.*, *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge* 2, Univ. Md. Ctr. for Democracy & Civic Engagement (Jan. 2024), <https://cdce.umd.edu/sites/cdce.umd.edu/files/pubs/Voter%20ID%202023%20survey%20Key%20Results%20Jan%202024%20%281%29.pdf>.

4. *Id.* at 2, 5; Michael J. Hanmer & Samuel B. Novey, *Who Lacked Photo ID in 2020?: An Exploration of the American National Election Studies* 3, Univ. Md. Ctr. for Democracy & Civic Engagement (Mar. 2023), https://www.voteriders.org/wp-content/uploads/2023/04/CDCE_VoteRiders_ANES2020Report_Spring2023.pdf.

5. *See Verifying Lawful Presence*, Texas Dep’t of Public Safety, <https://www.dps.texas.gov/sites/default/files/documents/driverlicense/documents/verifyinglawfulpresence.pdf> (“An applicant for a driver license (DL) or identification card (ID) must present proof of lawful presence in the US.”).

expired government-issued ID,⁶ but even that requirement is not uniformly applied.⁷ Decisions about what form of ID is sufficient to prove age will be left to platforms and will surely be inconsistent and arbitrary in their application.

Reliance on government-issued ID for age-gating also means that certain demographics will be disproportionately burdened when trying to speak or access protected speech online. Black Americans and Hispanic Americans are disproportionately less likely to have current driver's licenses.⁸ And 18% of Black adult Americans do not have a driver's license at all.⁹ Young adults are also less likely to have the requisite ID: 41% of U.S. citizens between 18 and 24 do not have an up-to-date driver's license.¹⁰ The same is true for 38% of citizens between the ages of 25

6. See, e.g., *Jumio Troubleshooting Tips*, Patreon Help Center, <https://support.patreon.com/hc/en-us/articles/22107198811789-Jumio-troubleshooting-tips> (last accessed Sep. 17, 2024) (stating “only valid, non-expired government-issued identification” will be accepted for age verification); *Learn About ID Verification for Meta Accounts*, Meta, <https://www.meta.com/help/quest/articles/accounts/privacy-information-and-settings/id-verification-meta-accounts/> (last accessed Sep. 17, 2024) (“Make sure the ID you upload hasn’t expired.”).

7. See, e.g., *Using An Expired Driver's License or State ID*, ID.me Help Center, <https://help.id.me/hc/en-us/articles/4419146629783-Using-an-expired-driver-s-license-or-state-ID> (last accessed Sep. 17, 2024) (allowing the use of expired ID if it expired in the last 12 months).

8. Rothschild, *supra* note 3, at 2.

9. *Id.*

10. *Id.*

and 29.¹¹ Americans with disabilities and Americans with lower annual incomes are also less likely to have a current driver’s license.¹²

Moreover, as Texas’ expert noted in the trial court, government-ID-based age verification often requires the user to upload a freshly taken photo to compare to the user’s ID photo. *See Colmenero*, 689 F. Supp. 3d at 401. But facial recognition technology is error-prone,¹³ and adults whose current appearances do not adequately match the photo on their ID may be rejected.¹⁴

HB 1181 allows services to verify users’ ages by other means, but the one alternative, which relies on public

11. *Id.*

12. *Id.* at 3–4.

13. *See* Alex Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard Sci. in the News (Oct. 24, 2020), <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/> (also noting that a “growing body of research exposes divergent error rates across demographic groups, with the poorest accuracy consistently found in subjects who are female, Black, and 18-30 years old.”); Nigel Jones, *10 Reasons to Be Concerned About Facial Recognition Technology*, Priv. Compliance Hub (Aug. 2021), <https://bit.ly/3XXLWbp>; Bennett Cyphers, Adam Schwartz, & Nathan Sheard, *Face Recognition Isn’t Just Face Identification and Verification: It’s Also Photo Clustering, Race Analysis, Real-Time Tracking, and More*, EFF (Oct. 7, 2021), <https://www.eff.org/deeplinks/2021/10/face-recognition-isnt-just-face-identification-and-verification>.

14. *See, e.g.*, Jo Yurcaba, *Over 200,000 Trans People Could Face Voting Restrictions Because of State ID Laws*, NBC News, Nov. 1, 2022, <https://www.nbcnews.com/nbc-out/out-politics-and-policy/200000-trans-people-face-voting-restrictions-state-id-laws-rcna52853>.

or private transactional data, still does not guarantee access to those lacking a compliant form of government ID. *See* HB 1181 § 129B.003(b)(2). For one, HB 1181 does not *require* online services to allow transactional data as an alternative, and many services may not offer alternative means to adults beyond supplying their ID. Even assuming a service opts to use transactional data, depending on the method chosen, many adults will still not have access to the means to verify their age via this method. For example, if a service relied on mortgage documents, it would exclude an enormous amount of adults, as nearly 35% of Americans do not own a home.¹⁵ If a service used educational records, this would exclude the more than 2.8 million Texans age 25 or older who do not have at least a high school diploma.¹⁶ Should credit data be used, close to 20% of U.S. households do not have a credit card.¹⁷ Immigrants, regardless of their legal status, may not be able to obtain credit cards, either.¹⁸

15. *See* U.S. Census Bureau, CB24-62, *Quarterly Residential Vacancies and Homeownership, First Quarter 2024*, at 5 (Apr. 30, 2024), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

16. *See* Blake Decker, *Trends in Educational Attainment: Some College, No Degree*, The Texas A&M University System, <https://www.tamus.edu/data-science/2023/03/15/trends-in-educational-attainment-some-college-no-degree/> (last accessed Sep. 17, 2024).

17. *See* Board of Governors, U.S. Fed. Reserve, *Economic Well-Being of U.S. Households in 2022*, at 44 (May 2023), <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf> (in 2022, 82% of American households had a credit card).

18. *See* Sonia Lin, *Identifying and Addressing the Financial Needs of Immigrants*, Consumer Fin. Prot. Bureau (June 27, 2022),

B. Online Age Verification Chills Adult Users From Accessing Protected Speech By Impermissibly Burdening The Right To Be Anonymous Online.

Even if an adult can supply the requisite proof-of-age, HB 1181’s age-verification requirement still impermissibly deters adult users from speaking and accessing lawful content by undermining anonymous internet browsing. Anonymity is a respected, historic tradition that is “an aspect of the freedom of speech protected by the First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–43 (1995). Online anonymity “promotes the robust exchange of ideas and allows individuals to express themselves freely[.]” *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). Age-verification schemes “are not only an additional hassle,” but “they also require that website visitors forgo the anonymity otherwise available on the internet.” *Am. Booksellers Found.*, 342 F.3d at 99. Moreover, “preserv[ing] anonymity” may be essential for users who seek to have “a distinct online identity,” *Cyberspace, Commc’ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 742 (E.D. Mich. 1999), *aff’d and remanded*, 238 F.3d 420 (6th Cir. 2000), or who want to discuss “sensitive, personal, controversial, or stigmatized content,” *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007), *aff’d sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008). Without anonymity, “the stigma associated with the content of [certain] sites may deter

<https://www.consumerfinance.gov/about-us/blog/identifying-and-addressing-the-financial-needs-of-immigrants/> (describing how “many financial institutions have policies and practices in place that effectively exclude immigrants from access to bank services and to credit due to immigration status”).

adults from visiting them” at all. *PSINet, Inc.*, 362 F.3d at 236; see also *NetChoice, LLC v. Griffin*, No. 23-CV-05105, 2023 WL 5660155, at *17 (W.D. Ark. Aug. 31, 2023). That chilling effect only underscores the impermissible burden on protected anonymity that Texas’ statute imposes on its residents.

HB 1181’s age-verification requirement will make anonymous internet browsing on covered sites extremely difficult and deter adult users from accessing speech due to concerns about being identified. Unlike in-person age-gates, the only viable way for a website to comply with HB 1181’s mandate is to require all users to *submit*, not just momentarily display, data-rich government-issued identification or other proof-of-age. See HB 1181 § 129B.003. And as said above, relying on facial recognition to estimate a user’s age is error prone. As this Court has recognized, this imposes significant burdens on adults’ access to constitutional speech and “discourage[s] users from accessing” the online services that require that verification. *Reno*, 521 U.S. at 856 (1997).

HB 1181’s requirement that covered commercial entities delete users’ personal data does not solve this problem. As the district court correctly noted, for users to be certain that they can maintain their anonymity, they must both know that their data is required to be deleted and be confident that every website or online service with access to that data will, in fact, delete it. *Colmenero*, 689 F. Supp. 3d at 400. Both premises are “dubious.” *Id.*¹⁹

19. See also Paige Collings, *Debunking the Myth of “Anonymous” Data*, EFF Deeplinks (Nov. 10, 2023), <https://www.eff.org/deeplinks/2023/11/debunking-myth-anonymous-data>.

A person who submits identifying information online can never be sure whether it will be retained, or how it might be used or disclosed. This stands in stark contrast to *Ginsberg*, in which there was no record kept of a person's data when they sought to purchase adult materials.

Disturbingly, HB 1181 may permit the Texas government to log and track user access without legal process when verification is done via government-issued ID. *Colmenero*, 689 F. Supp. 3d at 399–400. The law thus “runs the risk that the state can monitor when an adult views sexually explicit materials” and threatens to force individuals “to divulge specific details of their sexuality to the state government to gain access to certain speech.” *Id.* at 399. In doing so, it forces adult users to risk “relinquish[ing] their anonymity to access protected speech, and . . . create a potentially permanent electronic record” of the sites they choose to visit. *ACLU v. Mukasey*, 534 F.3d 181, 197 (3d. Cir. 2008).

HB 1181 does nothing to prohibit a host of other entities from potentially gaining access to people's personal information collected to verify their ages. All online data is transmitted through a host of intermediaries. This means that when a commercial website shares identifying information with its third-party age-verification vendor, that data is not only transmitted between the website and the vendor, but also between a series of third parties. Those intermediaries are *not* required to delete a user's identifying data under the plain language of the law. *See Colmenero*, 689 F. Supp. 3d at 400.

The third parties hosted on websites include trackers managed by data brokers, advertisers, and other companies

that are constantly collecting data about a user's browsing activity.²⁰ Because many entities derive significant profits from selling personal information collected online, an array of actors are incentivized to collect as much data as possible. Every mouse click and screen swipe can be tracked and then shared with or sold to third party ad-tech companies and the data brokers that service them.²¹ None of those third-party entities are required to delete users' personal data under HB 1181. Many people take steps online to protect their anonymity and avoid this pervasive surveillance, but HB 1181 makes this even more difficult by requiring additional and more frequent disclosure of sensitive, identifying records. HB 1181's failure to engage with the realities of the online advertising industry thus further undermines user anonymity.

C. Online Age Verification Further Chills Adult Users From Speaking and Accessing Protected Speech By Putting Their Most Sensitive Data At Risk Of Inadvertent Disclosure, Breach, Or Attack.

Legitimate data security concerns will further deter internet users from accessing protected First Amendment content. "Requiring Internet users to provide . . . personally identifiable information to access a Web site would significantly deter many users from entering the

20. See Bennett Cyphers & Gennie Gebhart, *Behind the One-Way Mirror: A Deep Dive Into the Technology of Corporate Surveillance*, EFF (Dec. 2, 2019), <https://www.eff.org/wp/behind-the-one-way-mirror>.

21. See Collings, *Debunking the Myth of "Anonymous" Data*, *supra* note 19.

site, because Internet users are concerned about security on the Internet and . . . afraid of fraud and identity theft[.]” *Gonzales*, 478 F. Supp. 2d at 806; *see also Mukasey*, 534 F.3d at 196; *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878, 889 (W.D. Va. 2001), *aff’d*, 362 F.3d 227 (4th Cir. 2004) (“Fear that cyber-criminals may access their [identifying information] . . . may chill the willingness of some adults to participate in the ‘marketplace of ideas’ which adult Web site operators provide.”).

The same issues motivating the anonymity concerns described above apply equally to data privacy and security concerns. HB 1181 will expose users’ most sensitive information to an unquantifiable vast web of websites and intermediaries, third-party trackers and data brokers, and potentially the Texas government itself. This not only gives multiple actors access to adult users’ sensitive data, but also creates even more opportunities for the data to leak or be breached. By forcing users to submit to age verification, HB 1181 increases their risk of being victims of data breaches, which are nearly unavoidable in this digital age. And once that personal data gets into the wrong hands, victims are vulnerable to targeted attacks both online and off. These dangers are serious and legitimate, and users are right to fear them.²²

22. *See, e.g.*, Michelle Faverio, *Key Findings About Americans and Data Privacy* (Oct. 18, 2023), <https://www.pewresearch.org/short-reads/2023/10/18/key-findings-about-americans-and-data-privacy/> (76% of U.S. adults have “very little or no trust at all” that leaders of social media companies will not sell their personal data to others without their consent). *See also* Maria Bada & Jason R.C. Nurse, *The Social and Psychological Impact of Cyber-Attacks* (2020), <https://arxiv.org/ftp/arxiv/papers/1909/1909.13256.pdf>.

1. HB 1181 Does Not Ameliorate The Data Privacy Concerns Surrounding Online Age-Verification Regimes.

Nothing in HB 1181 addresses the legitimate privacy and security harms that adult internet users face in online age-verification schemes. Ignoring the district court’s factual findings—and applying the wrong legal standard—the Fifth Circuit decided that HB 1181 is “more privacy-protective than was the statute in *Ginsberg*” for two reasons: (1) it allows for multiple possible methods of age verification, “[a]t least one” of which the Fifth Circuit assumes “will have no more impact on privacy than will in-person age verification à la *Ginsberg*”; and (2) it “punishes entities \$10,000 for each instance of retention of identifying information.” *Free Speech Coal., Inc.*, 95 F.4th at 271 & n.17.

The Fifth Circuit was incorrect for at least three reasons.

First, allowing for multiple age-verification methods does not alleviate security risks when privacy experts agree that “there is currently no solution that satisfactorily” provides “sufficiently reliable verification, complete coverage of the population and respect for the protection of individuals’ data and privacy and their security.”²³

23. *Online Age Verification: Balancing Privacy and the Protection of Minors*, CNIL (Sept. 22, 2022), <https://www.cnil.fr/en/online-age-verification-balancing-privacy-and-protection-minors>; see also *Position Paper: Online Age Verification and Children’s Rights*, European Digital Rights (Oct. 4, 2023), <https://edri.org/wp-content/uploads/2023/10/Online-age-verification-and-childrens-rights-EDRI-position-paper.pdf> (“[T]here is a lack of evidence

Second, the Fifth Circuit speculates that the statute will protect users' privacy more than its predecessors by setting statutory damages for commercial entities that "knowingly" retain users' identifying information. *See* HB 1181 § 129B.002(d). But as already explained, the district court found the opposite and the reality of the modern internet is that dozens of entities can collect, retain, use, and sell this data because they are not subject to HB 1181. *See supra*, Sec. I.B.

Third, HB 1181's limited protections for retaining users' personal data "would not alleviate the deterrent effect of age verification on users, because users must still disclose the personal information to a Web site to pass through the screen, and then rely on these entities, many of whom are unknown . . . to comply with the confidentiality requirement." *Gonzales*, 478 F. Supp. 2d at 806; *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (recognizing the harm that would result should cable providers disclose a list of cable subscribers who sought access to channels featuring sexual materials). The district court rightfully concluded that these dangers and the accompanying deterrent effect were present in HB 1181. *Colmenero*, 689 F. Supp. 3d at 400.

that the widespread adoption of online age verification systems as a precursor for accessing private messaging, app downloads, or social media will keep children safe."); Jackie Snow, *Why Age Verification Is So Difficult for Websites*, Wall St. J. (Feb. 27, 2022), <https://www.wsj.com/articles/why-age-verification-is-difficult-for-websites-11645829728>.

2. HB 1181's Data Collection Regime Will Inevitably Be Plagued By The Unavoidable Inadvertent Disclosure Of Data.

In this increasingly digital world, we often resign ourselves to the unfortunate fact that companies routinely amass our sensitive personal information. But we hope, or even trust, that these services will make every effort to secure and safeguard our data. Nevertheless, in data breach after data breach, even the best-intentioned companies fall victim to inadvertent disclosures.²⁴

Data breaches are an endemic and ever-increasing part of modern life. A record 3,205 data breaches occurred in 2023, up 78% from the year prior, and far exceeding the previous record of 1,860 breaches in 2021.²⁵ These

24. See, e.g., Frank Landymore, *Twitter Caught Selling Data to Government Spies While Complaining About Surveillance*, Byte (Mar. 28, 2024), <https://futurism.com/the-byte/twitter-selling-data-government>; Will Evans, *Amazon's Dark Secret: It Has Failed to Protect Your Data*, Wired (Nov. 18, 2021), <https://www.wired.com/story/amazon-failed-to-protect-your-data-investigation/>; Gennie Gebhart, *You Gave Facebook Your Number For Security. They Used It For Ads.*, EFF (Sept. 27, 2018), <https://www.eff.org/deeplinks/2018/09/you-gave-facebook-your-number-security-they-used-it-ads>; Bennett Cyphers & Gennie Gebhart, *The Google+ Bug Is More About The Cover-Up Than The Crime*, EFF (Oct. 11, 2018), <https://www.eff.org/deeplinks/2018/10/google-bug-more-about-cover-crime>; Kashmir Hill, *Facebook Is Giving Advertisers Access to Your Shadow Contact Information* (Sept. 26, 2018), <https://gizmodo.com/facebook-is-giving-advertisers-access-to-your-shadow-co-1828476051>.

25. Press Release, Identity Theft Resource Center, *ITRC 2023 Annual Data Breach Report Reveals Record Number of Compromises; 72 Percent Increase Over Previous High* (Jan.

breaches affected over 350 million people—more than the entire population of the United States—and compromised nearly 11% of all publicly traded companies.²⁶ Those numbers continue to rise, and some of the most significant data breaches to date have occurred in 2024. In July, AT&T revealed that criminals stole phone numbers and call records of around 110 million people—“nearly all” of its customers.²⁷ Meanwhile, other bad actors stole an alleged 560 million records from Ticketmaster, as well as the medical and billing information of a “substantial proportion” of people in the U.S. from health tech giant Change Healthcare.²⁸

The likelihood a user’s information will be compromised in a breach also increases every time that information is transmitted to third party online actors. The AT&T and Ticketmaster breaches, for example, occurred because both companies shared information with a third-party

25, 2024), <https://www.idtheftcenter.org/post/2023-annual-data-breach-report-reveals-record-number-of-compromises-72-percent-increase-over-previous-high>; *see also* Michael Hill & Dan Swinhoe, *The 15 Biggest Data Breaches of the 21st Century*, CSO (Nov. 8, 2022), <https://www.csoonline.com/article/2130877/the-biggest-data-breaches-of-the-21st-century.html>.

26. ITRC, *supra* note 25.; *see also id.* (“69% of general consumers have been victims of an identity crime more than once”).

27. Zack Whittaker, *The Biggest Data Breaches in 2024: 1 billion Stolen Records and Rising*, TechCrunch (Aug. 12, 2024), <https://techcrunch.com/2024/08/12/2024-in-data-breaches-1-billion-stolen-records-and-rising/>.

28. *Id.*

cloud data vendor that was breached.²⁹ Under HB 1181, regulated online services will have to contract with third-party age-verification services, creating similar risks.

Further compounding the issue, the personal data disclosed under HB 1181 is extremely sensitive and often immutable.³⁰ The disclosure of personal information contained in a government-issued ID is more problematic because most people cannot easily change their biographic information or their home address. Contrast this with information that *is* intended to be more frequently given to third parties, such as credit card information. As an important security measure, credit card companies typically offer a quick and straightforward process for changing information, such as the card number, in the event of identity theft or a data breach.³¹

HB 1181 further amplifies the security risks by potentially linking personal information to the consumption of sensitive content that can “reveal [a user’s] intimate desires and preferences.” *Colmenero*, 689 F. Supp. 3d at 399. This makes the data “particularly valuable because users may be more willing to pay to

29. *Id.*

30. Driver Privacy Protection Act, 18 U.S.C. §§ 2721 *et seq.*

31. *See, e.g., Have a Lost or Stolen Card?*, Visa, <https://usa.visa.com/support/consumer/lost-stolen-card.html> (last accessed Sep. 17, 2024); *Frequently Asked Questions: What If My Card Is Lost Stolen Or Damaged?*, Chase, <https://www.chase.com/digital/digital-payments/additional-wallets/faqs/lost-or-stolen> (last accessed Sep. 17, 2024).

keep that information private.” *Id.* at 400.³² These risks will justifiably deter security-minded adult internet users from accessing lawful speech online. And HB 1181 will undermine legitimate efforts by Texas residents to secure their personal information online through tools that block digital online trackers or otherwise increase their privacy.³³

II. ALTHOUGH AGE VERIFICATION TECHNOLOGY HAS EVOLVED, NONE OF THOSE CHANGES HAVE SUBSTANTIALLY LESSENED THE HARMS IMPOSED BY HB 1181 ON ADULTS WHO WISH TO ACCESS LAWFUL SPEECH ONLINE.

In upholding HB 1181, the Fifth Circuit assumed that changes in technology have made online age verification meaningfully less burdensome and harmful for adults than it was in decades earlier. The court provided no explanation or evidence to support this assumption, and the factual record led the district court to the opposite conclusion. *Colmenero*, 689 F. Supp. 3d at 400. This

32. See, e.g., Jim Reed, *EE Data Breach ‘Led to Stalking’*, BBC (Feb. 7, 2019), <https://www.bbc.com/news/technology-46896329>; Lee Brown, *Russian Hackers Post Nude Photos of US Cancer Patients to Dark Web in Sick Extortion Plot*, N.Y. Post (Mar. 8, 2023), <https://nypost.com/2023/03/08/russian-hackers-post-nude-photos-of-us-cancer-patients-to-dark-web/>; Sara Morrison, *This outed priest’s story is a warning for everyone about the need for data privacy laws*, Vox (Jul. 21, 2021), <https://www.vox.com/recode/22587248/grindr-app-location-data-outed-priest-jeffrey-burrill-pillar-data-harvesting>.

33. See, e.g., Privacy Badger, EFF, <https://privacybadger.org/>.

erroneous assumption pervades the Fifth Circuit's legal analysis.

Critically, the Fifth Circuit relied on this assumption to justify disregarding the constitutionally significant burdens created by HB 1181's broad online age-verification mandate described in Section I above. Instead, the court subjected HB 1181 to the much less invasive in-person requirements contemplated by the law at issue in *Ginsberg. Paxton*, 95 F.4th at 271-72. Although age-verification technology has changed over the last few decades, none of those changes have substantially lessened the harms imposed on adults who wish to access lawful speech online.

A. Certain Burdens On Adults' First Amendment Rights Are Inherent To Broad Age-Verification Mandates And Are Not Eliminated By New Technology.

In addition to imposing the specific harms described in the previous section, online age-verification mandates, like HB 1181, carry with them broad, inherent burdens on adults' rights to access lawful speech online. These burdens will not and cannot be remedied by new developments in age-verification technology.

Laws that seek to protect minors but affect internet access in all households, even those without minors, are inherently overinclusive.

As the district court examining the evidentiary record found, online age verification is imposed on many, many more users than an in-person ID check. *See Colmenero*,

689 F. Supp. 3d at 397. This is true, of course, no matter what method of age verification is used or how advanced the technology purports to be. Online age-verification laws are “dramatically different” from statutes that apply “only to personally directed communication between an adult and a person that the adult knows or should know is a minor.” *Am. Booksellers Found. for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078, 1082 (D. Alaska 2011). And because of the sheer scale of the internet, regulations affecting online content sweep in millions of people who are obviously adults, not just those who visit physical bookstores or other places to access adult materials, and not just those who might perhaps be 17. Age-verification laws reach into fully every U.S. adult household, despite most not having any children.³⁴

Although other laws that prohibit the sale of adult content to minors result in age verification via a government ID or other proof-of-age in physical spaces, there are practical differences that make those disclosures less burdensome or even nonexistent. Most tellingly, an in-person interaction between a merchant and an adult is often enough to verify that the individual is older than 17 and can legally purchase the materials. After all, there are usually distinguishing physical differences between young

34. Approximately 60% of U.S. family households do not include children under 18, and this percentage does not even account for the number of *non-family* households without children under 18. See Veera Korhonen, *U.S. Family Households With Children, By Family Type 1970-2022*, Statista (Nov. 3, 2023), <https://www.statista.com/statistics/242074/percentages-of-us-family-households-with-children-by-type/>.

adults and those older than 35.³⁵ An older adult who forgets their ID at home or lacks an up-to-date government ID is not likely to face difficulty in obtaining material in a physical store because a visual check by a merchant can confirm they are an adult. Yet there is no analog to such ephemeral age checks online, which inherently require the disclosure and collection of personal information to verify an internet user's age.

Additionally, online age verification is likely to notably reduce adult users' willingness to consume or create protected content on a site.³⁶ Internet users are highly sensitive to website access barriers, and age verification adds a significant new step to a user's visit, in which they must submit government-issued ID or other identifying information, along with, in some instances, a current photo.

B. The Burdens Imposed By HB 1181 Are Not Resolved By Newer Forms Of Age-Gating Technology, Such As Age Estimation.

Although there are new forms of age-gating technology, those products have not substantially lessened the burdens

35. See David Gaudet, *ID Under 35: The BARS Program Carding Policy*, BARS Program (May 3, 2016), <https://www.barsprogram.com/blog/?12310/id-under-35-the-bars-program-carding-policy>.

36. See *Will Co. v. Lee*, 47 F.4th 917, 924–25 (9th Cir. 2022) (“Research shows that sites lose up to 10% of potential visitors for every additional second a site takes to load, and that 53% of visitors will simply navigate away from a page that takes longer than three seconds to load.” (footnote omitted)).

on adults' rights to speak and access lawful speech online. Some newer services have begun to offer "age estimation," an alternative to document-based age verification that predicts a user's age based on AI analysis of their biometric features or data about their online interactions.³⁷ But age estimation is no silver bullet.

To start, it does not appear that services could rely on age estimation to comply with HB 1181. HB 1181 requires "age verification," which is a different technological method from "age estimation." The terms are not used interchangeably by the industry.³⁸ The statutory language also does not reference biometric or task-based information, instead requiring "age verification" via "government-issued identification" or "transactional data," defined in terms of official "records" or information that "documents" an "exchange, agreement, or transfer." §§ 129B.001(7), 003(b). Further, because services are not required to use other methods to verify ages besides relying on government-issued ID and HB 1181 references "government-issued identification," the most straightforward and least legally risky method of compliance will be government-ID-based age verification.

On their merits, age estimation systems suffer from accuracy issues. Because this method is inherently based

37. See *Position Paper: Online Age Verification and Children's Rights*, European Digital Rights (Oct. 4, 2023), at 13, <https://edri.org/wp-content/uploads/2023/10/Online-age-verification-and-childrens-rights-EDRI-position-paper.pdf>.

38. See e.g., Definitions, The Age Verification Providers Ass'n, <https://avpassociation.com/definitions/> (last accessed Sep. 8, 2024).

on predictions, not certainty, it often has a margin of error of several years, even when working properly.³⁹ Recent studies have also found that biometric-based identification especially struggles with accuracy for people of color and for women.⁴⁰ Task-based age estimation, in which age is predicted based on each user completing a certain movement or task, similarly has the potential to discriminate against people with disabilities.⁴¹ These forms of age estimation therefore create an unacceptable risk that adults will be wrongly and discriminatorily blocked from speech they legally can access because of their demographic or health characteristics.

Moreover, age estimation shares many of the same burdens as age verification. It still requires websites to erect access barriers that apply broadly to millions of adults, as described above. *See supra*, Sec.II.A.

Nor does age estimation solve for the anonymity or security burdens that similarly plague document-based age verification. Although age estimation does not require

39. *See id.*

40. *See* Kayee Hanaoka, *Face Analysis Technology Evaluation: Age Estimation and Verification*, National Institute of Standards and Technology, U.S. Department of Commerce (May 2024), <https://nvlpubs.nist.gov/nistpubs/ir/2024/NIST.IR.8525.pdf>; *Position Paper: Online Age Verification and Children's Rights*, *supra* note 29, at 13; Shiona McCallum, *Payout for Uber Eats Driver Over Face Scan Bias Case*, BBC (Mar. 25, 2024), <https://www.bbc.com/news/technology-68655429> (last accessed Sep. 8, 2024).

41. *See Position Paper: Online Age Verification and Children's Rights*, *supra* note 29, at 21, 23.

users to upload sensitive documents like a driver's license, it still forces adult users to share personally identifying information, such as a scan of a user's face or access to a user's email account.⁴² Like identifying documents, this information can be deeply sensitive and revealing. Facial scan information, for example, is unique to each person but largely immutable. And because age estimation relies on having enough data to make predictions, it exacerbates the issues of mass data collection online. As one European study cautioned, requiring a biometric age estimation check every time a user logs onto a site "would incentivise the routine processing of sensitive data as a result, and might even incentivise the creation of underlying biometric databases of children – posing a clearly unacceptable risk."⁴³ Thus for many of the same reasons detailed above, internet users who are concerned about maintaining their right to anonymity and protecting their online security will be rightfully reluctant to share such information and will therefore be chilled from accessing lawful speech online.

C. HB 1181's Statutory Scheme Otherwise Exacerbates The Harms Of Online Age Verification.

In addition to the burdens described throughout this brief, HB 1181's statutory scheme itself imposes additional harms on adults who wish to lawfully speak or access speech online.

Critically, HB 1181 denies unburdened access to

42. *See id.*, at 13.

43. *Id.*

websites in whole, rather than, per *Ginsberg*, individual offending materials within that site. It applies to the contents of any site Texas deems to be at least “one-third” composed of “sexual material harmful to minors,” which will surely encompass numerous commonly used popular, general-purpose websites.⁴⁴ HB 1181 § 129B.002(a); *Colmenero*, 689 F. Supp. 3d at 394–95. HB 1181’s requirements are akin to requiring ID every time a user logs into a streaming service like Netflix, regardless of whether they want to watch a G- or R-rated movie. *See Colmenero*, 689 F. Supp. 3d at 392, n.5.

Yet despite its breadth, HB 1181’s age-verification mandate does not require standardization across covered platforms, leading to user inconvenience and uncertainty: adults might be unduly blocked from some websites using certain age-verification methods, but not from others, using different methods. As a result, adults must navigate a maze of different rules and policies to access lawful speech online.

44. The range of protected content that will be age-gated under the law is vague and potentially boundless. As the district court explained, the law “refers to ‘minors’ as a broad category, but material that is patently offensive to young minors is not necessarily offensive to 17-year-olds. . . . The result of this language as applied to online webpages is that constitutionally protected speech will be chilled. 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.” *Colmenero*, 689 F. Supp. 3d at 394.

III. HB 1181 FAILS STRICT SCRUTINY.

The burdens HB 1181 imposes on adult’s First Amendment rights to speak and access lawful speech online require that the statute be subject to strict scrutiny. The previous sections demonstrate that the more permissive *Ginsberg* standard, applicable to restrictions only on minors’ access to materials harmful to minors, should not apply here because HB 1181 “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.” *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (quoting *Reno*, 521 U.S. at 874).

Speech involving human sexuality is presumed to be protected by the First Amendment. *Reno*, 521 U.S. 844 (indecent materials online); *Sable Communications v. FCC*, 492 U.S. 115 (1989) (phone sex), *FCC v. Pacifica*, 438 U.S. 726 (1978) (indecent communications); *Ashcroft*, 535 U.S. 564 (materials harmful to minors). This Court has reaffirmed the constitutional protection afforded to non-obscene, sexually explicit materials in numerous contexts.⁴⁵

45. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (adult entertainment licensing scheme); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing); *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (same); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (adult entertainment zoning ordinance); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (same); *Roth v. United States*, 354 U.S. 476, 487 (1957); *Stanley v. Georgia*, 394 U.S. 557 (1969) (recognizing the First Amendment right to possess obscene material in one’s home).

Non-obscene sexual content that may be indecent or offensive to some nonetheless remains fully constitutionally protected. “In evaluating the free speech rights of adults, we have made it perfectly clear that ‘[s]exual expression which is indecent but not obscene is protected by the First Amendment.’” *Reno*, 521 U.S. at 874–75 (quoting *Sable*, 492 U.S. at 126). “[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.” *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977). In *Pacifica*, this Court admonished that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.” 438 U.S. at 745.

As explained above, HB 1181’s age-verification regime unconstitutionally burdens adults’ access to a wide range of protected speech and forums in which to speak. The law’s age-verification regime applies to any website of which more than “one-third” of its content includes adult content. HB 1181 § 129B.002(a). The statute thus creates a classic content-based distinction that is subject to strict scrutiny.

Strict scrutiny requires Texas to identify a compelling interest and show that HB 1181 is narrowly tailored to advance that interest. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799 (2011). Narrow tailoring under strict scrutiny requires that the law directly advance the government interest, that it can be neither overinclusive nor underinclusive, and that it is the least speech-restrictive means to advance the interest. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). It is thus “unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purposes that the statute was enacted to serve.” *Id.*

When HB 1181 is subjected to strict scrutiny, it fails.

Texas has a legitimate interest in protecting children from harmful materials. However, its efforts to accomplish that goal cannot be at the expense of the rights of adults to access constitutionally protected speech. As this Court explained, the Government may not “reduce[] the adult population . . . to . . . only what is fit for children.” *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 759 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). “[R]egardless of the strength of the government’s interest’ in protecting children, ‘[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.” *Reno*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74–75 (1983)). The burdens placed on adult access to constitutionally protected online speech by Texas is harmful to the marketplace of ideas. As it did in *Reno*, this Court should “presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.” *Id.* at 885.

In contrast to HB 1181’s broad content-restricting ban, Texas had many less-speech-restrictive and more effective alternatives to restrict minors’ access to adult sexual materials. *Colmenero*, 689 F. Supp. 3d at 400–404; *see also Reno*, 521 U.S. at 879 (finding no narrow tailoring where the government failed to explain why a less restrictive alternative would not be as effective). As other courts have found, these less restrictive alternatives include parental control tools and systems for making affirmative requests to companies. *See NetChoice, LLC v. Fitch*, No. 1:24-cv-170-HSO-BWR, ___ F. Supp. 3d ___, 2024 WL 3276409, at *12 (S.D. Miss. July 1, 2024) (“[T]

he Attorney General has not shown that the alternative suggested by NetChoice, a regime of providing parents additional information or mechanisms needed to engage in active supervision over children’s internet access would be insufficient to secure the State’s objective of protecting children.”); *Free Speech Coalition, Inc. v. Rokita*, No. 1:24-cv-00980-RLY-MG, ___ F. Supp. 3d ___, 2024 WL 3228197, at *17-18 (S.D. Ind. June 28, 2024) (finding that “[t]here are two possible narrower, effective alternatives to restrict minors’ access to harmful materials” and Indiana “chose an ineffective and more broad method to protect minors from harmful materials than other alternatives”); *Gonzales*, 478 F. Supp. 2d at 813–14 (finding that there exist less restrictive alternatives to punishing sites for failure to age gate); *see also Griffin*, 2023 WL 5660155 at *21 (“Age-verification requirements are more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies.”); *id.* at *6–7 (describing existing parental controls available to parents, including, the ability to use wireless routers “to block certain websites or online services that they deem inappropriate, set individualized content filters for their children, and monitor the websites their children visit and the services they use,” and the ability to use parental controls on internet browsers “to control which websites their children can access”).

Moreover, HB 1181’s content restriction would not be narrowly tailored even if it applied only to websites that exclusively host adult content. Regardless of whether Texas believes sexual materials “add[] anything of value to society,” they are “as much entitled to the protection of

free speech as the best of literature.” *Interactive Digit. Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 958 (8th Cir. 2003) (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)); *see also Brown*, 564 U.S. at 790 (noting that First Amendment principles apply to new forms of communication regardless of their esthetic and moral value).

Other courts, applying this Court’s precedents, have consistently struck down age-verification laws because they failed strict scrutiny. *See PSINet Inc. v. Chapman*, 362 F.3d 227, 235 (4th Cir. 2004) (noting that courts have “consistently struck down as unconstitutional” regulations that suppress a large amount of speech that adults have a constitutional right to receive); *Am. Booksellers Found. for Free Expression*, 799 F. Supp. 2d at 1082–83 (striking down an age-verification statute that could have a “chilling effect on protected speech”); *Dean*, 342 F.3d at 101 (“[R]estrictions aimed at minors may not limit non-obscene expression among adults.”); *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819, 831 (E.D. Ark. 2004) (holding unconstitutional a prohibition on the display of material harmful to minors because it would burden adults’ and older minors’ access to non-obscene materials); *see also Fitch*, 2024 WL 3276409, at *12; *Rokita*, 2024 WL 3228197, at *18; *Griffin*, 2023 WL 5660155, at *17.

CONCLUSION

For the reasons stated above, this Court should overturn the Fifth Circuit's decision below.

Respectfully submitted,

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