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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Petitioners do not dispute that the pornography they sell is harmful to children and that if they were to peddle their wares from brick-and-mortar bookstores or sidewalk magazine stands, Texas could combat that harm by requiring them to make sure their customers are not children. *Ginsberg v. New York*, 390 U.S. 629, 634-35 (1968). Nevertheless, Petitioners insist that because they have moved their business online, the First Amendment protects their right to distribute a nearly inexhaustible amount of obscenity to any child with a smartphone.

For nearly thirty years, due to technological limitations, governments have struggled to translate *Ginsberg* from bookstores to the internet. *See Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997). Technology, however, has evolved: Around the world, websites can and do create adult-only zones where adults can view 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 it is facially unconstitutional for a State to require a commercial entity that provides such materials to take commercially reasonable steps to verify the age of its customers.

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Erznoznik v. City of Jacksonville,
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Cases (Ctd.):

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Jennings v. Stephens,
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Cases (Ctd.):

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Other Authorities:

Aliah Richter, et al., *Youth Perspectives on the Recommended Age of Mobile Phone Adoption: Survey Study*, 5(4) JMIR Pediatrics & Parenting 1 (2022) 36

Other Authorities (Ctd.):

Amanda Giordano, *What to Know About Adolescent Pornography Exposure*, Psychology Today (Feb. 27, 2022) 8-9

Amy Adler, *Arousal by Algorithm*, 109 Cornell L. Rev. 787 (2024) 3, 4, 35

BBC, *Porn Viewers in EU May Have to Prove Their Age* (Dec. 20, 2023) 10

Bradley Saacks, *Inside Pornhub's Finances*, Semafor (Jul. 27, 2023) 3

Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*, 45 Vt. L. Rev. 43 (2020).. 4, 5

11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §2948.1 (3d ed. Apr. 2023 update)... 47

Chiara Sabina, et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 CyberPsychology & Behavior 691 (2008) 8

David Horsey, *Our Social Experiment: Kids with Access to Hard-Core Porn*, L.A. Times (Sept. 3, 2013) 14

David Pilgrim, *The Jezebel Stereotype* (updated 2024), Jim Crow Museum 5

IDTech, *Socure to Provide Biometric Onboarding Tech for DraftKings* (Apr. 9, 2021) 10

Kari Paul, *Pornhub Removes Millions of Videos After Investigation Finds Child Abuse Content*, The Guardian (Dec. 14, 2020) 5, 6

Other Authorities (Ctd.):

Kevin Granville & Ashley Gilbertson, *In Amish Country, the Future Is Calling*, N.Y. Times (Sept. 15, 2017) 37

Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869 (1996) 32

Leading Cases: Freedom of Speech and Expression, 118 Harv. L. Rev. 353 (2004) 18

Leo Herrera, *AI and the Future of Sex*, MIT Tech. Rev. (Aug. 26, 2024) 6

Marc Novicoff, *A Simple Law is Doing the Impossible. It's Making the Online Porn Industry Retreat*, Politico (Aug. 8, 2023) 1

Matt Raymond, *How 'Big' is the Library of Congress?*, Libr. of Cong. Blogs (Feb. 11, 2009) 5-6

Michael B. Robb & Supreet Mann, Common Sense Media, *Teens and Pornography* (2022) 8

Peggy Orenstein, *The Troubling Trend in Teenage Sex*, N.Y. Times (Apr. 12, 2024) 7

Press Release, Office of Attorney General of Texas, *Texas Secures Settlement with Operator of Major Pornography Website, Ensuring Compliance with Texas Law* (Apr. 26, 2024) 14

Todd Love et al., *Neuroscience of Internet Pornography Addiction: A Review and Update*, 5(3) Behavioral Sciences 388 (2015) 3

William Melhado, *Pornhub Suspends Site In Texas Due To State's Age-Verification Law*, Tex. Tribune (Mar. 14, 2024) 21, 32

INTRODUCTION

Through smartphones and other devices, children today have instantaneous access to unlimited amounts of hardcore pornography—including graphic depictions of rape, strangulation, bestiality, and necrophilia. Like "doomscrolling" on social media, online pornographers use sophisticated algorithms to keep adults who have greater maturity than children on their sites. Childhood access to this avalanche of misogynistic and often violent 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) (quoting Louisiana age-verification bill), https://tinyurl.com/Novicoff2023.

In 2023, the Texas Legislature—voting 164 to 1—addressed this crisis by enacting House Bill 1181 ("H.B. 1181"). H.B. 1181 does not prevent adults from viewing pornography. Instead, it requires online pornographers to take commercially reasonable steps to ensure that their customers are not children. Nor is H.B. 1181 an outlier. Countries all around the world require online pornographers to use age-verification technology.

Petitioners say little about what they sell. But even they admit (at 3) that Texas has a compelling interest in preventing children from viewing the content on their websites. This Court has held—"categorically"—that "obscene material is unprotected by the First Amendment," *Miller v. California*, 413 U.S. 15, 23 (1973), and has emphasized that States may prevent "the sale to minors of *sexual* material that would be obscene from the perspective of a child … so long as the legislature's judgment that the proscribed materials [are] harmful to children '[is] not irrational.'" *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793-94 (2011) (quoting *Ginsberg*, 390 U.S.

at 641). States thus can require brick-and-mortar retailers peddling obscenity to verify the ages of their customers. *Ginsberg*, 390 U.S. at 634-35. Indeed, all "50 States" bar minors from buying "pornographic materials." *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988).

Because no one disputes that Texas can prevent kids from accessing hardcore pornography, this case is about means, not ends. Petitioners would prefer that the protection of children be left to device manufacturers. But where, as here, the level of constitutional protection depends on the identity of the listener, a State can require the speaker to serve as a gatekeeper. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 125-26 (1989). That principle of law has not changed just because obscenity has moved online.

Even if *Ginsberg* were inapplicable in cyberspace, however, H.B. 1181 would still easily survive. Texas seeks to protect kids from some of the most prurient sexual content imaginable. And the means Texas has chosen is appropriate. Texas has addressed only websites dedicated to pornography, has allowed them to comply by using common age-verification technology, and has not imposed criminal penalties. Such a modest but important law satisfies any level of scrutiny.

That point is especially true, moreover, in the posture of a facial, pre-enforcement preliminary injunction. Petitioners' decision to facially challenge H.B. 1181 "comes at a cost." *Moody v. NetChoice*, 144 S.Ct. 2383, 2397 (2024). They must show that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* They cannot because much of the content on their websites is obscene even for *adults*. No one has a constitutional right to view "teen bondage gangbang" videos,

much less hundreds of thousands of them. J.A.176. And because this case concerns the extraordinary remedy of a preliminary injunction, Petitioners must show more than just a substantial likelihood of success on the merits. Yet they have not identified a single person who has been chilled. By any measure, the Fifth Circuit correctly vacated the district court's flawed injunction.

STATEMENT

I. Children and Online Pornography

A. The online pornography industry

1. Petitioners say almost nothing about what's on their websites. Suffice it to say, they are not streaming "romance novels or R-rated movies." *Contra* Pet.Br.1. Petitioners include (1) 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. ROA.19-24.[1] Petitioner MG Freesites Ltd. operates Pornhub—"the 12th most visited website in the world … ahead of Amazon, TikTok, and LinkedIn." Bradley Saacks, *Inside Pornhub's Finances*, Semafor (Jul. 27, 2023), https://perma.cc/EC8Q-3FEU; ROA.21.

Online pornographers are sophisticated. Like social-media companies, they use complex algorithms to hook users. *See, e.g.*, Amy Adler, *Arousal by Algorithm*, 109 Cornell L. Rev. 787, 811 (2024). Their content triggers neurological effects akin to gambling. *See* Todd Love et al., *Neuroscience of Internet Pornography Addiction: A Review and Update*, 5(3) Behavioral Sciences 388 (2015); *see also* J.A.254 (H.B. 1181 bill analysis noting that pornography is biologically addictive).

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[1] "ROA" refers to the record on appeal.

Petitioners' business models generally fall into two categories: advertisement-based and subscription-based. The first generates revenue from "advertising placements on its website and through referral fees." ROA.249. The second generates revenue from subscriptions—often paid for with personal credit cards, complete with identifying information. ROA.250-51.

2. As online pornographers have become more sophisticated, the type of content they display has also changed. Now, websites use their "extraordinary trove of user data to script pornography (often using A/B testing), giving data-driven specific requirements to porn producers to fulfill." Adler, *supra*, at 813. This creates what one scholar has identified as an "A.I.-driven feedback loop" in which pornography "gains the capacity to crystalize, amplify, and distort desire itself." *Id.*

"Most of today's pornography," moreover, "does not reflect consensual, loving, healthy relationships" but "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). For example, and Texas recites the following with considerable reluctance, in one of Petitioner Xnxx's more than 300,000 free videos of "teen bondage gangbang[s]," five men tie a young woman down with electrical tape and take turns penetrating her orally, vaginally, and anally—sometimes simultaneously. J.A.176. In this 36-minute video—viewed more than 650,000 times as of August 2023—the men choke the woman and eventually strap an open-mouth gag or "mouth spreader" over her head, forcing her mouth open while they ejaculate in it. J.A.176.

This video is far from unique. Gagging, slapping, hair

pulling, spanking, and increasingly choking are the five most common forms of physical aggression found in pornography, and women are the targets of such violence 97% of the time. J.A.158. In 2020, Pornhub removed "millions of videos—the majority of its content—after an investigation revealed a large number of them featured underaged and sex-trafficked subjects." Kari Paul, *Pornhub Removes Millions of Videos After Investigation Finds Child Abuse Content*, The Guardian (Dec. 14, 2020), https://perma.cc/MXU8-6KFC. Even so, one of Petitioner's sites recently 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 popular category is hentai, a cartoon introduction to violent pornography which commonly features "a grotesque creature penetrating a girl with an enormous phallus or tentacle"—acts which, if performed in real life, would result in severe injury or death. J.A.159-60. Pornhub alone hosts over 100,000 of these videos. J.A.159. And for customers whose tastes in domination and humiliation run to particular races, Petitioners have that, too. One site offers 88,713 free videos of "Asian bondage" and another 91,203 of "Ebony bondage." J.A.175. Unsurprisingly, "[t]he pornography industry remains a bastion of explicit anti-black stereotyping—raw, obscene, and increasing mainstreamed." David Pilgrim, *The Jezebel Stereotype* (updated 2024), Jim Crow Museum, https://perma.cc/2VT8-LVFU.

3. The astounding amount of online obscenity continues to grow. Pornhub alone transferred 6,597 petabytes of data in 2019. Romney, *supra*, at 50. That represents "1.36 million hours (169 years) of new content"—more data than the *entire* internet in 2002, *id.* and 90,000 times the Library of Congress, Matt Raymond,

How 'Big' is the Library of Congress?, Libr. of Cong. Blogs (Feb. 11, 2009), https://perma.cc/TQ5B-4NYD. Before being forced to remove millions of its videos when "credit [card] companies … cut ties with" it for hosting "inappropriate and illegal videos," Paul, *supra*, Pornhub bragged that if you "started watching 2019's new videos in 1850, you would still be watching them today." J.A.177.

Furthermore, artificial intelligence is revolutionizing the industry. *See, e.g.*, Leo Herrera, *AI and the Future of Sex*, MIT Tech. Rev. (Aug. 26, 2024), https://perma.cc/SH8C-Q6PN. "Users can now check boxes on a list of options as long as the Cheesecake Factory menu …: categories like male, female, and trans; ages from 18 to 90; breast and penis size; details like … underwear color; backdrops like grocery stores, churches, the Eiffel Tower, and Stonehenge; even weather." *Id.* It is also possible to furtively create pornography involving people in one's daily life. *Id.*

B. The effects of pornography on children

1. Pornography harms children, a fact Petitioners nowhere deny. Repeated exposure may trigger disassociation, "depression," and psychosomatic symptoms such as "headache, irritability, [and] trouble sleeping." J.A.160, 162. Children who view pornography are more likely to use tobacco, alcohol, or drugs and disengage from school. J.A.161. They have less social integration and decreased emotional attachment with caregivers. J.A.160. They also experience "poor social functioning, impulsiveness, and social anxiety," and "dysfunctional stress responses and poor executive function," as well as "impairments to judgment, memory, and emotional regulation." J.A.162. They may also develop unrealistic expectations about their appearance. J.A.163.

Children who habitually view pornography are more

likely to exhibit behavioral problems such as emulating sexual strangulation, dating violence, and sexual coercion. J.A.160-163. In fact, "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." J.A.161. Adolescent viewers are thus at higher risk of intimate partner cyberstalking and adult perpetration of child sexual abuse. J.A.160-61, 164. For girls, early exposure to online pornography is a risk factor for later suffering sexual abuse, sexual coercion, and sexual aggression. J.A.161. And all children exposed to pornography are "more likely to display hypersexualization and to develop paraphilias (*e.g.*, exhibitionism, voyeurism)." J.A.161.

The dramatic rise of "choking" well illustrates the danger, 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. J.A.158. Not by coincidence, children mirror such dangerous conduct. *See, e.g.*, Peggy Orenstein, *The Troubling Trend in Teenage Sex*, N.Y. Times (Apr. 12, 2024), https://tinyurl.com/2mp4z4j2 (tying the alarming spike of "sexual strangulation" of girls "between the ages [of] 12 and 17" to online pornography, where such behavior has become a "staple").

Far from rebutting this trend, Petitioners' own evidence confirms that "all signs point to the idea that mainstream online pornography appears to negatively influence youth in several ways." ROA.1637. It may "negatively influence attitudes towards women," "cause depression, anxiety, decreases in well-being, reduced self-esteem," and cause "risker sexual behaviors (such as condom non-use), a likelihood to experience unhealthy

dating relationships, [and] a tendency to perpetrate and/or experience sexual violence." ROA.1637-39.

C. Children's exposure to online pornography

Childhood exposure to obscenity has increased as online pornography's reach and sophistication has grown. In fact, "approximately one in five youth experience unwanted online exposure to sexually explicit material." J.A.241 (bill analysis for H.B. 1181).

The last two decades have also seen a dramatic increase in the number of children under 13 exposed to pornography—despite content filtering. In 2006, just over 25% of children aged 13 or younger were exposed to online pornography. *See* Chiara Sabina, et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 CyberPsychology & Behavior 691, 692 (2008). By 2022, that number more than doubled to 54%. *See* Michael B. Robb & Supreet Mann, Common Sense Media, *Teens and Pornography* at 5 (2022), https://perma.cc/YG3L-W3LK. And the number of children exposed to online pornography at age 10 or younger increased more than seven-fold from less than 2% in 2008 to 15% by 2022. *Id;* Sabina, *supra* at 692.

If the picture these statistics paint was not disturbing enough, it becomes even darker when the *kind* of pornography is considered. Over a third of boys exposed to pornography 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." Sabina, *supra*, at 693. And all of that was *before* the explosion of smartphones. Today, "using smartphones to access free pornography online is the most common means of viewing pornographic material." Amanda Giordano, *What to Know About Adolescent*

Pornography Exposure, Psychology Today (Feb. 27, 2022), https://tinyurl.com/GiordanoPsych.

D. Age-verification technology

1. Age verification is a generic term that refers to a set of techniques and technologies to determine someone's likely age. J.A.49. It is used for any number of age-restricted products and services such as online gambling, alcohol and tobacco sales, and car rentals. J.A.194, 198. Such technology can determine a person's age in various ways, including by government identification, credit cards, credit checks, bank records, and even age estimation through facial, voice, or behavioral analysis. J.A.188-91. Age may also be inferred by the existence of some other fact—for example, someone who is a commercial airline pilot must be over 18. J.A.187, 189.

Age verification often does not take place on the website that requires it. J.A.185. Instead, a person can obtain verification from a third-party provider by downloading an age-verification app (such as Yoti) or visiting an age-verification provider's website. J.A.185-86, 189, 201. An age-restricted website can also redirect customers to a third-party provider, who typically offers consumers their choice of age-verification method. J.A.186. Regardless of how a person first contacts a third-party provider, that provider usually relays to the purveyor of the age-restricted product only the answer to a single question: Is this person 18 years or older? Yes or No. J.A.185.

This process is not one that adults must undertake every time they wish to access pornographic material on the internet. Instead, an age-verified person may travel through the internet with a token that signifies their status as an adult—and nothing more—to each age-restricted website they visit. J.A.186, 197-98.

2. Age verification has become an increasingly

common feature of online commerce. The pornographic website OnlyFans, for example, uses Yoti, one of the world's largest third-party providers. J.A.181. And after the public relations and legal crises resulting in the removal of millions of videos, Pornhub also began using Yoti to verify the ages of content *providers*—but not content *viewers*. J.A.181. Pornhub and others have age-verification technology built into their systems. J.A.285.

Countries around the world require age verification for online pornography, including Australia, France, Germany, and the United Kingdom. Last year, the European Union ordered three of the largest online pornographers (Pornhub, XVideos and Stripchat) to verify the age of users. BBC, *Porn Viewers in EU May Have to Prove Their Age* (Dec. 20, 2023), https://perma.cc/Y3R2-GXLV.

Nor does age verification suggest that an adult views pornography. J.A.203. This service "is widely used by thousands of sellers and their consumers on a daily basis around the world, in a variety of contexts" that have nothing to do with pornography. J.A.181, 209. For example, the millions of customers who use DraftKings for fantasy sports betting must verify their ages using a third-party verification provider. *See, e.g.*, IDTech, *Socure to Provide Biometric Onboarding Tech for DraftKings* (Apr. 9, 2021), https://perma.cc/7VFG-WTDX. Age verification thus is not only doable—it's already being done. J.A.181, 209.

II. H.B. 1181

In H.B. 1181, Texas enacted an age-verification requirement to address three realities: (1) the internet contains vast amounts of obscenity easily accessed by kids, (2) today's online obscenity is especially harmful to children, and (3) age-verification technology is increasingly

common across industries and allows websites to identify when their customers are children.

Specifically, H.B. 1181 requires pornographic websites to "use reasonable age verification methods" to verify that a customer "is 18 years of age or older." Tex. Civ. Prac. & Rem. Code §129B.002(a).[2] 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." *Id.*

H.B. 1181 defines "[s]exual material harmful to minors" based on this Court's test for obscenity to encompass material that (1) "appeal[s] to or pander[s] to the prurient interest" when taken as a whole and with respect to minors; (2) describes, displays or depicts "in a manner patently offensive with respect to minors" various sex acts and portions of the human anatomy, including depictions of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, [and] excretory functions"; and (3) "lacks serious literary, artistic, political, or scientific value for minors." *Id.* §129B.001(6); *compare Miller*, 413 U.S. at 24-25.

To comply with H.B. 1181, a covered website need not change anything it posts. Instead, it must require customers 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

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[2] H.B. 1181 also requires such websites to provide health warnings about the dangers of pornography. Tex. Civ. Prac. & Rem. Code §129B.004(1). The district court enjoined that provision, Pet.App.136a-50a; the Fifth Circuit affirmed the injunction, Pet.App.27a-38a; and Texas has not sought relief from this Court.

individual." Tex. Civ. Prac. & Rem. Code §129B.003(b). Covered websites thus may use third-party providers like Yoti. And to ensure user privacy, the age-verifier "may not retain any identifying information of the individual." *Id.* §129B.002(b). And, of course, if a covered website is concerned that an age-verification provider may wrongly transmit information to others, it can choose a different provider or do age verification itself. *Id.* §129B.003(b).

H.B. 1181 empowers the Attorney General to bring civil-enforcement actions for injunctive relief, civil penalties, and attorneys' fees and costs. *Id.* §129B.006.

III. Procedural History

H.B. 1181 was to go into effect on September 1, 2023. Pet.App.175a. On August 4, 2023, Petitioners brought a pre-enforcement facial challenge. ROA.16-46. No adult viewer of pornography in Texas joined the suit. ROA.20.

As relevant here, Petitioners allege that H.B. 1181's age-verification requirement violates the First Amendment. ROA.42-43. They moved for a preliminary injunction, ROA.54-83, and the district court held a hearing less than three weeks later, ROA.1829-96. The only live witness was the State's expert, J.A.267-86, who explained that age verification is "not new" for pornographic websites, which "use it elsewhere in the world," J.A.285.

Eight days later, the district court—applying strict scrutiny—issued a preliminary injunction facially enjoining enforcement of H.B. 1181's age-verification requirement. Pet.App.107a-36a. Yet rather than evaluating the "full range" of H.B. 1181's applications and then determining whether the law's supposedly "unconstitutional applications substantially outweigh its constitutional ones," *NetChoice*, 144 S.Ct. at 2397, the court refused to view even a sample of the content on Petitioners'

websites, ROA.1881. Instead, it insisted that mainstream movies with partial nudity and simulated sex like those on Netflix are "as raw as any pornography," ROA.1877-78; *but see* J.A.175 (Xnxx.com's six categories of "bondage" videos).

The Fifth Circuit administratively stayed the district court's preliminary injunction and expedited oral argument. Pet.App.167a-68a. A month later, the court stayed the injunction pending resolution of the appeal. Pet.App.165a-66a. In March 2024, the Fifth Circuit vacated the injunction of H.B. 1181's age-verification requirement. Pet.App.8a-27a. It relied on *Ginsberg* to conclude that "regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review." Pet.App.8a. The court distinguished *Reno* because the law there was far broader than H.B. 1181 and *Ashcroft II* because it did not consider which level of scrutiny applied. Pet.App.13a-19a. The Fifth Circuit then "easily" concluded Texas satisfied rational-basis review. Pet.App.26a-27a. Judge Higginbotham dissented, concluding that strict scrutiny applied because H.B. 1181 limited adult access to protected speech, Pet.App.47a-48a, and content filtering and the like are less restrictive alternatives, Pet.App.76a-78a.[3]

The Fifth Circuit thereafter denied Petitioners' request to stay issuance of its mandate. Pet.App.162a-63a. This Court denied Petitioners' emergency application to stay the mandate on April 30, 2024. Accordingly, H.B. 1181's age-verification requirement has been in effect since September 19, 2023. Following the Fifth Circuit's decision, moreover, one prominent pornography website

[3] Petitioners also made arguments about vagueness or whether they fall within H.B. 1181's scope. They do not advance such arguments here.

committed to using an age-verification service. *See* Press Release, Office of Attorney General of Texas, *Texas Secures Settlement with Operator of Major Pornography Website, Ensuring Compliance with Texas Law* (Apr. 26, 2024), https://perma.cc/UV63-WPX9.

SUMMARY OF ARGUMENT

"For 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. That "social experiment," *id.*, has failed. To address a public-health crisis, Texas did not restrict adult access to pornography. Instead, Texas imposed an age-verification requirement—just as governments have done the world over for this industry and others. Petitioners cannot show that H.B. 1181 is unconstitutional under the correct level of scrutiny—rational basis—or any other. And they especially cannot make that showing in the context of a facial, pre-enforcement preliminary injunction.

I. The Fifth Circuit followed *Ginsberg* and *Sable*. Where the level of constitutional scrutiny depends on the nature of the audience, *Sable* allows a State to put the onus on the speaker to serve as the gatekeeper. And *Ginsberg*—which upheld a State's power to require brick-and-mortar retailers to prevent children from viewing obscenity—employs a rational-basis test.

Petitioners offer a bevy of counterarguments, but each misfires. H.B. 1181 is not "content based" because the question it asks is whether the content is constitutionally protected in the first place. Such threshold determinations have never been subjected to strict-scrutiny review. *See, e.g.*, *United States v. Stevens*, 559 U.S.

460, 468-69 (2010). Otherwise, a State could not criminalize speech that facilitates crime without triggering strict scrutiny. And the suggestion that States cannot express disapproval of *obscenity*—a "valueless" category of speech, *Counterman v. Colorado*, 600 U.S. 66, 73 (2023)—turns the First Amendment on its head.

Nor did *Ashcroft II* overrule *Sable* and *Ginsberg*. Because it is just as easy for websites to ensure that those wishing to gamble, buy alcohol, or view pornography are adults as it is for brick-and-mortar shopkeepers, Texas acted well within its police power by imposing that requirement on websites trafficking in hardcore pornography. And if *Ashcroft II* prevents Texas from requiring Petitioners to use the *same* age-verification services as comparable websites, *Ashcroft II* must be overruled. Reliable age verification was not on the table twenty years ago. That is not remotely true today.

II. Even if heightened scrutiny applied, the preliminary injunction would still fail. Any heightened standard could only be intermediate scrutiny, but H.B. 1181 would clear even strict scrutiny. Not only is Texas's interest overwhelming, H.B. 1181 focuses on websites causing the most harm to children. And as more than two decades of failed filtering confirms, Texas cannot vindicate its interest in any other way.

Again, Petitioners' counterarguments fail. They say that H.B. 1181 is not narrowly tailored because Texas does not regulate every website where obscenity is available. Yet Texas "may focus on [its] most pressing concerns" and "need not address all aspects of [the] problem in one fell swoop." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). Petitioners also urge content filtering but cannot show it is "at least as effective" as age verification. *Reno*, 521 U.S. at 874. To the contrary, despite

widespread availability, filtering "has proven an ineffective mechanism." J.A.207.

III. Petitioners also cannot successfully bring a facial challenge. Because such challenges "rest on speculation" about how a law will be interpreted and what the facts will reveal, a plaintiff ordinarily must show that the law is "unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). Although the Court has shown greater solicitude to free-speech claims, *see, e.g.*, *NetChoice*, 144 S.Ct. at 2397, a facial injunction blocking enforcement of a state law is "strong medicine" presenting significant separation-of-powers concerns, *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Petitioners have not come close to meeting their burden. Even on the incomplete record before the Court, much of the content here is plainly obscene—and thus constitutionally unprotected—even for adults. The district court, however, committed a more egregious version of the error identified in *NetChoice*. Not only did it fail to consider each application of H.B. 1181, it did not even consider H.B. 1181's heartland. Instead, it speculated about hypothetical applications while refusing to review the content squarely at issue. Petitioners, however, cannot complain that their adult customers' constitutional rights have been chilled based on content that those customers have no constitutional right to view.

IV. Finally, a preliminary injunction is an "extraordinary remedy" that is never awarded as of right. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). Instead, a plaintiff "must establish" not only "that he is likely to succeed on the merits," but also "that he is likely to suffer irreparable harm in the absence of preliminary relief" and "that an injunction is in the public interest." *Id.* at 20. Here,

even if Petitioners satisfied their burden with respect to the merits, they flunked the other requirements. They did not identify a single adult who has been chilled from visiting their websites, and they cannot show that any (nonexistent) injury outweighs harm to children. Enforcement of H.B. 1181 has been permitted for more than a year and the sky has not fallen. The Court should retain that status quo while litigation continues.

ARGUMENT

I. The Fifth Circuit Applied the Correct Test.

Because H.B. 1181 imposes a gatekeeping function that forecloses only *minors* from accessing obscenity, the Fifth Circuit properly applied *Ginsberg*'s rational-basis analysis. Pet.App.8a-10a. Petitioners do not question that *Ginsberg* states the proper test for *minors'* access to such content, only (at 20-21) whether *Ginsberg* applies when the question is whether prohibiting access by minors allegedly impedes access by adults. Petitioners are wrong: Requiring commercial enterprises to take commercially reasonable steps to verify that their customers are adults need only be a rational way to combat the harms that even Petitioners accept (at 3) their products cause children.

A. *Ginsberg*'s rational-basis test governs.

1. In *Ginsberg*, New York took this Court's then-existing definition of obscenity and adjusted it for kids. 390 U.S. at 635. Thus, the State decreed that material "[h]armful to minors" included content that "predominantly appeals to the prurient, shameful or morbid interest of minors" and "is utterly without redeeming social importance for minors," among other elements. *Id.* at 646. New York then made it unlawful for businesses to knowingly sell such material to minors, but provided that

an honest mistake about age would excuse liability if the shopkeeper made a "reasonable bona fide attempt" to ascertain the customer's age. *Id.* at 631, 646. One obvious way to do so was by reviewing identification. *See, e.g.*, *Leading Cases: Freedom of Speech and Expression*, 118 Harv. L. Rev. 353, 363 & n.85 (2004).

Considering a First Amendment challenge to the law, the Court first concluded that a child's rights do not prevent States from defining obscenity based on its appeal to minors. *Ginsberg*, 390 U.S. at 637-39. The Court then identified two interests to support the law: (1) parental interests in deciding whether their children should view such material, and (2) the State's independent interest in the well-being of children. *Id.* at 639-41. Because "obscenity is not protected expression," the Court required only that New York have made a "rational" decision that exposure to such material be harmful to minors. *Id.* at 641-43. Concluding New York had, the Court rejected the constitutional challenge. *Id.*

Since deciding *Ginsburg*, the Court has reiterated its holdings many times. In *Erznoznik v. City of Jacksonville*, for example, the Court cited *Ginsberg* for the "well settled" proposition that governments "can adopt more stringent controls on communicative materials available to youths than on those available to adults." 422 U.S. 205, 212 (1975). In *Young v. American Mini Theatres, Inc.*, a plurality considering zoning rules for adult movie theaters invoked *Ginsberg* to explain that "the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults." 427 U.S. 50, 69 (1976) (plurality op.) And in *Brown*, the Court explained—without qualification—that because "obscenity

is not protected expression," laws like that at issue in *Ginsberg* that address obscenity for children need only be rational. 564 U.S. at 794.

2. The Court's decision in *Sable* makes explicit what was already implicit in *Ginsberg*: Where the level of constitutional protection depends on the *audience*, States may require the *speaker* to serve as the primary gatekeeper to that audience. 492 U.S. at 125-26. The federal law at issue in *Sable* prohibited making, by way of an interstate telephone call, "any obscene or indecent communication for commercial purposes." *Id.* at 123 n.4. Sable operated "dial-a-porn" phone lines, offering prerecorded, sexually explicit messages. *Id.* at 117-18. Upholding the ban on "obscene" phone calls, the Court explained that the statute did not impose a national standard of obscenity but instead relied on "contemporary community standards," as required by *Miller*. *Id.* at 124-25.

Judged by each individual community's standards, the same recorded messages might be considered obscene (and therefore unprotected by the First Amendment) in some communities but not obscene (and therefore protected) in others. *Id.* at 125-26. Sable objected that it was not its burden as speaker to distinguish between those listeners. This Court disagreed, holding that "[i]f Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 126. The Court recognized that Sable might be "forced to incur some costs" to develop and implement its own "system" to determine the locale of incoming calls but found "no constitutional impediment" to the imposition of such costs. *Id.* at 125.

The principle from *Sable* is thus plain: Where a speaker's audience consists of two groups—one to whom

the speaker has the right to speak a particular message and another to whom the speaker does not—the State may place the onus on the speaker to distinguish between the groups. *See id.* at 126. Such a rule makes sense. It is less invasive on speech when the speaker assesses his own listeners, rather than when the government does so. Thus, even if distinguishing between listeners imposes costs, a State may require the speaker to serve as gatekeeper. *See, e.g.*, *Ashcroft v. ACLU* (*Ashcroft I*), 535 U.S. 564, 583 (2002) (plurality op.); *see also id.* at 582 ("In [*Sable*], this Court made no effort to evaluate how burdensome it would have been for dial-a-porn operators to tailor their messages [because] the burden of complying with the statute rested with those companies.").

3. The Fifth Circuit thus correctly recognized that *Ginsberg* controls this case: H.B. 1181 adjusts this Court's definition of obscenity as it applies to minors, Tex. Civ. Prac. & Rem. Code §129B.001(6); does not bar adult access to material that is obscene as to minors; is supported by the same state interests as in *Ginsberg* that have only grown more compelling; and is rationally related to those interests (a point Petitioners do not contest).

True, one distinction between H.B. 1181 and the New York law in *Ginsberg* is that H.B. 1181 makes age verification mandatory, *id.* §129B.002(a), while New York made it an affirmative defense, *Ginsberg*, 390 U.S. at 646. But this distinction is immaterial: Operationally, to avoid criminal conviction, New York retailers that sold material considered obscene for minors had to ascertain the age of the person buying it—an assessment that could be made by looking at the person or by requesting other proof of age. And the other main distinction between the

New York law and this one cuts in favor of H.B. 1181. Whereas the New York law was a criminal provision that carried with it the risk of one year in prison, *id.* at 633 n.2, H.B. 1181 is a civil provision. *Ginsberg* thus applies *a fortiori*.

Indeed, H.B. 1181 addresses a situation remarkably similar to *Sable*: speech that is obscene and therefore unprotected for one community (children) but—arguably[4]—not obscene and therefore protected for another community (adults). To be even more precise, H.B. 1181 addresses speech that is unprotected for minors *in Texas*. Tex. Civ. Prac. & Rem. Code §129B.001(6). Thus, Petitioners can comply with H.B. 1181 by leaving the State—as Pornhub has done. William Melhado, *Pornhub Suspends Site in Texas Due to State's Age-Verification Law*, Tex. Tribune (Mar. 14, 2024), https://perma.cc/N9K6-W7CL. But "[i]f a publisher chooses to send its material" to Texas, "this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community's standards." *Ashcroft I*, 535 U.S. at 583 (plurality op.) (following *Sable*, 492 U.S. at 125-26).

4. None of the forgoing analysis changes merely because H.B. 1181 addresses the internet—not magazine stands. First Amendment principles "do[] not change because the [interaction] has gone from the physical to the virtual world." *NetChoice*, 144 S.Ct. at 2393. The gatekeeping function performed by the 1960s shopkeeper is now performed by websites using age-verification technology. Notably, *Sable* did not involve a brick-and-mortar building, but this Court nonetheless held that if a

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[4] In reality, much of the content on Petitioners' websites is obscene even as to adults. *See supra* pp.4-5; *infra* p.43.

company in the speech business wishes to operate nationally, it must adjust its "system" to ensure that every audience member in each community may lawfully hear its message. *Sable*, 492 U.S. at 125. As *Sable* confirms, it is constitutionally irrelevant that such adjustments may require the company itself to "screen[]" would-be customers, contract with a third party to do it, or leave the market. *Id.* Nor did the imposition of such "burdens" trigger strict scrutiny. *Contra* Pet.Br.32.

It would be odd—to say the least—for this Court to (1) permit States to require speakers to serve as gatekeepers for their own audiences without any additional scrutiny, *see Sable*, 492 U.S. at 126; and (2) cite *Ginsberg* for the rule that States need only have a rational basis to restrict minors' access to pornography, *e.g.*, *Erznoznik*, 422 U.S. at 212; yet (3) impose strict scrutiny on a requirement that pornographers take reasonable steps to ensure their audiences don't include children. In fact, such a doctrine would not just be odd—it would be incoherent.

B. Petitioners' theories are unpersuasive.

Petitioners disagree, but their theories overlook precedent, misread precedent, or miss the point. Regardless, if *Ashcroft II* means what Petitioners say, the Court should overrule it because it would contradict other precedent and rest on untrue factual premises.

1. In challenging the Fifth Circuit's application of the rational-basis standard, Petitioners insist (*e.g.*, at 24-27) that because H.B. 1181 is a "content-based" restriction on speech, it must trigger strict scrutiny. Both the major and the minor premise are wrong. This Court has "reject[ed] … the view that *any* examination of speech or expression inherently" makes a law content based and "triggers heightened First Amendment

concern." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 73 (2022). Moreover, though the Court has applied strict scrutiny to some content-based restrictions, *e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000), many laws that in one sense are "content based" are not subject to strict scrutiny, *see, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (plurality op.).

Here, H.B. 1181 is not a content-based restriction on protected speech. It is a requirement that speakers serve as the gatekeeper when their speech is *un*protected as to certain listeners. Under cases like *Sable*, such a requirement is entirely permissible. And because H.B. 1181 involves protecting minors from exposure to hardcore pornography, it is subject to rational-basis scrutiny.

a. Contrary to Petitioners' view, not every regulation of expression that turns in some sense on content is subject to strict scrutiny. To the contrary, "[t]he question whether speech is[] or is not protected by the First Amendment often depends on the content of the speech." *New York v. Ferber*, 458 U.S. 747, 763 (1982) (quoting *Am. Mini Theatres*, 427 U.S. at 66 (plurality op.)). One cannot tell if speech is unprotected incitement, defamation, a true threat, or integral to a crime without considering its content. *See, e.g.*, *Stevens*, 559 U.S. at 468-69. Regulations of commercial speech, *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985), and bans against solicitation, *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981), similarly turn on content. Applying these well-established principles, H.B. 1181 is not a regulation of *protected* speech but a law controlling access by a particular community to *unprotected* speech.

Because it has always been understood that the First Amendment allows "restrictions upon the content of speech" in these limited areas, restrictions limited to those areas are not subject to strict scrutiny. *Counterman*, 600 U.S. at 73 (quoting *Stevens*, 559 U.S. at 468). H.B. 1181 addresses perhaps the prototypical example of such an area of unprotected expression: materials that are obscene for minors. *See, e.g.*, *Stevens*, 559 U.S. at 468-69. Because H.B. 1181 does nothing more than create a mechanism to distinguish between minors and adults' ability to access materials that are not protected as to minors, it cannot be subject to strict scrutiny.[5]

b. Obscenity, which the Court has described as "valueless material," *Counterman*, 600 U.S. at 73, is one category of "speech" that is "not protected," *Smith v. California*, 361 U.S. 147, 152 (1959). "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." *Roth v. United States*, 354 U.S. 476, 483 & n.13 (1957); *see also id.* at 485 n.17 (listing federal obscenity laws). Accordingly, the regulation or prohibition of obscenity is not subject to strict scrutiny, even though one has to see it to know it. *See, e.g.*, *Hamling v. United States*, 418 U.S. 87 (1974) (criminalizing obscenity). Even the dissenters in *Reagan* agreed that governments may prohibit obscenity—a "content-based restriction[]"—without

[5] Petitioners spill considerable ink (at 16-19) defending speech that is (allegedly) *not* obscene as to minors or adults. It is unclear, however, how much of that speech Petitioners make. Because the preliminary-injunction record does not answer that question, this point cannot support their facial challenge. *See NetChoice*, 144 S.Ct. at 2398-99.

meeting strict scrutiny. 596 U.S. at 87 n.1 (Thomas, J., dissenting).

This rule does not change merely because the line here concerns obscenity for minors. Speech is generally considered obscene if the "average person, applying contemporary community standards," would conclude that "the work, taken as a whole, appeals to the prurient interest." *Miller*, 413 U.S. at 24. In determining whether a depiction is or "is not protected expression," governments can consider whether the audience comprises adults or children. *Brown*, 564 U.S. at 794 (discussing *Ginsberg*). Accordingly, the fact that H.B. 1181 requires considering the content of speech to determine whether it is protected by the First Amendment as to minors does not require the application of strict scrutiny.

2. In arguing to the contrary, Petitioners point (at 21-23) to *Ashcroft II*, *Sable*, *Playboy*, and *Reno* for the proposition that strict scrutiny applies to alleged burdens on adult access to speech even if that same speech is unprotected for minors. These cases, however, are inapposite because each involved a law that banned protected speech for all listeners—not, as H.B. 1181 does, require the speaker to serve as the gatekeeper to ensure those individuals who have a constitutional right to do so (and only those individuals) can access the material.

a. The Fifth Circuit concluded that the Child Online Protection Act (COPA) at issue in *Ashcroft II* is the closest analog to H.B. 1181. Pet.App.16a. Like H.B. 1181, COPA defined material that was "harmful to minors" using the *Miller* standard. 542 U.S. at 661. But, *unlike* H.B. 1181, COPA criminalized posting such information to the internet for "commercial purposes." *Id.* COPA involved age verification in some sense, but only as an affirmative defense: A criminal defendant could avoid liability by

restricting access to obscene-for-minors material by requiring, among other things, a credit card, adult access code, digital age certificate, or measures feasible under existing technology. *Id.* at 662.

Ashcroft II is irrelevant here for at least three reasons.

First, COPA placed a greater burden on speech than H.B. 1181. It was a criminal statute that used age verification only as a defense, so there was no guarantee against prosecution. *See, e.g.*, *Ashcroft II*, 542 U.S. at 674 (Stevens, J., concurring). Criminal statutes often require greater scrutiny. *See, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). By contrast, H.B. 1181 is a civil statute and so is not "enforced by severe criminal penalties." *Ashcroft II*, 542 U.S. at 660.

Second, the Court did not purport to overrule *Sable* or to limit *Ginsberg* to brick-and-mortar shopping. Instead, the Court barely addressed either case, and never mentioned the relevant portion of *Sable* addressing when governments can require speakers to act as gatekeepers. The Court does not lightly toss aside foundational legal principles (as opposed to fact-heavy analysis), and certainly did not do it without saying so. Further, the Court recognized that the 5-year-old record did not "reflect currently technological reality." *Id.* at 671. Accordingly, for case-specific reasons, age verification was seen as a material burden rather than a manageable gatekeeping obligation. Here, by contrast, because of technological advances, it is now far easier and less invasive to age verify; in fact, it can be done via software that does not even retain facial images. J.A.190-91.

Third, as the Fifth Circuit explained, no one contested strict scrutiny's application in *Ashcroft II*. This Court's rule "in both civil and criminal cases" is to "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). In fact, "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 arguments entitling them to relief." *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (cleaned up). Because the government did not argue for a lesser burden, the Court was not obligated to make an argument for it. Pet.App.19a.

c. None of Petitioners' other three cases establish that H.B. 1181 is subject to strict scrutiny.

First, Petitioners' reliance on *Sable* (at 21) is selective. As explained above, *Sable*'s gatekeeping analysis—which Petitioners do not address—squarely supports H.B. 1181. The Court in *Sable* also *upheld* an outright ban on "obscene" telephone calls because "protection of the First Amendment does not extend to obscene speech." 492 U.S. at 124. Granted, the Court applied strict scrutiny to the ban on "indecent" communications, noting that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Id.* at 126. Although the government attempted to justify the complete ban on indecent calls as necessary to protect minors, the Court recognized that other means were available to vindicate that interest—namely, requiring Sable to screen its customers. *Id.* at 128. As that is what H.B. 1181 requires covered websites to do, it is hard to see how *Sable helps* Petitioners.

Second, *Playboy* concerned what amounted to a ban on speech that was *not* obscene. The Telecommunications Act of 1996 required cable operators who provided channels "primarily dedicated to sexually-oriented

programming" to scramble those channels or limit their transmission to nighttime hours. 529 U.S. at 806. Relevant here, it was undisputed that the material at issue was not obscene, and therefore that the law was a content-based restriction on *protected* speech. *Id.* at 811-12. Because scrambling was not guaranteed to be effective due to signal bleed, most operators were effectively forced not to transmit such speech outside of nighttime hours. *Id.* at 806-07. This, in turn, prevented adults from viewing such materials for two-thirds of the day. *Id.* at 812. Because the statute prohibited adults from viewing constitutionally protected speech, this Court held it was subject to strict scrutiny. *Id.* at 813. The Court did not address whether the content at issue constituted obscenity for children, let alone what the analysis would be for a law that limited *only* children's right to access such materials during daylight hours.

Third, *Reno* concerned the Communications Decency Act (CDA), the "breadth" of which was "wholly unprecedented." 521 U.S. at 877. The CDA criminalized the online transmission of "any comment, request, suggestion, proposal, image, or other communication which is obscene *or indecent*" to someone known to be a minor. *Id.* at 859 (emphasis added). In defining affected material, the CDA also prohibited "patently offensive" communications involving sexual activities and organs but did not fully parrot the Court's obscenity precedent. *Id.* at 860. Thus, the CDA applied to far more speech than obscenity for minors. Further, because it applied "broadly to the entire universe of cyberspace," *id.* at 868, anyone posting had to assume a minor was present and "in the absence of a viable age verification process" censor their speech accordingly, *id.* at 876.

To the extent that *Reno* is relevant at all, it rebuts Petitioners' attempt to cabin *Ginsberg* (at 20-21, 30-31) as holding only that a State may define obscenity with respect to minors. If that were true, *Reno* would have been much shorter. The Court would not have needed to distinguish the CDA from the New York law in *Ginsberg* in at least four respects: the CDA (1) did not allow parents to consent to the speech, (2) applied to non-commercial transactions, (3) used a much broader definition of covered content, and (4) defined minors as those under 18. 521 U.S. at 865-66. Instead, the Court could have simply said *Ginsberg* answered a different question.

The Fifth Circuit properly noted that at least three of the distinctions identified in *Reno* are inapplicable to H.B. 1181. Pet.App.13a-15a. Under H.B. 1181, so long as parents age verify themselves, they may allow their children to view any material on covered websites. *See* Tex. Civ. Prac. & Rem. Code §129B.002. H.B. 1181 applies only to commercial entities whose websites contain more than one-third harmful material. *Id.* §129B.002(a). H.B. 1181 also closely follows the Court's definition of obscenity. *Id.* §129B.001(6). And while H.B. 1181 defines minor as an individual under 18 rather than 17, *id.* §129B.001(3), that is a distinction without a difference here, especially for a facial challenge. Thus, just as the *Reno* Court distinguished the New York law in *Ginsberg* from the CDA, this Court should distinguish H.B. 1181 from the CDA.

C. If *Ashcroft II* requires strict scrutiny, it should be overruled.

Texas does not believe that *Ashcroft II* requires application of strict scrutiny here. If the Court disagrees, however, so much the worse for *Ashcroft II*. Under Petitioners' theory, *Ashcroft II* ran roughshod over *Sable*

and *Ginsberg* while creating an untenable distinction between cyberspace and brick-and-mortar commerce—something this Court refused to do in *NetChoice*. Doctrinally, it makes no sense that a State can require an offline merchant to verify that a customer is not a child—à la *Ginsberg*—but cannot do the same for an online merchant. After all, the same sort of (supposed) chill exists in either forum. *E.g.*, Pet.App.11a (noting Petitioners' admission). Yet this Court in *Ginsberg* and *Sable* allowed States to place the burden on the speaker.

Furthermore, the facts have changed markedly since 2004—a key reason to overrule precedent. *See, e.g.*, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 924-25 (2018). Although the federal government's decision not to challenge strict scrutiny in *Ashcroft II* may seem strange in retrospect, given the infancy of the internet and the rudimentary technologies at issue, no one then credibly could have claimed that age-verification technology reliably and easily distinguished adults from minors. Furthermore, online obscenity has grown much more dangerous for kids as the volume, production quality, and algorithm usage increases—and will grow even more dangerous as AI becomes more entrenched. The world has changed.

II. H.B. 1181 Survives Any Level of Review.

Petitioners do not argue that H.B. 1181 fails rational-basis review, instead focusing on strict scrutiny. Even if heightened scrutiny applied, however, H.B. 1181 would clear it. At most, the standard would be intermediate scrutiny, but even under strict scrutiny, Texas has a compelling interest and H.B. 1181 appropriately vindicates that interest. Because "[t]his Court … does not review lower courts' opinions, but their *judgments*," *Jennings v.*

Stephens, 574 U.S. 271, 277 (2015), the Court can affirm on these bases as well.

A. At most, intermediate scrutiny applies.

1. If the Court concludes that the *Ginsberg/Sable* rule does not govern, H.B. 1181 should be subject, at most, to intermediate scrutiny. For decades, this Court has recognized that States may protect children by creating adult-only spaces. After all, "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting." *Pacifica*, 438 U.S. at 750. As the internet further eases—exponentially—children's access to even more harmful variations of such material, that rationale applies with even greater force.

Similar analysis is found in the Court's secondary-effects doctrine. In *City of Renton v. Playtime Theatres, Inc.*, for example, the Court examined a zoning ordinance prohibiting adult theaters within 1,000 feet of residential zones, family dwellings, churches, parks, or schools. 475 U.S. 41, 54 (1986) (quoting *Am. Mini Theatres*, 427 U.S. at 71 (plurality op.)). Like other laws of its kind, application of the ordinance turned (at least in part) on the content of the films. *Id.* at 47. Nevertheless, the Court concluded that the ordinance was not "aimed" at that "*content*" but "rather at the *secondary effects* of such theaters on the surrounding community." *Id.* (emphasis in original). Because the ordinance was "*justified* without reference to the content of the regulated speech," it was deemed "content-neutral." *Id.* at 48. Thus, the Court held, it was constitutional as long as it was "designed to serve a substantial governmental interest and allow[ed] for reasonable alternative avenues of communication." *Id.* at 50.

2. As Justice O'Connor explained in *Reno*, efforts to regulate children's access to online pornography are best understood as attempts to translate *Renton* to cyberspace. 521 U.S. at 889 (O'Connor, J., concurring in part). Doing so was infeasible at the time because the internet of the 1990s lacked the two characteristics necessary "to create 'adult zones'": the power to sort by "geography and identity." *Id.* (citing Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869, 886 (1996)). That is, "[a] minor can see an adult dance show only if he enters an establishment that provides such entertainment," yet that would be all but impossible to do because he could not "conceal completely his identity (or, consequently, his age)." *Id.* Due to technological constraints, the same could not be said of the internet of the 1990s and early 2000s. *Id.*

But the internet has fundamentally changed. It is now possible "to exclude persons from accessing certain messages on the basis of their identity" and to treat different jurisdictions differently. *Id.* at 890. Even apart from H.B. 1181, many websites use platforms like Yoti to age verify individuals. J.A.181. Websites can also distinguish users by geography: Pornhub left the Texas market after the Fifth Circuit stayed the district court's injunction. Melhado, *supra*. And a host of websites age verify in jurisdictions all around the world. These facts demonstrate that it is now possible to distinguish adults from minors and between physical locations online, making *Renton* directly analogous.

3. Petitioners do not dispute that H.B. 1181 serves a substantial—indeed, compelling—interest. Accordingly, because "reasonable alternative avenues of communication" remain open to Petitioners, *Renton*, 475 U.S. at 50, it follows that H.B. 1181 survives intermediate scrutiny.

A restriction on videos of "teen bondage gangbang[s]," J.A.176, does not "invade[] the area of freedom of expression constitutionally secured to minors," *Ginsberg*, 390 U.S. at 637. And whether or not such materials can be deemed "artistic, informative, or even essential to important parts of career and life," Pet.Br.1, Petitioners are free to produce, publish, and profit from as much of them as the *adult* market can bear. Accordingly, their argument (at 35) that the Fifth Circuit erred in distinguishing between outright bans on speech and burdens has no place in the secondary-effects analysis.

H.B. 1181 also does not discriminate against speech; instead, content is considered for the sole purpose of determining whether it is unprotected speech as to minors. H.B. 1181 is thus content neutral for the same reasons producers of materials depicting "actual sexually explicit conduct" can be required to maintain records of their performers' identities and ages to comply with a law designed to prevent child pornography. *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 325, 328-29 (6th Cir. 2009) (en banc).

4. Petitioners reject that intermediate scrutiny may apply based on their misreading of *Ashcroft II*—rebutted above—and separately (at 34-37) because H.B. 1181 supposedly "embodies speaker-based discrimination." This latter argument reflects confusion.

Speaker-based distinctions are not inherently suspect. For example, laws prohibiting speech integral to criminal conduct do not unconstitutionally discriminate against would-be criminals because of the message they wish to convey. *See, e.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). And Petitioners' suggestion (at 35) that counsel for Texas's *accurate* characterization of their products means that legislation

enacted by a different branch of government is subject to strict-scrutiny review is bewildering. Petitioners do not dispute that content on their websites constitutes obscenity for children. Indeed, much of that content is also obscene for adults. *See, e.g.*, *supra* pp.4-5; *infra* p.43.

Furthermore, speaker-based discrimination implicates constitutional concerns only when the government uses it as a proxy for viewpoint-based discrimination. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992). Laws such as H.B. 1181 regulating those who would otherwise speak harmful and unprotected obscenity to minors do not discriminate based on the speaker, but based on whether the speech is protected in the first place.

Petitioners posit (at 35) that Texas's decision to exempt search engines or websites with less than one-third harmful content means the State has discriminated against the pornography industry. This is wrong for at least four reasons.

First, Petitioners misunderstand Texas law: Search engines are exempt only to the extent they "provid[e] access or connection to or from" a website that is not under their control. Tex. Civ. Prac. & Rem. Code §129B.005. If a search engine operates—or controls an entity that operates—a website subject to H.B. 1181, it would no longer be exempt. *Id*. Likewise and contrary to Petitioners' claim (at 35), social-media companies are not exempt from H.B. 1181 but must comply with it if they reach the one-third threshold. *Id.* §129B.002(a).

Second, Petitioners presume both that the subjective motivation of a legislator is relevant to the constitutional inquiry and that such motivation can be determined without evidence. Both presumptions are mistaken. The burden of showing an improper legislative motive is a "demanding one," *Easley v. Cromartie*, 532 U.S. 234, 241

(2001), and "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Third, the Court has already held that governments cannot address the epidemic of online pornography's effect on children by "broadly" regulating "the entire universe of cyberspace." *Reno*, 521 U.S. at 868. Given that holding, Texas's choice to regulate only those in the *business* of distributing online obscenity is an effort to comply with precedent—not disregard it. *Contra* Pet.Br.28. It is instead Petitioners who seek to evade precedent by expanding the law of content- or speaker-based discrimination such that it would render all laws governing unprotected speech subject to strict scrutiny.

Fourth, Petitioners are wrong (at 36) that H.B. 1181's exemptions "defeat[] the law's avowed purpose." This argument boils down to the view that H.B. 1181 is underinclusive. Yet underinclusiveness is not fatal, else governments could only regulate in "one fell swoop" or not at all. *Williams-Yulee*, 575 U.S. at 449. Regardless, the idea that a search engine is the same as Pornhub defies credulity; Google has not embedded an addictive algorithm in its *search* function. *Compare* Adler, *supra*, at 811. And a State surely can treat websites centered—like a hub—around pornography differently than those in which such content may appear but is hardly the focal point.

B. H.B. 1181 also survives strict scrutiny.

Ultimately, the standard-of-scrutiny question is academic because H.B. 1181 satisfies even strict scrutiny.

1. H.B. 1181 serves a critical state interest. The Court said as much in *Sable* and Petitioners do not contend otherwise. Rather, they concede (at 3) that Texas has a compelling interest in the well-being of its children

that would permit regulation of Petitioners' speech even if subjected to strict scrutiny. For good reason. As this Court recognized in *Ginsberg*, Texas has an independent interest—separate from that of a child's parents—in the well-being of the children within the State. 390 U.S. at 640. And as the Fifth Circuit discussed, "the record is replete with examples of the sort of damage that access to pornography does to children." Pet.App.26a.

Even in this preliminary stage of litigation, Texas offered evidence showing that children exposed to pornography exhibit "a host of mental health afflictions" including depression, disassociation, and other behavioral problems such as dating violence, emulating sexual strangulation, and sexual coercion. J.A.160. They are also more likely to use tobacco, alcohol, and drugs. J.A.161. And as the Fifth Circuit observed, exposure to pornography correlates with an increased likelihood children will view bestiality or child pornography. Pet.App.26a. It is not by accident that nations all around the world—holding divergent views on a host of social concerns—agree that children should be not exposed to hardcore pornography.

2. 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. *See, e.g.*, *supra* pp.8-9. In 1997, children could go online only at home or in a crowded venue such as a classroom or public library. Not so today. Instead, "53% of children have a smartphone by age 11," and "over 95% of teens ages 13 to 17 years hav[e] access to a cell phone." Aliah Richter, et al., *Youth Perspectives on the Recommended Age of Mobile Phone Adoption: Survey Study*, 5(4) JMIR Pediatrics & Parenting 1 (2022). Even Amish communities worry about online

pornography. *See, e.g.*, Kevin Granville & Ashley Gilbertson, *In Amish Country, the Future Is Calling*, N.Y. Times (Sept. 15, 2017), https://tinyurl.com/amishtimes.

H.B. 1181 also is not "a wholesale prohibition upon adult access to indecent speech." *Sable*, 492 U.S. at 132 (Scalia, J., concurring). Rather, it protects children from that which is obscene by their standards, by requiring the purveyors to check whether their viewers *are* children—leaving adults able to access pornography by engaging in a process that they must complete potentially only once and that applies equally to viewing pornography, buying wine, or renting a car. *Supra* pp.9-10. Although this requirement may impose a limited (if not de minimis) financial burden on Petitioners, they can decide how to minimize that burden by choosing to contract for or handle verification themselves. Tex. Civ. Prac. & Rem. Code §129B.003; *accord Sable*, 492 U.S. at 125-26.

3. H.B. 1181 is also the least restrictive means to vindicate Texas's compelling interest. Because Texas may protect children from exposure to obscenity, "it necessarily follows that there must be a constitutional means of carrying it out." *Glossip v. Gross*, 576 U.S. 863, 869 (2015) (cleaned up). Requiring a speaker to check its own customers' ages is an appropriate means. Indeed, it is difficult to see a better one. The nation has tried the alternative—content filtering—for twenty years. It has not worked. Texas thus may do the same thing that jurisdictions around the world are already doing.

Nor is it a secret why content filtering fails. Filters only work if they are consistently applied, but given the ubiquity of internet-enabled computers, tablets, phones, watches and even eyeglasses, consistent application is an impossibility. A single child with an unfiltered device can expose all his friends to the vilest obscenity, no matter

the content-filtering vigilance of other parents. In other words, in a world where internet access is limited to classrooms, libraries, and living rooms, it may be possible to rely on filters. But as jurisdictions around the globe recognize, that hasn't been reality for years.

C. Petitioners' response fails.

Petitioners offer several contrary arguments, none of which is persuasive.

1. To start, Petitioners complain (at 38) that H.B. 1181 is overinclusive because it applies to "an *entire* website" even if only one-third of the material is harmful. But if otherwise covered websites were to rigidly segregate obscene material, H.B. 1181 presumably would not apply.[6] Like this Court, the Texas Supreme Court construes statutes to avoid constitutional concerns. *E.g.*, *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000). And it is certainly possible to construe H.B. 1181 to allow entities to subdivide their content in such a way that no age verification would be required for a child-friendly website. Because this is a pre-enforcement challenge, however, no state court has had the opportunity to answer this question. Regardless, Petitioners have not attempted to prove that they, much less a substantial number of such websites, categorize their offerings that way. *See infra* Part III.

2. Shifting gears, Petitioners also say (at 38-39) that H.B. 1181 is underinclusive because it is limited to websites that host a substantial amount of obscenity rather

[6] Petitioners' movie example (at 38) illustrates the point. If no one makes sure that ticket buyers actually go only to their assigned screen and stay there, a State absolutely could forbid a theater showing hardcore obscenity on some screens from selling tickets to 12-year-olds.

than every website with such material. Putting aside the "somewhat counterintuitive" nature of arguing that H.B. 1181 violates the First Amendment by failing to regulate *more* speakers, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee*, 575 U.S. at 449 (quoting *R.A.V.*, 505 U.S. at 387). Texas thus "need not address all aspects of [the] problem in one fell swoop" but instead "may focus on their most pressing concerns." *Id.* Underinclusiveness is problematic only when it serves as a proxy for viewpoint discrimination. *Id.* Texas, however, has drawn reasonable—and long permitted—lines.

Of course, Texas could have chosen to lower the "sexual material harmful to minors" content threshold from one third of a commercial website's content, but doing so would increase the burden on online speech, bringing it closer to what was held unconstitutional in *Reno*, 521 U.S. at 877-78. Instead, H.B. 1181 applies to websites devoted to providing access to pornography. In the words of *Williams-Yulee*, 575 U.S. at 449, H.B. 1181 "aims squarely at the conduct most likely to undermine" the health of underage Texans: pornographic websites like those run by the Petitioners. Applying Petitioners' logic, Texas would have to regulate either the entire internet, or none of it. But "[t]he First Amendment does not put a State to that all-or-nothing choice." *Id.* at 452. This Court should "not punish [Texas] for leaving open more, rather than fewer, avenues of expression." *Id.*

3. Similarly without merit are Petitioners' contentions (at 39-41) that H.B. 1181 fails to use the least restrictive means. Petitioners insist (at 40-41) that because this Court has stated a preference for content filtering over the primitive age-verification technologies in the 1990s, Texas is forever limited to cajoling parents into

using filtering or requiring companies that provide internet-enabled devices to employ it. Indeed, Petitioners largely give up the game when they say (at 41 n.6) that the States can require device manufacturers and internet service providers to age verify, which would block *at least* the same amount of content if not more. It is thus far from clear that such filtering *is* less restrictive given it could lead to restriction of more content. At the very least, Petitioners have failed to offer sufficient evidence to succeed on this ground *facially*. *Infra* Part III.

Assuming for argument's sake that content filtering is less restrictive, however, that does not answer the question. Content filtering has existed for decades, yet the problem targeted by H.B. 1181—childhood exposure to obscenity—has gotten much worse. "It is always true, by definition, that the status quo is less restrictive than a new regulatory law." *Ashcroft II*, 542 U.S. at 684 (Breyer, J., dissenting)). That is why the least-alternative-means analysis requires the proposed alternative to be "*at least as effective*" as the challenged provision. *Reno*, 521 U.S. at 874 (emphasis added). As even the minimal evidence available at this early stage confirms, despite its wide availability for decades, content filtering "has proven an ineffective mechanism" to limit "exposure to adult content by minors." J.A.207.

Leaning—tellingly—on an amicus brief, Petitioners (at 41) also raise the specter of Virtual Private Networks (VPNs). Petitioners point to the contention that "twenty percent of females and thirty-two percent of males between the ages of sixteen and twenty-four" use VPNs. ICMEC.Cert.Br.12-13.[7] That claim has not been tested

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[7] Petitioners did not raise this statistic below, let alone address whether VPN usage was predominantly by those between the ages

in discovery, including whether such use is constant or sporadic. Even assuming it is true, however, that VPNs are used by young *adults*, that only undercuts Petitioners' argument that H.B. 1181 will do nothing to prevent *children* from being exposed to hardcore pornography. Pre-pubescent children, for example, are particularly drawn to hentai—and there is no evidence they have access to VPNs. Regardless, even if an unknown percentage of older minors (as opposed to young adults) in Texas consistently use VPNs, *amici*'s numbers suggest that approximately 70-80% or more may *not* be using VPNs. That would powerfully recommend H.B. 1181's value in advancing Texas's interest in protecting kids.

4. Petitioners and the district court also are wrong that H.B. 1181 should be deemed something other than the least restrictive means based on "privacy" concerns. Specifically, the district court worried "the state government can log and track" pornography access by implementing age verification, Pet.App.125a, and Petitioners echo that concern here (at 8-9). Nothing could be further from the truth. H.B. 1181 does not require adult pornography viewers to "affirmatively identify *themselves*." Pet.App.125a (emphasis added). Instead, they must only *corroborate* their age through a method selected by Petitioners. Tex. Civ. Prac. & Rem. Code §§129B.002-.003. And far from using age verification to track anyone, Texas has made the practice *illegal*. *Id.* §129B.002(b). H.B. 1181 thus does not require any record of the "most intimate and personal aspects of people's lives" at which the government *could* "peer," Pet.App.125a—even if Texas wanted to (which it doesn't).

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of 18 and 24. This argument thus is nowhere addressed in the Fifth Circuit's decision.

In sum, "[t]he traditional power of government to foster good morals," especially those of kids, "ha[s] not been repealed by the First Amendment." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring). H.B. 1181 is Texas's attempt to protect children from obscenity *without* depriving adults of the choice to view such material. This Court "should not hastily dismiss the judgment of legislators, who may be in a better position … to assess the implications of new technology." *Brown*, 564 U.S. at 806 (Alito, J., concurring).

III. H.B. 1181 is Not Facially Unconstitutional.

Even putting aside the forgoing, the district court's analysis of this *facial* challenge cannot possibly be reconciled with *NetChoice*.

A. Petitioners are not entitled to facial relief.

1. As the Court explained in *NetChoice*, facial challenges "come[] at a cost." 144 S.Ct. at 2397. Not only must courts consider whether "heartland" applications are unconstitutional, but also whether "a substantial number" of the whole universe of "applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* In other words, plaintiffs must show that "a law's unconstitutional applications" are "substantially disproportionate." *United States v. Hansen*, 599 U.S. 762, 770 (2023). Absent a "lopsided ratio," "courts must handle unconstitutional applications as they usually do—case-by-case." *Id.*

The Court reiterated this analysis in *United States v. Rahimi*. Rather than focusing on "the circumstances in which" a law "was most likely to be constitutional," the lower court "focused on hypothetical scenarios where [it] might raise constitutional concerns." 144 S.Ct. 1889, 1903 (2024). But that was "slaying a straw man." *Id.* Although

Rahimi arose in the Second rather than First Amendment context, the Court's rejection of "hypothetical" scenarios is also a familiar feature of First Amendment law. *See, e.g.*, *Hansen*, 599 U.S. at 786 (Thomas, J., concurring) (citing *Broadrick*, 413 U.S. at 610-11).

2. Here, the district court's facial analysis is deficient in numerous respects.

First, the preliminary-injunction record does not reflect how much of the material on Petitioners' websites is also obscene for *adults*. As demonstrated above, *see supra* pp.4-5, the answer to this question is "a lot." Because a substantial portion of the content is obscene, it receives no First Amendment protection—no matter *who* is looking. *See Counterman*, 600 U.S. at 73. If graphic displays of "mouth spreaders," J.A.176, and much else besides, do not satisfy the *Miller* standard, nothing does.

The district court refused to consider such content (of which there are petabytes), instead focusing on media like Netflix films. ROA.1877-81. In so doing, it failed *NetChoice* two times over. Not only did it fail to consider the whole universe of applications, but it did not even consider those applications within H.B. 1181's heartland.

Second, "[t]o justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful." *Hansen*, 599 U.S. at 770. Rather than providing specific real-world examples, however, Petitioners imagine (at 38) a website in which 35% of the content is harmful to minors and 65% is protected political speech. Should such a unique website exist, it may attempt to bring an as-applied challenge, although that challenge would fail under the *Ginsberg*/*Sable* rule. But the possibility that such a site *might* exist does not show that a "substantial number of [H.B. 1181's] applications are uncon-

stitutional." *NetChoice*, 144 S.Ct. at 2397. The district court committed a similar error. Pet.App.115a.

Third, Petitioners did not offer evidence of the burden on adults they hypothesize. Nothing in the record demonstrates that fear of hypothetical hacking of age-verification websites has chilled anyone from visiting any website—whether it be to access pornography or any of the other services that require such verification. *Supra* pp.9-10. There certainly is no evidence that H.B. 1181 has *increased* the risk of exposure over the status quo. For example, because some Petitioners operate subscription-based websites, an individual's credit-card information is already subject to hacking. ROA.250-51. More broadly, "[m]odern cell phones are not just another technological convenience" but instead "hold for many Americans the privacies of life." *Riley v. California*, 573 U.S. 373, 403 (2014) (citation omitted). Thus, a misplaced phone containing "[a]n Internet search and browsing history … could reveal an individual's private interests or concerns." *Id.* at 395. There is no evidence that age verification materially increases the risk of privacy violations above what already exists for anyone living in the modern world—and certainly not in a lopsided number of cases.

B. Petitioners' response again fails.

Petitioners' attempt (at 24-25, 41-43) to preemptively rebut Texas's argument only underscores why a facial injunction is unwarranted.

Petitioners first suggest (at 25) that Texas conceded at oral argument that Petitioners' sites do not contain material that is obscene for adults. Not so. Counsel said that *H.B. 1181* does not restrict an adult's access to any of the content on Petitioners' sites. Oral Argument, No. 23-50627 (Oct. 4, 2023) at 13:35-14:10,

https://bit.ly/4c5B42K. That statement is correct for the reasons discussed at length above. It does not follow, however, that the material is not obscene.

They next argue (at 24, 42) that Texas elsewhere criminalizes obscenity. That is a non sequitur. For any supposed "chill" argument to succeed, the content on Petitioners' websites must be constitutionally protected. That is a question of federal constitutional law—not Texas statutory law. Because no one has a First Amendment right to view much of the content on Petitioners' sites, it is beside the point whether Texas has decided not to bar adults from viewing that content as part of this statute. What matters is Petitioners cannot leverage the First Amendment to attack a state law by complaining that some adults might be chilled from viewing content they have no constitutional right to view.[8]

Petitioners also observe (at 42) that this Court affirmed facial preliminary injunctions in *Ashcroft II* and *Reno*. But the Court did not conduct facial analysis in *Ashcroft II*—indeed, neither the word "facial" or "face" is used in the opinion. And in *Reno*, the statute was extraordinarily broad. *See supra* p.28-29. Not so here. The facts are also different; because age-verification is now

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[8] Petitioners overread (at 24-25) *Reno* and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), to suggest that the Court should ignore obscenity on their websites. In *Free Speech Coalition*, the Court addressed a statute that sought "to reach beyond obscenity" and made "no attempt to conform to the *Miller* standard." 535 U.S. at 240. It covered a wide swath of materials that were not obscene for anyone and was backed by criminal penalties. *Id.* at 244, 246-47. By contrast, H.B. 1181 tracks the *Miller* standard, addresses websites containing an extraordinary volume of obscenity for anyone, and is civil. And in *Reno*, the Court observed that the CDA covered extraordinary amounts of "indecent" but non-obscene content. 521 U.S. at 871. That is not the situation here.

common across many industries and modern technology ensures privacy, any notion that a sufficiently large number of adults may be chilled is not credible.

Petitioners assert too (at 42) that "there are no distinctions among covered websites that entitle some to greater constitutional protection than others." That is pure question begging. If content on some but not all sites is obscene even for adults, then there would be a "distinction" across sites. The district court, however, failed to conduct the required analysis.

Finally, Petitioners repeatedly suggest (*e.g.*, 1, 6, 24) that H.B. 1181 captures essentially everything because it protects young children, too. Texas, however, did the same thing that New York did in *Ginsberg*—it took this Court's obscenity standard and applied it to children. Petitioners, however, do not claim that New York's law therefore captured ordinary "sex education content." *Contra* Pet.Br.7. It is beyond implausible that Texas courts will construe H.B. 1181 in such a manner, even more so because such content presumably would not be "prurient" and would have "serious … scientific value for minors," Tex. Civ. Prac. & Rem. Code §129B.001(6); *see also Ashcroft I*, 535 U.S. at 579 & nn.9-10 (plurality op.). Regardless, such issues should be resolved in as-applied challenges. And Petitioners' suggestion (at 27) that those without identification will suffer is a red herring. Age-verification technology does not require government identification, *supra* pp.9-10, and even if it did, such an argument could be the subject of an as-applied suit.

IV. Petitioners Flunk the Remaining Factors.

Because Petitioners are unlikely to succeed on the merits, this Court need go no further. *Winter*, 555 U.S. at 32-33. Even if Petitioners had made that showing, they would not be entitled to a preliminary injunction.

First, Petitioners have not shown "[p]erhaps the single most important prerequisite for" interim relief—that they are "likely to suffer irreparable harm before a decision on the merits can be rendered." 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §2948.1 (3d ed. Apr. 2023 update). Before the district court, Petitioners pointed to no evidence that age verification has chilled any actual person from accessing any website. Nor could they because (1) age verification is already a hallmark of many industries, (2) that someone has been age verified says nothing about whether that person views pornography, (3) H.B. 1181 forbids covered websites from preserving identifying information, and, (4) regardless, countless adults pay to access Petitioners' websites with credit cards. It is not enough for Petitioners to wave the "chill" flag—they need to prove it. Nor can they rely on compliance costs when Pornhub and other such websites already have age verification built into their systems.

Second, Texas—and millions of children in Texas—will suffer irreparable harm if H.B. 1181 is enjoined, which has profound consequences for the public interest. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012). But the harm here is even more significant. H.B. 1181 addresses an ongoing crisis. *Accord United States v. Morrison*, 529 U.S. 598, 614 (2000) (noting the "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families"). Texas is not powerless to address that crisis. The Court thus should again leave the status quo in place while this litigation continues.

CONCLUSION

The Court should affirm the Fifth Circuit's judgment.

Respectfully submitted.

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