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

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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

KYLE D. HIGHFUL
Assistant Solicitor General

COY ALLEN WESTBROOK
JOHN RAMSEY
Assistant Attorneys General

Counsel for Respondent

QUESTION PRESENTED

Petitioners do not dispute that if they were brick-and-mortar bookstores or sidewalk magazine stands, *Ginsberg v. New York* would permit Texas to require them to check the age of their customers before selling them pornography. 390 U.S. 629, 634-35 (1968). Petitioners instead insist that because they have moved their business online, the First Amendment allows them to provide access to nearly inexhaustible amounts of obscenity to any child with a smartphone.

For thirty years, due to technological limitations, governments have struggled with how to translate *Ginsberg*'s holding from bookstores to the internet without impinging upon the constitutional rights of adults. *See Ashcroft v. ACLU,* 542 U.S. 656 (2004)*; Reno v. ACLU*, 521 U.S. 844 (1997). Technology, however, has evolved: As experience from all over the world and a host of industries confirms, website operators can now create adult-only zones where adults can indulge in materials unsuited for children. The question presented here is thus:

Given that a State may, consistent with the Constitution, restrict minors' access to pornographic materials, whether that State may require a commercial entity that sells such materials to take commercially reasonable steps to verify the age of its customers.

TABLE OF CONTENTS

Page

Question Presented ... I
Table of Authorities ... IV
Introduction ... 1
Statement ... 3
I. Factual background ... 3
A. Childhood exposure to pornography ... 3
B. The operation of pornographic websites ... 6
II. H.B. 1181 ... 8
III. Procedural History ... 9
Reasons To Deny the Petition ... 11
I. This Court's review is premature. ... 12
A. The interlocutory posture of this case counsels against granting review. ... 12
B. There is no circuit split requiring this Court's attention at the present time. ... 14
C. The Court would benefit from further percolation regarding how to apply *Ginsberg* in the light of advances in technology. ... 18
II. The Fifth Circuit properly applied this Court's precedent, obviating any need for immediate intervention. ... 21
A. Even adults lack a constitutional right to access much of the content on Petitioners' websites. ... 22
B. The Fifth Circuit correctly applied this Court's precedent allowing States to protect minors from age-inappropriate material. ... 23
1. *Ginsberg* provides the appropriate test. ... 23

2. H.B. 1181's age-verification requirement easily survives rational-basis review under *Ginsberg*. 24
3. Neither *Reno* nor *Ashcroft* requires the application of strict scrutiny. 26
4. The other cases cited by Petitioners are inapplicable... 30

C. Even if the Fifth Circuit erred, the Court is unlikely to reverse its judgment vacating the preliminary injunction.................................. 32

Conclusion 34

TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott v. Veasey,
580 U.S. 1104 (2017) 12-14
ACLU v. Johnson,
194 F.3d 1149 (10th Cir. 1999) 16
ACLU v. Mukasey,
534 F.3d 181 (3d Cir. 2008) 17
Am. Booksellers Found. v. Dean,
342 F.3d 96 (2d Cir. 2003) 15
Armour v. City of Indianapolis,
566 U.S. 673 (2012) 26
Ashcroft v. ACLU,
542 U.S. 656 (2004) .... I, 16, 17, 25-30
Box v. Planned Parenthood of Ind. & Ky., Inc.,
139 S.Ct. 1780 (2019) 21
Broadrick v. Oklahoma,
413 U.S. 601 (1973) 29
Brown v. Ent. Merchs. Ass'n,
564 U.S. 786 (2011) 2, 18, 23, 24, 29, 30
Burson v. Freeman,
504 U.S. 191 (1992) 33
Calvert v. Texas,
141 S.Ct. 1605 (2021) 21
Castro v. United States,
540 U.S. 375 (2003) 28
Cohen v. California,
403 U.S. 15 (1971) 31
Counterman v. Colorado,
600 U.S. 66 (2023) 24

Page(s)

***Cases (ctd.)*:**

Cutter v. Wilkinson,
544 U.S. 709 (2005) 20

DeVillier v. Texas,
601 U.S. 285 (2024) 14

Elonis v. United States,
575 U.S. 723 (2015) 24

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 23, 30

Estelle v. Gamble,
429 U.S. 97 (1976) 12

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 24

Free Speech Coal. v. Paxton,
No. 23-50627 (5th Cir.) 1, 10

Free Speech Coal. v. Paxton,
No. 23A925 (U.S. Apr. 30, 2024) 11

Ginsberg v. New York,
390 U.S. 629 (1968) .... I, 1-3, 11, 18, 21-26, 27-31

Glossip v. Gross,
576 U.S. 863 (2015) 2, 23, 30

Goldman v. Citigroup Glob. Markets Inc.,
834 F.3d 242 (3d Cir. 2016) 17

Greenlaw v. United States,
554 U.S. 237 (2008) 27

Iancu v. Brunetti,
588 U.S. 388 (2019) 24

Jennings v. Stephens,
574 U.S. 271 (2015) 32

Page(s)

***Cases (ctd.)*:**

Miller v. California,
413 U.S. 15 (1973) 22, 23, 25, 28
Mt. Soledad Mem'l Ass'n v. Trunk,
567 U.S. 944 (2012) 13
Nat'l Football League v. Ninth Inning, Inc.,
141 S.Ct. 56 (2020) 13
PSINet, Inc. v. Chapman,
362 F.3d 227 (4th Cir. 2004) 16
Reno v. ACLU,
521 U.S. 844 (1997) .... I, 2, 15, 16, 18, 19, 26-30
Sable Commc'ns of Cal., Inc. v. FCC,
492 U.S. 115 (1989) 23, 26, 31, 32
Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 17
Texas v. Aylo,
No. D-1-GN-24-001275 (250th Dist. Ct.,
Travis County, Tex., Feb. 26, 2024) 10
Thompson v. Oklahoma,
487 U.S. 815 (1988) 1
United States v. Hansen,
599 U.S. 762 (2023) 22
United States v. L. A. Tucker Truck Lines, Inc.,
344 U.S. 33 (1952) 28
United States v. Philip Morris USA Inc.,
546 U.S. 960 (2005) 12
United States v. Playboy Ent. Grp., Inc.,
529 U.S. 803 (2000) 31, 32
United States v. Sineneng-Smith,
590 U.S. 371 (2020) 28

Page(s)

***Cases (ctd.)*:**

United States v. Stevens,
559 U.S. 460 (2010) 31
Veasey v. Abbott,
830 F.3d 216 (5th Cir. 2016) 13
Veasey v. Abbott,
888 F.3d 792 (5th Cir. 2018) 14
Webster v. Fall,
266 U.S. 507 (1925) 28
Williams-Yulee v. Fla. Bar,
575 U.S. 433 (2015) 33
Wrotten v. New York,
560 U.S. 959 (2010) 13

Constitutional Provisions, Statutes, and Rules:

U.S. Const. amend.:
I .... I, 2, 3, 9, 10, 15, 16, 18, 21, 22, 25, 29, 30
VIII 9
XIV 9
47 U.S.C. §230 9-11
Communications Decency Act of 1996 15
N.Y. Penal Law §484 (1965) 25
Tex. Civ. Prac. & Rem. Code:
§129B.001(1) 27
§129B.001(6) 8, 22, 24, 25, 27, 28
§129B.001(6)(B)(iii) 8, 22
§129B.002 27
§129B.002(a) 8, 22, 29
§129B.002(b) 9

Page(s)

***Constitutional Provisions, Statues and Rules (ctd.)*:**

§129B.003 27
§129B.003(b) 9
§129B.004 .... 22, 29
§129B.004(1) 9
§129B.006(a) 9
§126B.006(b)-(c) 9
§129B.006(d) 9

Other Authorities:

Amanda L. Giordano, *What to Know About Adolescent Pornography Exposure*, PSYCH. TODAY (Feb. 27, 2022), https://tinyurl.com/Psych 5-6

Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography,* 45 VT. L. REV. 43 (2020) 3, 5

Chiara Sabina, et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 CYBERPSYCHOLOGY & BEHAVIOR 691 (2008) 5

David Horsey, *Our Social Experiment: Kids with Access to Hard-Core Porn*, L.A. TIMES (Sept. 3, 2013), https://perma.cc/9DGH-NZBN 3

House Comm. on Judiciary & Civ. Juris., Bill Analysis, Tex. C.S.H.B. 1181, 88th Leg., R.S. (2023) 1

Kevin Granville and Ashley Gilbertson, *In Amish Country, the Future Is Calling*, N.Y. TIMES (Sept. 15, 2017) 33

Page(s)

***Other Authorities (ctd.)*:**

Khadijah B. Watkins, *Impact of Pornography on Youth*, 57 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 89 (2018) 5

Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996).................. 19

Lexie Pelchen, *Internet Usage Statistics In 2024*, FORBES HOME (Mar. 1, 2024), https://tinyurl.com/forbesinternet2024...................... 15

Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat*, POLITICO (Aug. 8, 2023, 4:30 AM EDT), https://tinyurl.com/Novicoff2023 1

Matt Raymond, *How 'Big' is the Library of Congress*, LIBR. OF CONG. BLOGS (Feb. 11, 2009), https://blogs.loc.gov/loc/2009/02/how-big-is-the-library-of-congress....................................... 5

Peggy Orenstein, *The Troubling Trend in Teenage Sex*, N.Y. TIMES (Apr. 12, 2024).................... 4

Press Release, Off. of the Tex. Att'y Gen., Texas Secures Settlement with Operator of Major Pornography Website, Ensuring Compliance with Texas Law (Apr. 26, 2024), available at https://tinyurl.com/hb1181settlement... 7

Statista (Apr. 25, 2024), https://tinyurl.com/5ankuf9y;...................................... 20

Stephen M. Shapiro, et al., SUPREME COURT PRACTICE (11th ed. 2019) 12

Page(s)

***Other Authorities (ctd.)*:**

William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1983) 13

William Melhado, *Pornhub suspends site in Texas due to state's age-verification law*, TEX. TRIBUNE (Mar. 14, 2024), https://perma.cc/N9K6-W7CL 19

William W. Van Alstyne & Kurt T. Lash, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY 885 (5th ed. 2014) 25

INTRODUCTION

Children have omnipresent and instantaneous access to unlimited amounts of online pornography, and more than a million Texas "youth experience unwanted online exposure to sexually explicit material." House Comm. on Judiciary & Civ. Juris., Bill Analysis at 1, Tex. C.S.H.B. 1181, 88th Leg., R.S. (2023). This pornography is a far cry from the "girlie magazines" of a bygone era and is all-too-often marked by violent, graphic, and degrading content. *E.g.*, ROA.538.[1] And the growing consensus is that childhood access to this mountain of often misogynistic smut "is creating a public health crisis." Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat*, POLITICO (Aug. 8, 2023, 4:30 AM EDT), https://tinyurl.com/Novicoff2023.

For decades, this Court has recognized that all "50 States" bar minors from "purchas[ing] pornographic materials." *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988). Texas is no exception. Furthermore, the Court has held that whatever rights adults may enjoy, States may bar those who sell pornography from peddling their wares to minors. *Ginsberg*, 390 U.S. at 645.

House Bill 1181—the law challenged here—fits comfortably within the principle from *Ginsberg*. H.B. 1181 does not prohibit the performance, production, or even sale of pornography. Instead, it simply requires the pornography industry that makes billions of dollars from trafficking in obscenity to take commercially reasonable steps to ensure that those who access the material are adults. Nothing about that requirement is exceptional.

---

[1] "ROA" refers to the record on appeal in *Free Speech Coalition v. Paxton*, No. 23-50627 (5th Cir.).

What *is* exceptional is Petitioners' request that this Court nullify Texas's ability to protect minors from hardcore pornography based on nothing but a thin preliminary-injunction record. Contrary to Petitioners' tales of a circuit split, the Fifth Circuit is the only circuit court to have addressed the constitutionality of online age-verification requirements in *nearly twenty years*. When the cases Petitioners rely on were decided, online streaming was in its infancy and DVDs were competing with VHS cassettes as the technology of mass entertainment. Such dusty decisions say nothing about the relevant First Amendment question: Whether it is "*currently* possible to exclude persons from accessing certain messages on the basis of their" age. *Reno*, 521 U.S. at 890 (O'Connor, J., concurring in part & dissenting in part; emphasis added). Today, age verification "is widely used by thousands of sellers and their consumers on a daily basis around the world, in a variety of contexts." ROA.403. Indeed, it is undisputed that major pornographic websites use such age-verification technology. ROA.403-04. The notion that States cannot prevent children from accessing obscenity without also blocking adults from accessing it is no longer remotely true.

Nor is there any basis for Petitioners' claim that H.B. 1181 conflicts with this Court's precedents. Not only has this Court repeatedly held that States can protect children from obscenity and even reaffirmed *Ginsberg* by name, *e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793-94 (2011), it has also held that where a State has a power to do something, there must be a way to do so, *see Glossip v. Gross*, 576 U.S. 863, 869 (2015). In today's world, age verification is the only way to protect children from exposure to hardcore pornography.

Furthermore, not only does H.B. 1181 comport with the First Amendment and this Court's precedents, but there are special reasons to deny *this* Petition. For one, this case is still in an interlocutory posture; the Court should not address the question presented without the benefit of discovery. For another, other circuits will soon address challenges to age-verification requirements like H.B. 1181's; the Court should let this issue percolate. Regardless, because H.B. 1181 regulates obscenity that not even adults have a constitutional right to view, it does not squarely present how to apply *Ginsberg* in the context of today's internet.

STATEMENT

I. Factual background

A. Childhood exposure to pornography

1. "Most of today's pornography does not reflect consensual, loving, healthy relationships. Instead, pornography teaches dominance, aggression, disrespect, and objectification." Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography,* 45 VT. L. REV. 43, 43 (2020) (emphasis omitted). Indeed, "[f]or the first time in the history of humanity, children can easily be exposed to the most extreme, misogynistic sex acts imaginable, thanks to the phenomenon of Internet porn." David Horsey, *Our Social Experiment: Kids with Access to Hard-Core Porn*, L.A. TIMES (Sept. 3, 2013), https://perma.cc/9DGH-NZBN.

The dramatic rise in what is commonly called "choking" is particularly concerning given that it is "defined by medical science as 'nonfatal strangulation'" and "poses grave neurological harms to victims, including unconsciousness, brain injury, seizure, motor and speech

disorders, memory loss," and PTSD. ROA.368. And, not by coincidence, children mirror such conduct. *See, e.g.*, Peggy Orenstein, *The Troubling Trend in Teenage Sex*, N.Y. TIMES (Apr. 12, 2024), https://tinyurl.com/2mp4z4j2 (tying the spike of "sexual strangulation" of girls "between the ages of 12 and 17" to online pornography, where such behavior has become a "staple").

Although an *amicus* tries to portray Petitioners' websites as somehow more wholesome than other pornographic websites, ICMEC Br. 14-16, nothing could be further from the truth. For example, Petitioner Xnxx hosts more than 250,000 free videos of "teen bondage gangbang[s]," including one in which a young woman is restrained, gagged, strangled, and slapped while having sexual intercourse with multiple men for 36 minutes. ROA.538. As of the preliminary-injunction hearing, that video alone had 671,000 views. ROA 538-39. Nor is it an outlier. One Petitioner's site listed 306,230 videos of "perfect girl porn," 579,497 videos of "teen hardcore" porn, and 328,273 videos of "young petite porn." ROA.399. Another Petitioner's website included over 200,000 videos in the "*Un Consesual* [sic]" category, and 198,000 videos in the "*Non Consesual* [sic] Porn Porn videos"—deliberate misspellings to conceal visual depictions of *rape*. ROA.368 (emphases added). A third popular category on many of Petitioners' sites is hentai, which is the "pornified" version of cartoons, often featuring "a grotesque creature penetrating a girl with an enormous phallus or tentacle." ROA.368. Modern pornography contains many scenes of aggression, including "gagging, slapping, hair pulling, and choking," and in 97% of those scenes, women are the targets. ROA.367-68.

Today's digital environment offers inexhaustible amounts of this smut. For example, Petitioner Pornhub

transferred 6,597 petabytes of data in 2019 alone. Romney, *supra*, at 50. That represents "1.36 million hours (169 years) of new content [that] were uploaded to the site," *id.*—or nearly 90,000 times the data that was in the Library of Congress in 2009, Matt Raymond, *How 'Big' is the Library of Congress*, LIBR. OF CONG. BLOGS (Feb. 11, 2009), https://blogs.loc.gov/loc/2009/02/how-big-is-the-library-of-congress. Pornhub bragged that if one "started watching 2019's new videos in 1850, you'd still be watching today." ROA.343.

2. Kids on average are first exposed to pornography when they are just 11 years old. Khadijah B. Watkins, *Impact of Pornography on Youth*, 57 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 89 (2018). According to British regulators, hentai—again, pornographic cartoons—is particularly popular with "children aged 6-12." ROA.369.

One study based on data collected in 2006 is particularly telling: It reported that participants were as young as eight when they first viewed online pornography, and 72.8% had done so by 18. Chiara Sabina, et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 CYBERPSYCHOLOGY & BEHAVIOR 691, 691-92 (2008). That same study found that over a third of male participants reported viewing "[s]exual activity involving bondage"; almost a third, "[s]exual activity between people and animals"; over a fifth, "[s]exual activity involving urine or feces"; and almost that many, "[r]ape or sexual violence." *Id.* at 693.

And all of that was *before* the explosion of smartphone use among children since the iPhone was introduced in 2007. Today, "using smartphones to access free pornography online is the most common means of viewing pornographic material." Amanda L. Giordano,

What to Know About Adolescent Pornography Exposure, PSYCH. TODAY (Feb. 27, 2022), https://tinyurl.com/GiordanoPsych.

3. Children who habitually view pornography exhibit "a host of mental health afflictions," including depression, disassociation, and other behavioral problems such as emulating sexual strangulation, dating violence, and sexual coercion. ROA.369-70. A British study found that "42% of 15-16-year-olds expressed the desire to mirror pornography—and more than half of all boys believe that online porn depicts realistic sexuality." ROA.370. "Research also shows that minors who view porn are at a higher risk of adult perpetration of child sexual abuse." ROA.370. Although the risk is more acute with young girls, any child exposed to pornography is "more likely to display hypersexualization and to develop paraphilias (*e.g.*, exhibitionism, voyeurism)." ROA.370.

Studies also suggest that pornography exposure can lead to greater use of tobacco, alcohol, and illegal drugs, ROA.371, symptoms of "irritability, poor social functioning, impulsiveness, and social anxiety," and "dysfunctional stress responses and poor executive function," ROA. 371. Children exposed to pornography may suffer "impairments to judgment, memory, and emotional regulation." ROA.371. And it "may trigger adolescent depression and psychosomatic symptoms" such as "headache, irritability, [and] trouble sleeping." ROA.371.

B. The operation of pornographic websites

Petitioners' business models generally fall into two categories: advertisement-based and subscription-based. The first category generates revenue from "advertising placements on its website and through referral fees generated from certain advertisements placed by third party content creators." ROA.249. The second

generates revenue from subscriptions, which permit customers (many of whom have provided credit-card information) to view adult content uploaded by studios from around the world. ROA.250-51. The commercial success of this second category casts considerable doubt on any suggestion (*e.g.*, Pet.9) that modern identity-verification technology dissuades adults from accessing such sites.

Like the sellers of other age-restricted items or services, many pornographic websites already employ some form of age verification. For example, several Petitioners use the age-verification provider Yoti in other jurisdictions, ROA.403-04, as does the operator of Chaturbate, who has brought itself into compliance with H.B. 1181 in Texas and settled an existing enforcement action while this Petition was pending.[2] Age verification is also used around in the world and in other industries, like alcohol and tobacco sales and gambling. ROA.403.

Age-verification technology comes in three general types. ROA.1836. *First*, government-issued-document verification matches a user's "selfie" with a picture of a government-issued identification document. ROA.1836. *Second*, age-estimation algorithms can use up to 126 biometric markers on a user's face—without retaining the actual image of the face—to estimate how old the user is based on facial structure. ROA.1839. *Third*, software can use the existence of some other fact to infer the age of the person seeking to access the website—for example,

---

[2] *See* Press Release, Off. of the Tex. Att'y Gen., Texas Secures Settlement with Operator of Major Pornography Website, Ensuring Compliance with Texas Law (Apr. 26, 2024), available at https://tinyurl.com/hb1181settlement (including a link to the settlement agreement).

someone who is a commercial airline pilot must be over 18 years old. ROA.1840. Regardless of the method used, the age-verification process begins when the user accesses a covered site and is redirected to the website of a third party where the user enters the necessary information to verify his or her age. ROA.1836-37. That third party provides Petitioners only "the answer to the question, 'Is this person over 18? Yes or No.'" ROA.1837.

II. H.B. 1181

To combat the spread of hardcore pornography to minors, the Texas Legislature enacted H.B. 1181. It applies to commercial entities that "knowingly and intentionally publish[] or distribute[] material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code §129B.002(a). H.B. 1181's definition of sexual material harmful to minors tracks traditional obscenity law and speaks in terms of what is "patently offensive" under "contemporary community standards," "appeal[s] to or pander[s] to the prurient interest," and "lacks serious literary, artistic, political, or scientific value for minors." *Id.* §129B.001(6). It specifically targets salacious depictions of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, [and] excretory functions …." *Id.* §129B.001(6)(B)(iii).

Once triggered, H.B. 1181 requires a website to do two things. *First*, it must "use reasonable age verification methods" to verify that the user "is 18 years of age or older." *Id.* §129B.002(a). This is the requirement that Petitioners challenge in this Court. To comply, the pornographer must require the user to (1) "provide digital identification" or (2) "comply with a commercial age verification system that verifies age using" a "government-issued identification," or "commercially reasonable

method that relies on public or private transactional data to verify the age of an individual." *Id.* §129B.003(b). To ensure user privacy, the age verifier "may not retain any identifying information of the individual." *Id.* §129B.002(b). *Second*, in the portion of H.B. 1181 that remains enjoined, pornographers are required to display health warnings on behalf of the Texas Health and Human Services Commission. *Id.* §129B.004(1).

H.B. 1181 empowers the Texas Attorney General to bring civil-enforcement actions in state court for injunctive relief and attorneys' fees and costs. *Id.* §129B.006(a), (d). Civil penalties are also available for violation of the age-verification requirement. *Id.* §126B.006(b)-(c).

III. Procedural History

Petitioners include: (1) Free Speech Coalition Inc., an association of pornographic actors, producers, distributors, and retailers; (2) foreign and domestic producers, sellers, and licensers of pornography; and (3) Jane Doe, a pornographic performer whose performances are featured on various websites but who chose to proceed in this action pseudonymously. ROA.19-24. Petitioners all allege that H.B. 1181 violates the First Amendment, ROA.42-43, and the Due Process and Equal Protection Clause of the Fourteenth Amendment, ROA.43. A subset of Petitioners also allege that H.B. 1181 is preempted by 47 U.S.C. §230, ROA.43-44, and violates their Eighth Amendment rights, ROA.44. Petitioners moved for a preliminary injunction. ROA.54.

Sixteen days after Petitioners sued the Attorney General and barely a week before H.B. 1181 was scheduled to go into effect, the district court held a hearing on the application for a preliminary injunction. At the hearing, there was little dispute that much of the content on these websites is obscene. Further, expert testimony

showed that age-verification technology is "not new" for pornographic websites, which "use it elsewhere in the world." ROA.1854; *see* ROA.402-03. Despite refusing to view even a sample of the extraordinarily graphic content available on Petitioners' websites, ROA.1881, however, the district court insisted that mainstream movies like those on Netflix can be "as raw as any pornography," ROA.1877-78. *But see, e.g.*, ROA.538 (describing at least six categories of "bondage" videos).

Eight days after the hearing, the district court issued a pre-enforcement preliminary injunction on the grounds that H.B. 1181 facially violates the First Amendment, ROA.1770, and that certain Petitioners are likely to succeed on their Section 230 claims, ROA.1762. Texas asked the district court to stay its injunction, ROA.1793, but that request was denied, ROA.1828.

The Attorney General immediately filed his notice of appeal and moved to stay the district-court proceedings. ROA.1771; ROA.1793-811. The U.S. Court of Appeals for the Fifth Circuit granted an administrative stay and accelerated the case to the next available oral-argument sitting. ECF.66-1.[3] A month later, the court of appeals vacated its administrative stay and granted a stay of the injunction pending the resolution of the appeal. ECF.125. While the district court's preliminary injunction was stayed, but before the Fifth Circuit issued its merits opinion, Texas filed a state-court enforcement action against Aylo, Pornhub's parent company. *Texas v. Aylo*, No. D-1-GN-24-001275 (250th Dist. Ct., Travis County, Tex., Feb. 26, 2024).

---

[3] "ECF" refers to the Fifth Circuit docket number in *Free Speech Coalition v. Paxton*, No. 23-50627.

In March 2024, the Fifth Circuit vacated its stay pending appeal and reversed the district court's injunction regarding H.B. 1181's age-verification requirement. Pet.App.1a-27a. The Fifth Circuit, however, permitted the injunction regarding H.B. 1181's health warnings to remain in effect. Pet.App.27a-38a. The Fifth Circuit recognized that strict scrutiny is not applicable to H.B. 1181 because this Court's opinion in *Ginsberg* controlled. Pet.App.17a. Specifically, H.B. 1181 is a "regulation[] of the distribution *to minors* of materials obscene *for minors*." Pet.App.8a.[4]

Weeks after the opinion issued, Petitioners asked the Fifth Circuit to stay its mandate and effectively reinstate the district court's injunction. The Fifth Circuit denied Petitioners' motion, ECF.148-1; ECF.149-2, as did this Court, *Free Speech Coalition v. Paxton*, No. 23A925 (U.S. Apr. 30, 2024).

REASONS TO DENY THE PETITION

Petitioners ask the Court to resolve what they insist is an "exceptionally important" question, Pet.2, based solely on a single district court's preliminary-injunction record, before the parties can fully litigate the issues in the district court and on appeal, and before any other court of appeals can grapple with the issues here. There is no need for the Court to rush to judgment, and every reason to think that its analysis of the complex question would benefit from allowing the ordinary litigation (and percolation) process to unfold.

[4] The Fifth Circuit also held that Section 230 does not preempt H.B. 1181. Pet.App.38a-42a. Petitioners do not challenge that holding in this Court. Pet.12 n.2.

I. This Court's Review Is Premature.

Although the question presented here is important, there are at least three reasons why review by this Court now would be premature. *First*, the interlocutory posture of this case makes it unsuited to review on the merits. *Second*, the putative circuit split is illusory. *Third*, because the internet has dramatically evolved since this Court first addressed age-verification laws more than a quarter century ago, the Court would benefit from allowing more than one court of appeals to assess the functionalities of today's age-verification technologies. As Petitioners concede, Texas is not the only State to recently enact age-verification requirements for pornographic websites. Other circuits thus will also be able to soon address the issue presented here.

A. The interlocutory posture of this case counsels against granting review.

This Court's traditional rule is to "deny[] interlocutory review" even of cases presenting significant statutory or constitutional questions. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting) (criticizing deviation from that rule as "inexplicable"); *see also, e.g.*, *United States v. Philip Morris USA Inc.*, 546 U.S. 960 (2005); Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 4-19 (11th ed. 2019). Although the Court in recent years sometimes has been more willing to relax the stringency of this traditional rule, the Court has never rejected it—and for good reason. The rule serves many salutary purposes, several of which are particularly important here given the limited record.

The Chief Justice reiterated the presumption against review of interlocutory decisions in *Abbott v. Veasey*, 580 U.S. 1104 (2017) (*Veasey II*). There, the en banc Fifth Circuit concluded that Texas's interest in combatting

voter fraud did not justify requiring a voter to present an ID at the polls largely because the law did not apply to mail-in ballots, where fraud is "far more prevalent." *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) (*Veasey I*). The Fifth Circuit remanded, however, "for further proceedings on an appropriate remedy." *Veasey II*, 580 U.S. at 1104 (Roberts, C.J., respecting the denial of certiorari). This Court denied interlocutory review despite the undisputed national importance of the question because "[t]he issues will be better suited for certiorari review" "after entry of final judgment." *Id.*

Similarly, *Wrotten v. New York* involved a question about the use of video testimony at a criminal trial in a way that implicated the Confrontation Clause. 560 U.S. 959, 959 (2010) (Sotomayor, J., respecting the denial of certiorari). *Wrotten* raised an "important" question in a "strikingly different context" from this Court's closest precedent. *Id.* Nonetheless, the Court denied review because the state court remanded "for further review, including of factual questions." *Id.* As Justice Sotomayor wisely explained, this Court's denial of review was warranted because "procedural difficulties" may arise "from the interlocutory posture." *Id. Veasey* and *Wrotten*, moreover, are far from unique. *See, e.g.*, *Nat'l Football League v. Ninth Inning, Inc.*, 141 S.Ct. 56, 56-57 (2020) (Kavanaugh, J.) (citing *Veasey II*); *Mt. Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J.).

The Court's presumption against reviewing interlocutory decisions reflects the reality that litigation is unpredictable, and later developments may change the character of—or entirely obviate the need to address—the question presented. *See, e.g.*, William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). Again, this can be seen

in *Veasey II*. That case never returned to the Court because "[d]uring the remand, the Texas Legislature passed a law designed to cure all the flaws" identified by the plaintiffs. *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018) (*Veasey III*). Because "[t]he legislature succeeded in its goal," *id.*, this Court did not need to address questions about whether the superseded statute complied with federal law. It is also seen in more recent cases where the Court granted review of interlocutory orders, only to learn at the merits stage that the question's "premise" may not hold. *DeVillier v. Texas*, 601 U.S. 285, 292 (2024).

Although there is no indication that the Legislature intends to revisit H.B. 1181 at the present time—though legislative revision is certainly possible, especially given that the Fifth Circuit affirmed the district court's preliminary injunction with respect to H.B. 1181's health-warnings requirement—there is a significant possibility that additional facts *about* H.B. 1181 will develop, which may affect this Court's analysis. After all, the case was in the district court for less than a month before the court issued its injunction. ROA.8, 14. And the Fifth Circuit's decision itself anticipates further factual development. Pet.App.34a n.63. Indeed, the Petition is premised on a factual theory that Texas vigorously disputes—*viz.*, that age-verification using today's technology could reasonably chill adults' willingness to visit Petitioners' websites. The Court should not grant review now when still unresolved factual questions about what technology allows could well be relevant to the Court's ultimate decision.

B. There is no circuit split requiring this Court's attention at the present time.

The propriety of interlocutory review aside, Petitioners fail to grapple with how the internet has evolved in

the decades since other circuit courts addressed age-verification technology. Because a critical part of those courts' reasoning depended on how the law applied to *then-extant* technology, no other "circuit that has addressed the relevant question," Pet.30, and thus there is no circuit split requiring this Court's intervention. Today's internet is nothing like the internet of twenty years ago, and it disserves the law to pretend otherwise.

Petitioners, for example, rely (at 31) on the Second Circuit's opinion in *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003). But there, no one "challenged the district court's finding that the technology available to prevent minors from accessing websites and discussion groups has not developed significantly since the Supreme Court decided *Reno.*" *Id.* at 101. In *Reno*—decided in 1997, when people generally accessed the internet through via dial-up modems—the Court held that provisions of the Communications Decency Act of 1996 ("CDA") that criminalized the transmission or display of certain indecent messages to minors violated the First Amendment. *Reno*, 521 U.S. at 849, 858-60.

Much has changed about the internet since *Reno* and *American Booksellers* were decided. Indeed, in 1996, when *Reno*'s record was developed, only "[a]bout 40 million people used the Internet." *Id.* at 850. That number is now around 5.35 *billion*, or around 66% of the world's population—with 94.6% of Americans having access to the internet. Lexie Pelchen, *Internet Usage Statistics In 2024*, FORBES HOME, (Mar. 1, 2024), https://tinyurl.com/forbesinternet2024. In 2003, when *American Booksellers* was decided, Facebook and YouTube did not exist; broadband access was both slow and a luxury good; no one had smartphones; and although rudimentary streaming and age-verification technologies existed,

they were nothing like today's. And given the technological limitations, it was "not currently possible to exclude persons from accessing certain messages on the basis of their identity." *Reno*, 521 U.S. at 890 (O'Connor, J., concurring in part).

Nor does the decision below conflict with the Fourth Circuit's decision in *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004). To start, the Virginia law at issue "bann[ed] the display of all 'electronic file[s] or message[s],' containing 'harmful' words, images or sound recordings, that juveniles may 'examine and peruse.'" *Id.* at 239 (alterations in original). Virginia conceded that the law ran afoul of this Court's decision *Ashcroft* (decided in 2004)—which, like *Reno*, held that a federal criminal law violated the First Amendment—because it was *not* remotely tailored to the interest of limiting the availability of sexual materials to minors. *Id.* at 234. H.B. 1181 is not remotely the same; it is directly targeted at Texas's interest in preventing minors from accessing obscenity. The Virginia statute in *PSINet* also violated *Ashcroft* because (unlike H.B. 1181) it established age verification as an affirmative defense rather than an element of a prima facie violation. *Compare id.*, *with Ashcroft*, 542 U.S. at 670-71.

Furthermore, the laws in *PSINet*, 362 F.3d at 235 n.2, and *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), relied on PIN numbers from credit cards to distinguish between children and adults. Consistent with this Court's statements in *Reno*, 521 U.S. at 881-82, the Tenth Circuit explained that such technologies were so poor in "permit[ting] *effective* prevention of access" by minors that any connection between the law and the State's interest was "illusory," *Johnson*, 194 F.3d at 1157-58. Not so here. Although discovery is not yet

complete, the record in this case already includes evidence that age-verification software is sophisticated, widespread, and capable of accurately verifying age without receiving (much less retaining) identifying information. ROA.1834-41, 1854. The lynchpin of the Second, Fourth, and Tenth Circuits' analysis thus no longer holds.

Petitioners also claim that the Fifth Circuit's opinion conflicts with the Third Circuit's decision in *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), which applied strict scrutiny to the federal Child Online Protection Act ("COPA"). Pet.31 n.9. But *Mukasey* was little more than *Ashcroft II*, which based its reasoning in critical part on the "current technological reality." 542 U.S. at 658. Moreover, as the Fifth Circuit correctly noted, the parties did not dispute the relevant level of scrutiny. Pet.App. 17a-19a; *infra* 27-28. As with this Court, the Third Circuit follows the party-presentation rule. *See, e.g.*, *Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d 242, 251 (3d Cir. 2016) (citing, *inter alia*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

Taken separately or together, none of these cases addresses the question addressed by the Fifth Circuit: Because States undoubtably have the authority to restrict minors' access to prurient materials to which adults have a right, can a State require websites in the business of peddling such materials to use effective, non-invasive, commercially available software to determine whether potential users are adults? Because the court below appears to be the first to have addressed *that* question, there is no circuit split meriting this Court's review.

C. The Court would benefit from further percolation regarding how to apply *Ginsberg* in the light of advances in technology.

Instead of addressing technology today, Petitioners suggests that the "rudimentary" 1990s internet is a better comparison than "the 1960s-Long-Island-lunch-counter setting of *Ginsberg*." Pet.25 n.5. That is a false choice; rather than reasoning by analogy, the Court should directly apply the rule existing from the nation's founding that the First Amendment does not protect a minor's right to access obscenity or a pornographer's right to provide such access. Regardless, by its own terms, *Ginsberg* was not about lunch counters but about "[t]he creation of 'adult zones'"—something which "is by no means a novel concept." *Reno*, 521 U.S. at 887 (O'Connor, J., concurring in part). And *Reno* did not question whether States can, technology permitting, create such "adult zones" online. *Id.* at 887 & n.1. As the Court has since explained, States can. *See Brown*, 564 U.S. at 793-94. Precisely because *Reno* turned largely on whether technology existed that would permit internet companies to "den[y] minors access to speech deemed to be 'harmful to minors'" without at the same denying adults access to speech deemed constitutionally protected, *Reno*, 521 U.S. at 887 & n.2, factual comparisons to *either* a 1960s era lunch counter *or* the 1990s internet are analytically unhelpful. Although the principle from *Ginsberg* should control this Court's analysis, percolation in the circuit courts should help the Court delineate the contours of any right of access in the modern, digital age.

In her concurrence in *Reno*, Justice O'Connor discussed how the law in *Ginsberg* created an adult-only zone in physical space, *Reno*, 521 U.S. at 889 (O'Connor, J., concurring in part), and why that concept did not

transmit well into the cyberspace of the 1990s, *id.* at 887. In the physical world, only two characteristics are necessary to make "it possible to create 'adult zones': geography and identity." *Id.* (citing Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 886 (1996)). After all, "[a] minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age)." *Id.* But in the 1990s and early 2000s, the internet entirely lacked "the twin characteristics of geography and identity," *id.*, which would have made it "possible to exclude persons from accessing certain messages on the basis of their identity," *id.* at 890.

The internet has fundamentally evolved and technological limitations no longer prevent companies from prohibiting minors from accessing their websites based on identity and geography. It is thus now "possible to create 'adult zones' [through] geography and identity." *Id.* at 889. In fact, Petitioners' own conduct demonstrates that this is not just possible—it happens in the real world. For example, Pornhub left the Texas market after the Fifth Circuit stayed the district court's injunction. William Melhado, *Pornhub suspends site in Texas due to state's age-verification law*, TEX. TRIBUNE (Mar. 14, 2024), https://perma.cc/N9K6-W7CL. Others have chosen the more tailored approach of using platforms like Yoti to restrict content by identity—and, by extension, by age. ROA.403-04. These facts demonstrate that it is now possible to distinguish adults from minors and between physical locations.

True, certain of Petitioner's *amici* have suggested that such technology is imperfect. For example, one points to the fact that "twenty percent of females and

thirty-two percent of males between the ages of *sixteen and twenty-four* use [Virtual Private Networks]" to mask their identity." ICMEC Br. 12-13 (citing Usage of virtual private networks (VPN) worldwide as of 4th quarter 2023, by age and gender, Statista (Apr. 25, 2024), https://tinyurl.com/5ankuf9y; emphasis added). That factual claim has not been tested in discovery, including whether such VPN use is constant or sporadic. Even assuming that the claim is true, however, it does not support Petitioners. That such technology is used by to young *adults* undercuts Petitioners' argument that H.B. 1181 will do nothing to prevent *children* from being exposed to hardcore pornography. Young children, for example, are particularly drawn to hentai—and there is no evidence that they have access to VPNs. Regardless, even if an unknown percentage of older minors (as opposed to young adults over the age of 18) use VPNs, *amici*'s own numbers suggest that approximately 70-80% or more of minors are *not* using VPNs. That would powerfully recommend H.B. 1181's value in advancing Texas's interest in protecting kids.

The key point here is that this Court should not wade into this question in the first instance. To date, no circuit has addressed the issue. And *Petitioners*—who bear the burden of proof—have not tried to show whether that VPN usage was predominantly by those between those between the ages of 18 and 24 (who have a recognized constitutional right to certain categories of pornography) or those between 16 and 17 (who do not). This argument thus is nowhere addressed in the Fifth Circuit's decision—itself a reason to ignore it for purposes of whether to grant certiorari. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

More broadly, the Court should not address how to apply *Ginsberg* in the context of today's internet until other circuits weigh in. Petitioners concede that other States have enacted age-verification laws like H.B. 1181. Pet.34. It is thus only a matter of time before other circuits address the issue and can determine whether they agree with the Fifth Circuit. The Court's decision-making process will be improved following such percolation. *See, e.g.*, *Calvert v. Texas*, 141 S.Ct. 1605, 1606 (2021) (statement of Sotomayor, J.); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S.Ct. 1780, 1784 (2019) (Thomas, J., concurring).

II. The Fifth Circuit Properly Applied This Court's Precedent, Obviating Any Need for Immediate Intervention.

There is also no need for this Court's review because far from "openly def[ying]" this Court, Pet.1, the Fifth Circuit's decision correctly applied the Court's precedent to hold that H.B. 1181's age-verification requirement is likely constitutional, Pet.App.1a-27a. The First Amendment does not allow even adults to access obscenity, and H.B. 1181 applies to overwhelming amounts of content that meet this Court's test for adult obscenity. And even assuming the content on Petitioners' websites is not obscene as to adults, because the Constitution does not protect access to such material for children, it also does not preclude the States from requiring entities like Petitioners to determine whether their customers are adults or children. H.B. 1181's age-verification requirement is a reasonable—and constitutional—way to do just that.

A. Even adults lack a constitutional right to access much of the content on Petitioners' websites.

It is " categorically settled" that obscenity "is unprotected by the First Amendment" and can be regulated. *Miller v. California*, 413 U.S. 15, 23 (1973). That is what H.B. 1181 does. It applies only to sites that host "sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code §129B.002(a); *see id.* §129B.004. And H.B. 1181's definition of "[s]exual material harmful to *minors*" largely tracks this Court's test for *adult* obscenity (emphasis added). *Compare id.* §129B.001(6), *with Miller*, 413 U.S. at 24. Again, H.B. 1181 targets hardcore pornography, including "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act." Tex. Civ. Prac. & Rem. Code §129B.001(6)(B)(iii).

Although much of the content on Petitioners' sites is too graphic to describe to this Court, it fits the Court's "plain examples" of obscenity for adults. *Compare Miller*, 413 U.S. at 25, *with* ROA.506-08, 538-39. As Petitioners have not alleged—let alone shown—that they have separate pages and advertisements for their obscene and non-obscene content even for adults, an injunction against H.B. 1181's enforcement is improper. *See Miller*, 413 U.S. at 26; *cf. United States v. Hansen*, 599 U.S. 762, 770 (2023) (rejecting facial invalidation). By itself, this point should defeat certiorari. If the Court wishes to address how to apply *Ginsberg* in today's world, it should do so in the context of a law addressed to content that adults have a right to access but minors do not, rather than, as with H.B. 1181, to content that *no one* has a constitutional right to access.

B. The Fifth Circuit correctly applied this Court's precedent allowing States to protect minors from age-inappropriate material.

Regardless, the Fifth Circuit correctly applied this Court's precedent. That H.B. 1181's definition "adds the phrases 'with respect to minors' and 'for minors'" to *Miller*'s language, ROA.67, does not mean that the Fifth Circuit's ruling "jarringly depart[s] from this Court's precedent on an important question of constitutional law." Pet.15. To the contrary, this Court has repeatedly recognized that a legislature may pass laws that protect minors from material that is "obscene *as to youths*." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (emphasis added); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). This rule recognizes that courts must "adjus[t] the definition of obscenity to social realities," including that material acceptable for adults sometimes is simply not appropriate for children. *Brown*, 564 U.S. at 793-94 (quoting *Ginsberg*, 390 U.S. at 638).

Because the States have power to protect children from obscenity, "it necessarily follows that there must be a constitutional means of carrying it out"—that is, to require purveyors of indecent material to take reasonable steps to determine whether their customers are of age. *Glossip*, 576 U.S. at 869 (cleaned up). H.B. 1181's age-verification requirement does precisely that without contradicting any of the inapposite cases on which Petitioners rely.

1. *Ginsberg* provides the appropriate test.

As the Fifth Circuit explained below, "*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 [lower courts] today." Pet.App.10a. Petitioners do not expressly

contest that *Ginsberg* stands for the proposition that because the Constitution does not guarantee minors the same right of access to pornographic materials, a provision that is applicable to minors is only subject to rational-basis review. 390 U.S. at 637.

Although much about the world has changed in the intervening decades, *supra* p. 15-16, the vitality of *Ginsberg* has not. To the contrary, this Court and its Justices have repeatedly cited *Ginsberg*—"albeit for different propositions," Pet.App.10a. *See, e.g.*, *Iancu v. Brunetti*, 588 U.S. 388, 408 (2019) (Breyer, J., concurring in part); *Elonis v. United States*, 575 U.S. 723, 741 (2015); *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 519 (2009). Indeed, it came up just last year. *Counterman v. Colorado*, 600 U.S. 66, 111 (2023) (Barrett, J., dissenting). If there were any doubt, *Brown* put it to rest. There, this Court split on many things, but not a single Justice suggested *Ginsberg* was no longer good law. 564 U.S. at 793 (majority op.); *id.* at 807 (Alito, J., concurring); *id.* at 838 (Thomas, J., dissenting); *id.* at 842 (Breyer, J., dissenting). And the controlling opinion made a point to distinguish sexual content from the proscription against violent materials. *See id.* at 792-93; Pet.App.10a.

2. H.B. 1181's age-verification requirement easily survives rational-basis review under *Ginsberg*.

The Fifth Circuit correctly applied *Ginsberg*'s rational-basis standard to this case, which requires age verification before the sale of materials that are harmful to minors. H.B. 1181 uses materially the same standard as the New York statute at issue in *Ginsberg* to define what constitutes "[s]exual material harmful to minors." Tex. Civ. Prac. & Rem. Code §129B.001(6). Specifically,

in *Ginsberg*, this Court examined a statute prohibiting the sale of materials harmful to minors, defined as

> any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

390 U.S. at 646 (reproducing N.Y. Penal Law §484 (1965)). H.B. 1181, in turn, defines sexual material harmful to minors as material "patently offensive" under "contemporary community standards," "appeal[s] to or pander[s] to the prurient interest," and "lacks serious literary, artistic, political, or scientific value for minors." Tex. Civ. Prac. & Rem. Code §129B.001(6).

To be sure, H.B. 1181 speaks in terms of "serious ... value for minors," *id.* §129B.001(6), rather than "utterly without redeeming social importance," *Ginsberg*, 390 U.S. at 646. But that reflects the *greater* leeway that First Amendment jurisprudence gives States to regulate obscenity post-*Miller*. *See* William W. Van Alstyne & Kurt T. Lash, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY 885 (5th ed. 2014). This means that, if anything, H.B. 1181 is even further away from the constitutional line than the law in *Ginsberg*. Furthermore, unlike the law in *Ginsberg*, H.B. 1181 is purely civil, which further lessens First Amendment concerns. *Ashcroft*, 542 U.S. at 660.

H.B. 1181 easily satisfies rational-basis review. "It is uncontested that pornography is generally inappropriate for children, and the state may regulate a minor's access to pornography." ROA.1714. Indeed, Petitioners concede that the State's interest here is compelling. ROA.1714. They had to under this Court's precedent. *See Sable*, 492 U.S. at 126 (recognizing a "compelling" interest). H.B. 1181 is also reasonably related to Texas's interest in protecting children. Since there is a compelling state interest in preventing children from accessing pornography on the internet, it is entirely reasonable to require Petitioners to check their users' ages before they access the websites. Because rational-basis review does not require the government to "draw the perfect line nor even to draw a line superior to some other line it might have drawn," *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012), H.B. 1181 passes constitutional muster.

3. Neither *Reno* nor *Ashcroft* requires the application of strict scrutiny.

Unable to meet their burden under *Ginsberg*, Petitioners (at 20-21) insist that because the internet is involved, this Court's decisions in *Reno* and *Ashcroft* require strict scrutiny. Petitioners are wrong.

In *Reno*, this Court distinguished the CDA from the law in *Ginsberg* based on the combined effect of four differences, namely, the CDA: (1) did not permit parental consent, (2) applied to more than just commercial transactions, (3) failed to cabin its definition of material harmful to minors or make an exception for material with serious social value, and (4) defined "minor" as under 18 rather than 17. *Reno*, 521 U.S. at 865-66.

Except for the fact that H.B. 1181 defines minors to include 17-year-olds, those distinctions are absent: H.B. 1181 applies only to commercial entities and requires age

verification by the person accessing their websites. *See* Tex. Civ. Prac. & Rem. Code §§129B.001(1), .002, .003. Nothing prevents parents from logging on to the sites on behalf of their children. And H.B. 1181 excludes at every turn any material with serious social value from the statute's definition of "sexual material harmful to minors." *Id.* §129B.001(6). Instead, H.B. 1181 targets hardcore pornography that "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." *Id.* The Fifth Circuit did not conflict with *Reno* by invoking the more on-point *Ginsberg*.

The Fifth Circuit recognized that *Ashcroft* is Petitioners' "best ammunition" because it applied strict scrutiny. Pet.App.16a; *Ashcroft*, 542 U.S. at 670. But the Fifth Circuit is correct that the parties there *never challenged* what level of scrutiny was appropriate. *See* Pet.App.17a-19a. This Court's rule "in both civil and criminal cases" is that courts typically must "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Although the decision not to challenge the level of scrutiny may seem strange in retrospect, it was not strange at the time because age-verification technology as it then existed could not reliably distinguish adults from minors. Thus, the law in *Ashcroft* would limit a rational adult's access to content he or she had a right to see. H.B. 1181 is materially different in every respect, and thus does not materially implicate any adult's constitutional rights.

Regardless, because no party challenged the scrutiny standard in *Ashcroft*, it would have been atypical for the Court to *sua sponte* raise the issue. "[A]s a general rule, our system 'is designed around the premise that [parties

represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument[s] entitling them to relief.'" *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (second alteration in original) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)). Thus, any distinction that may be drawn between *Ginsberg*'s and *Ashcroft*'s approaches is not dispositive.[5]

Moreover, both *Ashcroft* and *Reno* are distinguishable for additional reasons. As explained above, in *Reno*, the Court considered a challenge to a provision of the CDA that criminalized sending or displaying a lewd message in a way that is available to a minor. 521 U.S. at 859. Especially relevant here, the Court held the law unconstitutionally overbroad because it omitted *Miller*'s element that obscenity must relate to "sexual conduct." *Id.* at 870, 873. H.B. 1181 neither criminalizes pornography nor omits this crucial element. It instead merely requires reasonable steps to distinguish between adults and children, *see* Tex. Civ. Prac. & Rem. Code §129B.001(6), so that longstanding limitations on the distribution of pornography to children can be applied in today's digital age. *Supra* p. 23-24. As a result, H.B. 1181 does not "suppress[]" anything, let alone "a large amount of speech

---

[5] To the extent that Petitioners are asserting that *Ashcroft* implicitly overruled *Ginsberg* by applying strict scrutiny, that is also wrong. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also, e.g.*, *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

that adults have a constitutional right to receive and to address to one another." *Reno*, 521 U.S. at 874.

Ashcroft is similarly distinguishable. To start, COPA and H.B. 1181 function very differently: Like the CDA, COPA *criminalized* the "posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" *Ashcroft*, 542 U.S. at 661. By contrast, H.B. 1181 is not "enforced by severe criminal penalties." *Id.* at 660. As far as H.B. 1181 is concerned, pornographers can create, post, and sell as much obscenity as the market will tolerate. Thus, *Ashcroft*'s premise—that the challenged law "suppresse[d] a large amount of speech," *id.* at 665—does not apply. Similarly, age verification is the requirement in H.B. 1181, not an affirmative defense as in COPA, alleviating the risk that "speakers may self-censor rather than risk the perils of trial." *Id.* at 670-71. That is, if commercial pornography websites require age verification, they will not violate H.B. 1181 regardless of what content they offer or who accesses it. Tex. Civ. Prac. & Rem. Code §§129B.002(a), 129B.004. And as explained above, because of technological advances, it is also far easier and less invasive to age verify; in fact, it can be done via software that does not retain facial images. ROA.411-12. Finally, COPA was a federal law. Pre-enforcement facial challenges to state laws like H.B. 1181 raise significant federalism concerns, given that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973).

Far from cabining *Ginsberg*, Pet.26, *Brown* reaffirmed that even after *Ashcroft* and *Reno*, States may protect minors from content that is obscene as to minors even if adults have a First Amendment right to view such

materials. *See Brown*, 564 U.S. at 793-94. That rule "necessarily" allows States to create reasonable regulations about how to distinguish between minors and adults. *Glossip*, 576 U.S. at 869. That is precisely where H.B. 1181 steps in. Although Petitioners contend that there is a point where such age-verification measures cross the line and infringe upon the rights of adults, *Brown* makes clear that neither *Reno* nor *Ashcroft* hold where that line is. Thus, there is no conflict between the decision below and this Court's precedent that requires review.

4. The other cases cited by Petitioners are inapplicable.

Apart from *Reno* and *Ashcroft*, Petitioners point to three cases to show why this appeal of an issue on which there is currently no circuit split nonetheless merits this Court's review in an interlocutory posture. None supports Petitioners' argument.

They first turn (at 18) to *Erznoznik*, for the proposition that a law—there a local ordinance—can violate the First Amendment if it "burden[s] the rights of adults" in the process of "restricting minors' access to sexually inappropriate material." But *Erznoznik* did not turn on whether adults were denied access to materials inappropriate for minors. Instead, it invalidated an ordinance that "sweepingly forb[ade] display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness." 422 U.S. at 213. Because the ordinance was neither "directed against sexually explicit nudity, nor … otherwise limited," it prohibited things as mundane as "a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous." *Id.* Since "all nudity cannot be deemed obscene even as to minors," *id.*, *Erznoznik* does nothing to displace *Ginsberg.* Instead, it

merely reaffirmed that "to be obscene 'such expression must be, in some significant way, erotic.'" *Id.* at 213 n.10 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)). The term "erotic" plainly applies to the content here. *Cf. United States v. Stevens*, 559 U.S. 460, 465-66, 478 (2010) (suggesting that it may be constitutional to prohibit "crush videos," which "appeal to persons with a very specific sexual fetish" if appropriately tailored).

Petitioners are even more off to invoke (at 18-20) *Sable* and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), both of which involved outright bans of certain types of speech. In *Sable*, the Court addressed a federal law targeted at "dial-a-porn" services. *Sable*, 492 U.S. at 118. As this Court explained, the law "impose[d] an outright ban on indecent as well as obscene interstate commercial telephone messages." *Id.* at 117; *see also Playboy*, 529 U.S. at 814 (explaining *Sable* was a "complete statutory ban on the medium"). In *Playboy*, the law also worked an outright ban such that "for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so." *Playboy*, 529 U.S. at 807. From these cases—and particularly from *Playboy*—Petitioners derive a principle that the only standard that can apply to the regulation of pornography is strict scrutiny. Pet.19. *Playboy* said no such thing. Instead, this Court looked approvingly on the law in *Ginsberg* as a constitutional "state statute barring the sale to minors of material defined as 'obscene on the basis of its appeal to them.'" *Playboy*, 529 U.S. at 814 (quoting *Ginsberg*, 390 U.S. at 631).

Playboy and *Sable* are inapposite because H.B. 1181 is far from an outright ban on pornography. Petitioners can make, sell, or watch all the pornography they want.

All they must do is take commercially reasonable steps to ensure that their customers are adults. *See* Pet.App.16a. This is readily doable, as Texas's recent settlement with a major pornography company shows. *See supra* p. 7 & n.2. That Petitioners would rather forgo access to the Texas market than adopt commercially reasonable steps to keep children off their websites is their choice. But it does not transform H.B. 1181 into a complete ban on the sale of pornography in Texas or subject it to strict scrutiny under *Playboy* and *Sable.*

C. Even if the Fifth Circuit erred, the Court is unlikely to reverse its judgment vacating the preliminary injunction.

Finally, even if the Court were to disagree with the Fifth Circuit about the correct standard of scrutiny, review is still unwarranted because the Petitioners cannot show this Court would reverse the Fifth Circuit's *judgment*—which is what matters. "This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015). Under any standard, H.B. 1181's age-verification requirement is permissible.

It is undeniable that H.B. 1181 serves a critical state interest. The Court said so in *Sable*. 492 U.S. at 126. H.B. 1181 is also narrowly tailored to the realities of today's increasingly digital world, where the dangers of unmonitored and surreptitious internet access by children is omnipresent. This is one reason why Petitioners' suggestion (at 11, 21) that content-filtering software installed on home computers is a preferrable solution is a red herring. That suggestion ignores that in 1997, children could go online only at home or in a crowded public venue such as a classroom or public library. Today, internet access is ubiquitous thanks to smartphones, smart watches, and

smart TVs—plus any other Wi-Fi-enabled devices. Even Amish communities today worry about online pornography. *See* Kevin Granville and Ashley Gilbertson, *In Amish Country, the Future Is Calling*, N.Y. TIMES (Sept. 15, 2017), https://tinyurl.com/amishtimes.

H.B. 1181 is also narrowly tailored to that interest. It is not overinclusive because, far from prohibiting a substantial amount of protected speech, it does not prohibit speech at all but rather only requires pornographers to check the ages of their users. *Supra* p. 8-9. It is not underinclusive—which would not be fatal anyway, *e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015))—because it targets entities who are in the business of peddling smut for cash. And even for those entities, the burden is not particularly onerous because technology has advanced such that there are now commercially viable methods of age verification "that do not require [users] to disclose personal and sensitive information," ROA.428, including age-estimation software that does not retain images, ROA.1839-40. Even strict scrutiny requires only that the law "be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yullee*, 575 U.S. at 454 (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). By any measure, H.B. 1181 clears that standard. H.B. 1181 is targeted at an ongoing public-health crisis. No government must stand by while millions of children whose understanding of the world and sense of self are maturing are exposed to content so lecherous it would make a Roman emperor blush.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

KYLE D. HIGHFUL
Assistant Solicitor General

COY ALLEN WESTBROOK
JOHN RAMSEY
Assistant Attorneys General

Counsel for Respondent

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

MAY 2024