No. 23-1122

In the Supreme Court of the United States

FREE SPEECH COALITION, INC., ET AL.,
PETITIONERS,

v.

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

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

BRIEF OF NATIONAL COALITION AGAINST CENSORSHIP AND O.SCHOOL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups. NCAC was founded in 1974 in response to this Court's landmark decision *Miller v. California*, 413 U.S. 15 (1973), which narrowed First Amendment protections for sexual expression and opened the door to obscenity prosecutions. The organization's purpose is to promote freedom of thought, inquiry and expression and to oppose censorship in all its forms. NCAC engages in direct advocacy and education to support free expression rights of authors, readers, publishers, booksellers, teachers, librarians, artists, students, and others. NCAC has long recognized—and opposed—attempts to censor or limit access to reading material, including great works of literature and art, under the guise of labeling it as obscene, pornographic, or sexually explicit. It therefore has a longstanding interest in assuring the continuance of robust First Amendment protections for all, including minors.

O.school is a science-based sexual education and wellness platform. Since its founding in 2017, O.school has relied on high quality, evidence-based research to educate individuals on sexual topics. O.school's website provides resources to learn about romantic and sexual health. O.school's resources are important, especially for minors, as only about half of all school districts in the

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

United States provide sexual education, and those that do often do not cover birth control, sexually transmitted infection prevention, or consent.

Petitioners' brief explains why Texas' age-verification law unconstitutionally infringes on the First Amendment rights of adults. Amici write separately to highlight the equally significant, and equally unconstitutional, effect Texas' law has on minors' ability to exercise their own, independent First Amendment rights. The rule Texas advocates—that states can limit minors' (and adults') access to "harmful information" so long as doing so is not irrational—would drastically reduce First Amendment rights for minors.

SUMMARY OF THE ARGUMENT

The First Amendment protects the rights of all Americans, no matter how young. Indeed, some of this Court's most notable free speech decisions have been rendered in the service of minors. When Justice Robert Jackson wrote that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," he did so in striking down a law requiring children to salute the American flag. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

Nonetheless, the arrival of new media is frequently accompanied by concern about protecting minors from accessing new forms of information and expression in new ways. This Court has repeatedly, and rightly, rebuffed government attempts to respond to that concern by limiting or burdening access to speech that is constitutionally protected—for adults and for minors alike. The Court's precedents make clear that the existence of adult, sexual,

or violent content on a medium of expression does not justify reduced First Amendment scrutiny, nor justify overbroad or vague attempts to limit access to new media. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011) (striking down overbroad ban on violent video games); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975) (striking down ban on public-visible nudity at drive-in theaters); *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (invalidating the Communications Decency Act's provisions limiting minors' access to harmful content online). In each of these cases, the Court has applied strict scrutiny to overbroad attempts to protect minors from harmful material, and in each case those laws have failed that demanding test.

Those precedents demand the same result here. Texas asks the Court to allow it to bar minors from accessing a range of speech touching on issues like sexuality, sexual health, and identity. In practice, H.B. 1181 would require online providers to restrict access to content that would be inappropriate for any minor, from toddlers to teenagers on the cusp of adulthood. Minors are not monoliths. Speech that may be harmful to a five-year-old might be acceptable—even vital—for a person of seventeen. Yet Texas' law takes no account of these differences. The law burdens older minors' ability to access anything that might be harmful to a young child; it puts those on the verge of adulthood in a digital sandbox. The result is a law that is dangerously overbroad, notably underinclusive, and subject to arbitrary application. And the law's content-based restrictions on older minors' access to content of educational, artistic, or literary value to them merits strict scrutiny.

This Court has held time and again that the State's authority to legislate for the "benefit" of children "does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794. H.B. 1181 flouts that principle. The Court should reaffirm its precedents, apply strict scrutiny, and reverse the judgment of the court of appeals.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHTS OF MINORS

A. Minors possess the rights to speak and receive speech.

The plain text of the First Amendment prohibits the government from making any law "abridging the freedom of speech," U.S. Const. amend. I, and through its incorporation against the States, it "protects the citizen against the State itself and all of its creatures," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943). That broad, unqualified prohibition on State abridgments of free speech has no age limit, as this Court has affirmed time and again in cases involving State attempts to restrict or compel the speech of minors. *See id.*; *see also Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511–14 (1969).

Minors enjoy "robust First Amendment protections." *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2048 (2021). Those protections include the right to express their views through speech or conduct, *see e.g.*, *Tinker*, 393 U.S. at 511–14, and "the right to *receive* information and ideas," *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867–68 (1982) (emphasis added); *see also Erznoznik*, 422 U.S. at 214 (explaining that, "[i]n most circumstances, the values protected by the

First Amendment are no less applicable when government seeks to control the flow of information to minors") (footnote omitted).

The recognized First Amendment right of minors to access the same categories of constitutionally-protected speech as adults "is not merely a matter of pressing the First Amendment to a dryly logical extreme." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576–77 (7th Cir. 2001). To the contrary, "educating the young for citizenship is *reason* for scrupulous protection of Constitutional freedoms of the individual." *Barnette*, 319 U.S. at 637 (emphasis added). "The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas which discovers truth 'out of a multitude of tongues,' (rather) than any kind of authoritative selection." *Tinker*, 393 U.S. at 510. As Judge Posner crisply put the point:

> Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-func-

> tioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

Kendrick, 244 F.3d at 577.

B. The rights of minors to receive constitutionally protected information can only be limited in narrow circumstances.

To be sure, *Ginsberg v. New York* held that States possess the constitutional authority "to control the conduct of children" in specific, limited ways that "reach[] beyond the scope of [their] authority over adults." 390 U.S. 629, 638 (1968) (citation omitted). But States' comparatively broader authority as to minors *does not* give States the ability to restrict minors' speech or access to speech carte blanche; "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik*, 422 U.S. at 212–13.

States have leeway to enforce narrow, context-sensitive restrictions on minors' access to speech if those restrictions are specifically tied to obscenity, which the Court has held is exempt from First Amendment protection *for all persons* more generally. *Brown*, 564 U.S. at 791 (citations omitted); *cf. United States v. Stevens*, 559 U.S. 460, 472 (2010) (governments do not have "a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment"). That is why, for example, this Court held in *Ginsberg* that States may "*adjust[]* the definition of obscenity" for minors under the age of seventeen—but not invent an entirely new defini-

tion—based on a rational legislative finding that the specific material prohibited was uniquely "harmful to minors." 390 U.S. at 638, 641 (emphasis added).

Accordingly, "[e]ven where the protection of children is the object" of a piece of legislation, *Brown*, 564 U.S. at 804, any categorical restrictions placed on minors' ability to access materials or information not "obscene as to youths" cannot be justified on the ground that those restrictions are necessary for the purpose of "protect[ing] the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 795 (quoting *Erznoznik*, 422 U.S. at 213–14). In other words, States simply do not have "a free-floating power to restrict the ideas to which children may be exposed." *Id.* at 794. That conclusion tracks this Court's general acknowledgement that "[t]he First Amendment . . . reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," and that "[o]ur Constitution [thus] forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 559 U.S. at 470.

II. TEXAS' AGE VERIFICATION REQUIREMENT CANNOT BE SQUARED WITH THE FIRST AMENDMENT'S PROTECTIONS OF MINOR'S RIGHTS

H.B. 1181 fails strict scrutiny. The law imposes sweeping content-based restrictions on protected speech but is not narrowly tailored to Texas' claimed interests. The law cannot meet that exacting standard. It is both under and over-inclusive; treats all minors the same regardless of age; imposes impossibly vague standards for evaluating what is considered "harmful to minors"; and is

both less effective at achieving Texas' goals and more restrictive of protected speech than alternatives such as content filtering. Such a sweeping law is not narrow in its effect, nor tailored to fix the problem Texas decries.

A. Strict Scrutiny Applies

Texas' age-verification requirement severely infringes on minors' and adults' First Amendment rights, and it is therefore subject to strict scrutiny for several independent reasons.

1. Texas' law is subject to strict scrutiny because it would have the government "restrict expression because of . . . its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (*Ashcroft I*).

The First Amendment ensures that "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000).

Texas' law violates that bedrock principle. H.B. 1181 is undoubtedly a content-based restriction: it imposes significant burdens (mandatory online age verification on all users) based on whether the content is "sexual" in nature, "designed to appeal to or pander to the prurient interest," and "patently offensive with respect to minors." Tex. Civ. Prac. & Rem. Code § 129B.001(6).

The law imposes that burden regardless of whether the speech is constitutionally protected or not. The age verification requirement applies to all users, not just minors, without regard to whether the content qualifies as obscenity for a given user. As the district court correctly

held, "H.B. 1181 does not regulate obscene content, it regulates all content that is prurient, offensive, and without value *to minors*. Because most sexual content is offensive to young minors, the law covers virtually all salacious material." Pet. App. 109a. "This includes sexual, but non-pornographic, content," like sex education materials, discussions of sexual identity, and depictions of sexual activity that would not be obscene as to adults or older minors. *Id.*

The purported justification for the law's restriction is to protect children from exposure to potentially harmful pornography. But the law's text reaches a wide swath of expression well afield of hardcore pornography, and imposes unique burdens on speech that may have value not only for adults, but many older minors. The law is therefore not entitled to any reduced First Amendment scrutiny on the grounds that it is "protecting children from pornography." By walling off online speech that may be sexual in nature, but have educational or artistic value to older minors, H.B. 1181 instead imposes a ban on content the Texas legislature finds unsuitable, rather than obscene or lacking in value. And the First Amendment prohibits the government from suppressing speech "to protect the young from ideas or images that a legislative body thinks unsuitable to them," *Erznoznik*, 422 U.S. at 213–14.

That the law leaves potentially "harmful" content available and accessible on websites not subject to the law does not cure the constitutional violation here (in fact, it shows that the law is not narrowly tailored, *see infra*). "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or

latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Playboy,* 529 U.S. at 826. Were the rule otherwise, governments would be free to severely curtail minors' ability to learn about topics the government deems controversial, so long as those steps do not make the information completely inaccessible. The burden of mandatory age verification, even if not applied on every website, is still subject to strict scrutiny.

2. Texas' law impermissibly requires parental consent to access protected speech.

Permitting parental consent as a workaround to the law's burdensome age verification mandate does not defeat the applicability of strict scrutiny—it compels strict scrutiny. Resp. Br. 26. Under the Act, a minor can access prohibited speech, so long as a parent is willing to provide his or her own identification to the website prior to the minor accessing the site. Tex. Civ. Prac. & Rem. Code § 129B.002(a). But states do not have "the power to prevent children from hearing or saying anything *without their parents' prior consent*," because "[s]uch laws do not enforce *parental* authority over children's speech . . . ; they impose *governmental* authority, subject only to a parental veto." *Brown*, 564 U.S. at 795 n.3; *see also Mahanoy*, 594 U.S. at 190 (explaining that states cannot crowd out "the zone of parental . . . responsibility"); *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *21 (W.D. Ark. Aug. 31, 2023) (invalidating parental–consent law for "social media" websites). It is the government of Texas, not parents, that the law empowers to impose penalties upwards of $10,000 per day against companies who violate the statute. Tex. Civ. Prac. & Rem. Code § 129B.006(b). Texas "cannot silence protected speech by wrapping itself in the

cloak of parental authority." *Interactive Digital Software Ass'n v. St. Louis Cnty., Mo.*, 329 F.3d 954, 957 (8th Cir. 2003).

If anything, the possibility of a parental bypass of Texas' law only highlights the law's constitutional infirmity. If the State believed that its interest in preventing minors from accessing prohibited speech were truly compelling, it would not allow for parental bypass, just as it does not allow parents to authorize their underage children to vote. The presence of a glaring loophole in Texas' law demonstrates its underinclusivity, which is reason alone to hold it unconstitutional. *See Brown*, 564 U.S. at 802.

3. Texas' law discriminates based on viewpoint.

This Court has on numerous occasions applied strict scrutiny to viewpoint-based restrictions designed to protect minors.[2] Viewpoint based restrictions "raise[] a host of serious concerns." *Morse v. Frederick,* 551 U.S. 393,

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[2] *Cf. Butler v. Michigan,* 352 U.S. 380, 383 (1957) (reversing conflict under law that restricted distributing material "containing obscene, immoral, lewd, lascivious language, or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth"); *Bolger v. Youngs Drug Prods.,* 463 U.S. 60, 73–75 (1983) (striking down law banning use of mails to advertise for contraceptives over claimed government interest of protecting parental authority to discuss birth control with their children); *Sable Comm. v. FCC,* 492 U.S. 115, 128, 131 (1989) (invalidating ban on dial-a-porn services over government claim that law was only way to prevent children from hearing indecent messages); *Playboy,* 529 U.S. at 827 (finding unconstitutional restrictions on when sexually explicit television channels could air); *Reno v. ACLU*, 521 U.S. at 875 (invalidating law imposing criminal penalties for "obscene or indecent" communications to minors over the internet).

426 (2007) (Breyer, J., concurring in the result), and pointing to alleged harms to minors "does not itself constitute a satisfying explanation . . . ." *Id.* at 427. Indeed, "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802.

Doubts about the Texas legislature's stated goals are warranted here in light of the glaring holes in the statute's scope. As the district court correctly noted, the Texas law "is severely underinclusive" due to its "substantial exemptions" for, *inter alia*, search engines and social media sites. Pet. App. 113a–14a. That omission leaves minors free to access websites and "material most likely to serve as a gateway to pornography use." *Id.* at 114a. The law's underinclusiveness is serious enough by itself to defeat it. *See Brown*, 564 U.S. at 802.

B. The Law Cannot Survive Scrutiny

Texas' law is "not narrowly tailored to promote" Texas' claimed interests, and there are "less restrictive alternative[s]" to its age verification requirements. *See Playboy*, 529 U.S. at 813. Several aspects of Texas' law confirm that there is a significant mismatch between the law's purported aims and the means it uses to achieve those aims. Because the law is not narrowly tailored, sweeping in protected speech and content that would not be harmful to minors of all ages, Texas' restrictions on minors' First Amendment rights go far beyond the "narrow and well-defined circumstances" where burdening minors' right to access speech is permitted. *Erznoznik*, 422 U.S. at 212–13 (1975).

1. The law's definition of "minor" creates arbitrary disparities.

Texas' law refers only to "minors," without drawing any distinctions based on age. An individual prohibited by the law from accessing protected speech could be "an infant, a five-year old, or a person just shy of age seventeen." *ACLU v. Mukasey*, 534 F.3d 181, 191 (3d Cir. 2008) (citation omitted); *see also* Opp'n Br. 26 (confirming "that H.B. 1181 defines minors to include 17-year-olds").

As the Third Circuit recognized when invaliding a similar restriction on online content, "[t]he type of material that might be considered harmful to a younger minor is vastly different—and encompasses a much greater universe of speech—than material that is harmful to a minor just shy of seventeen years old. . . ." *ACLU v. Ashcroft*, 322 F.3d 240, 268 (3rd Cir. 2003). Conversely, "material may have educational, cultural, or scientific value 'for minors,'"—that is, material that is excluded from the Texas law's ambit—"will likewise vary greatly between 5-year-olds and 17-year-olds." Pet. App. 115a.

The need to distinguish between minors of different ages is recognized in other areas of law. For example, minors in Texas may consent to medical treatment under certain circumstances. Tex. Fam. Code Ann. § 32.003. State law also varies on the age at which minors can begin the process of obtaining a learner's permit to drive. NHTSA, *A Fresh Look at Driver Education in America*, Table 1 (2012), https://tinyurl.com/ktaj5vzx. And in the First Amendment context, the Court has recognized that "age of the minor is a significant factor" in determining whether that minor possesses the "full capacity for individual choice which is presupposition of First Amendment

guarantees." *Erznoznik*, 422 U.S. at 214 n.11 (quoting *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring)).

Texas' law, however, makes no attempt to account for the "significant" factor that is minor's capacity. *Erznoznik*, 422 U.S. at 214 n.11 (quoting *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring)). Courts could determine that content is inappropriate for all minors if it is inappropriate for the youngest minors. "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." Pet. App. 115a. Even more strangely, older minors would be prevented from accessing information about any number of activities those same minors can legally engage in. A seventeen-year-old would be able to have sex, Tex. Penal Code § 22.011, but could not use the internet for sex education or seek medical information related to STDs or other sexual health issues. A sixteen-year-old whose pregnancy threatens her life might have the right to obtain an abortion, Tex. Health & Safety Code § 170A.002, but not the ability to learn about the abortion process. There is no valid reason for these bizarre results.

2. The law's "one third" threshold further reveals a lack of narrow tailoring.

The age-verification law is only triggered if "more than one-third of [the website] is sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code § 129B.002(a). But that standard is plainly underinclusive. As the district court pointed out, the "one third" threshold "means that certain social media sites, such as Reddit, can main-

tain entire communities and forums (i.e., subreddits), dedicated to posting online pornography with no regulation." Pet. App. 115a. Indeed, a website could contain the most hardcore pornography imaginable, but so long as that content makes up less than 33.33% of the site's total volume of content, then minors can access the site with no restrictions. And a web page that currently reaches the "one-third" threshold could take itself under the threshold by adding filler web pages or videos. The provision produces results that make no sense. And it underscores the fatal flaws in Texas' defense of its law.

The Texas law also does not define how the "one-third" threshold is met: should courts try to determine how many individual web pages under a site domain are devoted to "sexual material harmful to minors"? How would a business or court make that determination? Will the law require litigants to estimate the hours of video or number of images on a website that qualify as sexual material harmful to minors? This ambiguity presents further opportunities for over- and underinclusion. And it places untenable burdens on website operators and content creators to assess which content is "harmful" to which minors.

3. The law's vagueness compounds the problems.

The law defines "sexual material harmful to minors" to mean "any material that . . . *taken as a whole*, lacks serious literary, artistic, political, or scientific value for minors." Tex. Civ. Prac. & Rem. Code § 129B.001(6)(C) (emphasis added). Justice Kennedy previously noted the difficulty of applying the "as a whole" part of the *Miller* test in contexts other than books or magazines. *Ashcroft I*, 535 U.S. at 592 (Kennedy, J., concurring). That task is even

more difficult—if not impossible—when it comes the modern internet: "It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." *Id.*

The same problem exists here. The law provides no guidance on whether image or video on a website constitutes a single piece of "material," let alone how to evaluate something like a video depicting nudity or intimacy if presented on a longer web page that details information about sexual or genital health. And as a matter of logistics, if "material" here means a particular image or video, implementing the law's vague "taken as a whole" standard would be unduly burdensome on litigants and courts, as the law's "one-third" threshold might require a page-by-page assessment of an entire website.

4. Texas ignores multiple alternatives that are far less speech-restrictive, such as content filtering software. *See* Pet'rs' Br. 39–41.

Texas' explanations for why these less-restrictive alternatives are not feasible must fail. First, it argues that the internet (and children's access to it) and age verification software are both vastly different than in 1997 (when *Reno* was decided). Opp'n Br. 32. In Texas' telling, "unmonitored and surreptitious internet access by children" is "omnipresent" and "ubiquitous" today. *Id.* But complaints of technological change have never justified efforts to run roughshod over free speech. As this Court recently reiterated, "'[w]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles' of the First Amendment 'do not vary.'" *Moody v.*

NetChoice, 144 S. Ct. 2383, 2403 (2024) (quoting *Brown* 564 U.S. at 790).

Texas also ignores the reality that content filtering technology has also changed in those same 27 years. Contrary to Texas' assertion (at 32), it is not true that "content filtering software" can only be "installed on home computers." In fact, there are many products and services available to parents today that work on phones, laptops, and elsewhere that can allow parents to block websites and apps. *See* Bark, https://tinyurl.com/3n372cm6; *see also* Qustodio, https://tinyurl.com/58ejp534. Wireless routers in the home also have settings that allow parents to block websites. *See* Molly Price, *How to Set Up Parental Controls on Your Wi-Fi Router*, CNET (Aug. 21, 2024), https://tinyurl.com/3drrc5hd. Internet service and cell phone data plan providers also offer parental control options for home internet and cellular data plans. *See, e.g.*, Xfinity, *Introduction to Xfinity Parental Controls* (Apr. 16, 2019), https://tinyurl.com/2yu7e2t7; Verizon, *Fios Home Internet Parental Controls* (Apr. 4, 2024), https://tinyurl.com/4js9u7x6; T-Mobile, *Family Controls and Privacy*, https://tinyurl.com/5c3bya3w.

One thing remains true about the technological picture today compared to this Court's prior decisions: "[f]ilters may well be more effective" than Texas' law because "a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America." *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004) (*Ashcroft II*); *see also* Pet. App. 134a (noting that content filtering can block pornography from websites outside of the law's geographic reach, as well as prevent the use of VPNs to circumvent the law's restrictions).

Texas musters little argument that H.B. 1181 is more effective than filtering. Opp'n Br. 32. As an alternative to a Constitutionally-infringing law, content filtering options do not need to be perfect: "it is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." *Playboy*, 529 U.S. at 824. "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Id.* at 824. Rather than restrict minors' access to protected speech in service of "what the State thinks parents ought to want," *Brown*, 564 U.S. at 804, Texas should use its own speech to advocate for these commonsense alternatives.

C. H.B. 1181 Should Be Held Unconstitutional Like Other Recent State Restrictions on Speech

H.B. 1181 does not exist in a vacuum. Concern for the wellbeing of minors has frequently been used to justify politically one-sided censorship efforts. The risk that minors will have their access to information restricted in a politicized manner spans across the entire political spectrum. *See*, *e.g.*, Jacob Gallant, *Lawsuit filed after school bans girl's 'Jesus loves me' mask* (Nov. 4, 2020), https://www.wlbt.com/2020/11/04/lawsuit-filed-after-school-bans-girls-jesus-loves-me-mask/; *see also*, *e.g.*, Trib. Media Wire, *Students' pro-Trump hats blurred from Pennsylvania high school yearbook* (May 24, 2019), https://fox8.com/news/students-pro-trump-hats-blurred-from-pennsylvania-high-school-yearbook/; *see also generally* NCAC, Youth Censorship Database, https://ncac.org/youth-censorship-database (listing over 500 individual instances of censorship). The First Amend-

ment protections that enable minors to access constitutionally protected content are vital to guard against that kind of content-based censorship.

NCAC's near fifty-year history bears out this reality. For example, NCAC maintains a database of books that have been censored in schools on the claim that they are inappropriate for children. *See* NCAC, Youth Censorship Database. Among other things, the database identifies hundreds of individual instances of censorship involving works exploring themes of identity and sexuality, sex education materials, and numerous works of classic literature. One such example—though there are many others—was an attempt to remove Harper Lee's Pulitzer Prize winning novel "*To Kill A Mockingbird*" from a Wisconsin public-high-school English curriculum on the ground that having minority students read the book was discriminatory because the book's depiction of Jim-Crow Alabama included several uses of racial slurs. *See*, *e.g.*, Amber Gerber, *"Mockingbird" appeal denied by board*, Herald-Indep., May 16, 2018, https://www.hngnews.com/monona_cottage_grove/article_10c03045-3d5b-5d27-8998-71bb928e1dbd.html.

Attempts to censor information available to minors are not limited to libraries; H.B. 1181 is part of a larger pattern of recent speech restrictions ostensibly justified by the *Ginsberg* standard to protect minors from harmful material. And as courts have repeatedly found, such laws have often "evince[d] an overt and impermissible purpose to target the speech and expression of LGBTQ+ community members." *Imperial Sovereign Ct. v. Knudsen*, 699 F. Supp. 3d 1018, 1038 (D. Mont. 2023).

Earlier this year, for example, a different panel of the Fifth Circuit upheld the district court's injunction against Texas' READER Act. *Book People, Inc. v. Wong*, 91 F.4th 318, 341 (5th Cir. 2024). The panel found that plaintiffs were likely to succeed on their claim that READER compelled plaintiffs' speech in the form of compelled "ratings" about potentially sexual content in books sold to Texas schools. *Id.* at 324, 338. READER's proponents in the Texas legislature pointed to some LGBTQ materials that would be prohibited under that law,[3] but publicly stated that a famous novel was not prohibited despite depicting sexual violence by men against women.[4]

Other courts have likewise found that censorship laws do not "further[] a compelling government interest" where the government "presented no evidence before the Court to indicate that limiting children's exposure to speech and expression critical of gender norms or by gender non-conforming people bears any relationship to promoting children's welfare." *Imperial Sovereign*, 699 F. Supp. 3d at 1043; *see also, e.g.*, *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 846–47 (S.D. Tex. 2023); *HM Fla.-ORL, LLC v. Griffin*, 679 F. Supp. 3d 1332, 1341–43 (M.D. Fla. 2023).

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[3] Rep. Christin Bentley, Protect Childhood, *Sexually Explicit, Pervasively Vulgar, Educationally Unsuitable Booklist Oct 5 Update*, https://tinyurl.com/yck7k5sx (last visited Sept. 13, 2024).

[4] Representative Christin Bentley publicly declared that the novel Lonesome Dove "is not sexually explicit." Christin Bentley, *Filthy Books Found in Schools*, https://tinyurl.com/3e66yaae (last visited Nov. 15, 2023).

The same is true here. As in those cases, this Court should confirm that laws do not pass the exacting scrutiny required when they are vague, under- or overinclusive, or functionally a proxy for targeting specific viewpoints.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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