

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 FREE SPEECH COALITION, INC.,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 23-1122
7 KEN PAXTON, ATTORNEY GENERAL)
8 OF TEXAS,)
9 Respondent.)
10 - - - - -

11
12 Washington, D.C.
13 Wednesday, January 15, 2025

14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:13 a.m.

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P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-1122, Free Speech Coalition versus Paxton.

Mr. Shaffer.

ORAL ARGUMENT OF DEREK L. SHAFFER

ON BEHALF OF THE PETITIONERS

MR. SHAFFER: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, a Fifth Circuit majority held that mere rational basis review, the most lax form of judicial scrutiny, applies to a Texas law that burdens constitutionally protected speech based on its content, specifically by imposing an age verification barrier before anyone can access a sexually themed website.

That aberrant holding defies this Court's consistent precedent, including its Ashcroft decision, as Judge Higginbotham well explained in his dissent. This Court should begin by confirming that strict scrutiny continues to apply to any such content-based burden on websites and their adult users.

1 Notably, Texas's law is even more
2 problematic than its failed federal
3 predecessors. It applies to entire websites
4 depending on whether one-third of their content
5 is deemed inappropriate for minors. It also
6 brands websites with stigmatizing, unscientific
7 so-called "health warnings" that, despite being
8 enjoined, evidence Texas -- Texas's intention to
9 deter adults, even assuming they've cleared the
10 age -- age verification hurdle, from accessing
11 protected speech.

12 To abandon strict scrutiny here, Your
13 Honors, could open the door to an emerging wave
14 of regulations that imperil free speech online.
15 From there, this Court can readily restore the
16 preliminary injunction given Petitioners'
17 likelihood of success under strict scrutiny.
18 The district court found that this law's age
19 verification provisions are wildly
20 under-inclusive and unduly chilling.

21 At the same time, content filtering
22 today affords at least one alternative that is
23 both less restrictive and more efficacious.
24 Ashcroft teaches that a preliminary injunction
25 should stand in precisely these circumstances.

1 That result, Your Honors, does not
2 denigrate the government's compelling interest
3 in protecting children, nor does it prevent
4 Texas from trying to carry its burden between
5 now and final judgment or from enacting a new
6 and better-tailored law. Rather, reinstating
7 the preliminary injunction would simply maintain
8 fidelity to First Amendment rights and
9 precedents while litigation proceeds.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Can age verification
12 systems ever be found constitutional?

13 MR. SHAFFER: Justice Thomas, I think
14 a -- the government should start with content
15 filtering as a less restrictive alternative.

16 JUSTICE THOMAS: Well, but can age
17 verification ever be constitutional?

18 MR. SHAFFER: I don't think the Court
19 needs to close the door to that here, but it
20 would need to be tailored age verification of
21 the sort that the amici supporting Texas are
22 advocating, which is different from what Texas's
23 law permits.

24 JUSTICE THOMAS: And what would that
25 look like?

1 MR. SHAFFER: I think, Your Honor,
2 what you have from the amici is that there are
3 ways of verifying age short of identifying the
4 individual, short of the transactional data that
5 Texas would require be provided. And so you
6 would have less identification of the
7 individual. You would have privacy protections
8 that are maximally assured by the law. You
9 would have private rights of enforcement that
10 you do not have here. Everything depends upon
11 the Attorney General, who's avowedly hostile to
12 these websites and to their users.

13 And, last, Justice Thomas, you should
14 have confidentiality that is legally assured,
15 and the state should be providing assurance that
16 it will not misuse the information that is being
17 collected pursuant to the state mandate.

18 None of those features are present
19 in -- are present in Texas's approach to age
20 verification. And, tellingly, you have nothing
21 in the legislative record, you have nothing from
22 Texas even in its submissions to this Court,
23 that shows how the specific provisions of H.B.
24 1181 have been tailored with sensitivity to the
25 privacy concerns that exist in this context or,

1 for that matter, to actually being efficacious
2 and making sure that you have meaningful
3 protections that protect -- that protect minors
4 across the board.

5 And so, Your Honors, if we start with
6 strict scrutiny --

7 JUSTICE BARRETT: Counsel, can I ask
8 you a question? Would it -- is it a barrier --
9 explain to me why the barrier is different
10 online than in a brick-and-mortar setting? I
11 mean, in a brick-and-mortar setting -- I mean,
12 it seems like a lot of your concerns are driven
13 by privacy concerns, which are really a feature
14 of the Internet. I mean, you didn't have -- you
15 don't have privacy if you go into the bookstore
16 in Ginsberg or if you go to a movie theater that
17 displays pornographic movies. You have to show
18 age verification.

19 So explain to me why this is so
20 uniquely burdensome here when it's not been in
21 the real-world context.

22 MR. SHAFFER: Let me start with that,
23 Justice Barrett, with your question about why is
24 this medium different. And the answer is you're
25 creating a permanent record on the Internet when

1 you provide this information that is being
2 collected. It is a target for hackers. It is
3 something that is different from just flashing
4 an ID in physical space.

5 But I'd also note that you have
6 content filtering, as the Court has recognized,
7 that is the analogue in the physical space --

8 JUSTICE BARRETT: Well, whoa, whoa,
9 whoa.

10 MR. SHAFFER: -- for screening out --

11 JUSTICE BARRETT: I mean, let's see.
12 In -- in Ashcroft II, the Court, you know,
13 expressed anxiety about the fact that technology
14 moves so fast that the five years between the
15 district court findings in that case and the
16 case being at the Supreme Court, you know, that
17 technology may have moved beyond the record at
18 that point.

19 It's been 20 years since Ashcroft.
20 The iPhone was introduced in 2007 and Ashcroft
21 was decided in 2004. I mean, kids can get
22 online porn through gaming systems, tablets,
23 phones, computers. It's -- let me just say that
24 content filtering for all those different
25 devices, I can say from personal experience, is

1 difficult to keep up with.

2 So -- and -- and I think that the
3 explosion of addiction in -- to online porn has
4 shown that content filtering isn't working.

5 MR. SHAFFER: Justice Barrett,
6 let's -- let's flash forward on the technology.
7 I think it is actually common ground that
8 content filtering today is technologically
9 better than ever, more readily available than
10 ever. It's employed by this Court. It's
11 employed in workplaces throughout America. And
12 it's agreed by the experts for both sides that
13 it -- it can work specifically in this context
14 of parents protecting their kids through all the
15 devices that Your Honor just catalogued.

16 You -- you can find it in Joint --

17 JUSTICE BARRETT: This Court has an IT
18 department and so do workplaces.

19 MR. SHAFFER: But -- but this is
20 content-filtering software that's designed to be
21 implemented in the home. And so, if you -- if
22 you look at Joint Appendix 275-76, 282-285, you
23 can see Mr. Allen testifying for Texas about
24 content filtering today being fit for purpose.
25 It's a question of adoption.

1 And as to that, I think it is telling
2 that Texas has not considered the possibility of
3 educating parents, encouraging parents. There
4 was a proposal as to this law specifically to
5 say that devices would automatically install
6 content filtering. That would be legally
7 required.

8 They dropped that. Texas dropped that
9 without any explanation whatsoever. You can
10 find that in the Joint Appendix at 255-56.
11 Texas decided that they would empower parents
12 and -- and equip parents and then, without
13 explanation, decided they would skip ahead to
14 this very chilling step.

15 JUSTICE ALITO: Mr. Shaffer, do you
16 know a lot of parents who are more tech-savvy
17 than their 15-year-old children?

18 (Laughter.)

19 MR. SHAFFER: Justice Alito, it's a
20 fair question and I don't know that -- that -- I
21 think kids may be ahead of parents, but that's a
22 problem with this law. It's not solving for the
23 fact that --

24 JUSTICE ALITO: Well, it's a problem
25 with -- with filtering, isn't it?

1 MR. SHAFFER: I don't think it is,
2 Justice Alito, because this is filtering
3 software that is designed to withstand
4 circumvention, including by sophisticated tech
5 people in the workplace and in -- and in
6 courthouses.

7 JUSTICE ALITO: I mean, Mr. Shaffer,
8 come on, be real. There's a huge volume of
9 evidence that filtering doesn't work. We've had
10 many years of experience with it. We now have
11 many, many states who have adopted age
12 verification requirements.

13 You think they just -- their -- why
14 are they doing that if the filtering is so good?

15 MR. SHAFFER: Respectfully, Justice
16 Alito, they made no efforts to encourage content
17 filtering or to educate about it. And look,
18 Justice Alito, at the health warnings that are
19 in this law. Those are designed to change
20 established behavior --

21 JUSTICE ALITO: Well, those are not --
22 those are not before us. So is your -- is your
23 argument that this is unconstitutional because
24 it was -- it was motivated by a improper bias in
25 the part of the -- the Texas legislature that

1 voted almost unanimously for this law?

2 MR. SHAFFER: I -- I would suggest
3 that to Your Honors, but I don't think you need
4 to go that far. What I would say is that they
5 wanted to skip ahead to the more chilling
6 efforts to change behavior as opposed to
7 starting with content filtering or even
8 considering it.

9 JUSTICE KAVANAUGH: But the -- the
10 point is that content filtering may -- may work
11 to some extent, but it doesn't work to the same
12 extent in achieving the government's interest.
13 At least that's the argument. And the relevant
14 inquiry is not does content filtering work.
15 It's does it achieve the interest to the same
16 degree.

17 And as Justice Barrett indicated with
18 Ashcroft, you know, Justice Breyer's opinion in
19 Ashcroft, whether it was right or wrong at that
20 moment, seems correct today or at least
21 prescient today.

22 MR. SHAFFER: Justices Kavanaugh,
23 Alito, Barrett, I would encourage you to look at
24 the district court's findings in Petitioner's
25 Appendix 112 to 114 about all the gaps in

1 Texas's approach to regulating. Foreign
2 websites are going to be completely un--
3 undeterred and unchanged.

4 You have VPNs that minors --
5 tech-savvy minors can use to make it seem like
6 they're outside of Texas. You have search
7 engines. You have social media. All of those
8 are designedly outside the scope of Texas's law,
9 and the only way that kids are actually going to
10 be protected from all those many sources that
11 are the most readily available --

12 JUSTICE KAVANAUGH: Well, that's an
13 under-inclu- --

14 MR. SHAFFER: -- that are the
15 likeliest gateways --

16 JUSTICE KAVANAUGH: -- that's an
17 under-inclusiveness argument, and -- and I don't
18 think we've said that a state has to tackle
19 every aspect of the problem or else it can't do
20 anything.

21 MR. SHAFFER: All I mean to suggest is
22 that a genuine effort, a serious effort to
23 regulate in this area would look like the
24 federal laws that Your Honors were considering
25 that said, irrespective of source, there's

1 certain content that is sexually explicit and
2 inappropriate for minors. And that is the
3 subject of the law.

4 JUSTICE KAVANAUGH: What do you mean
5 by "genuine" and "serious"? You don't think
6 they're genuine in their interest?

7 MR. SHAFFER: I think that they're
8 genuine in their interest, Justice Kavanaugh,
9 but I think that their interest is an anti- -- a
10 broader anti-porn interest in preventing willing
11 adults from accessing this content. And they
12 want to make it more difficult. They want to
13 make it costlier. They want to make it
14 chilling.

15 And so, Justice Kavanaugh, what I
16 would say is, crediting the Court's concerns and
17 the concerns of a responsible government that
18 wants to regulate here, I think you should wait
19 for a government that actually shows they're --
20 they're making serious headway to tackle the
21 problem.

22 JUSTICE KAGAN: Could I take you back
23 to Justice Barrett's initial question? This was
24 about brick-and-mortar stores.

25 And if -- if -- if there's a

1 age-verification requirement about, like, porn
2 magazines, is that also subject to strict
3 scrutiny? Would that -- are you saying that
4 that should be analyzed the same way?

5 MR. SHAFFER: I'd need to see the law,
6 Justice Kagan. I would. I think, if it's an
7 age --

8 JUSTICE KAGAN: Well, no, I don't
9 think you need to see the law. Just -- I mean,
10 it's -- it's just this: It's a age-verification
11 requirement, but it applies to brick-and-mortar
12 stores and it relates to the distribution of,
13 you know, printed smut.

14 MR. SHAFFER: Here -- here's all I
15 mean, Justice Kagan. If that law was to say age
16 verification takes the form of an affidavit or
17 show your birth certificate, I think that that
18 would absolutely, of course, be subject to
19 strict scrutiny.

20 JUSTICE KAGAN: Well, it's a
21 age-verification law that requires the same kind
22 of documentary proof or whatever that this law
23 does.

24 MR. SHAFFER: I think, if it's going
25 beyond the New York law that was addressed in

1 Ginsberg, as I understand Your Honor's question,
2 I think it would be subject to strict scrutiny.
3 It would almost surely satisfy that -- that --
4 that scrutiny, unless it was gratuitously
5 designed to chill the adult customer from making
6 the purchase.

7 JUSTICE KAGAN: And why is it that
8 that law would satisfy strict scrutiny, but this
9 law does not?

10 MR. SHAFFER: Because it's tough to
11 imagine, Justice Kagan, how else you would be
12 getting after the -- the point-of-purchase
13 exchange to a minor, short of what Your Honor's
14 describing, assuming that this is the kind of
15 traditional sort of law.

16 I do note we -- we agree with the
17 Institute --

18 JUSTICE KAGAN: So, if that's the
19 case, your answer to that really depends
20 entirely on content blocking, the availability
21 of content blocking in the online space?

22 MR. SHAFFER: I don't think entirely,
23 Justice Kagan, because, if you go to a store and
24 the clerk is just looking at an ID, there's not
25 a special cost associated with that.

1 When you have age verification for
2 every single user in the Internet context and
3 you're multiplying those costs, \$40,000 per
4 hundred thousand users, as found by the district
5 court, at a minimum, you have a serious burden
6 on the speaker.

7 And we agree with the Institute for
8 Justice in its amicus brief that when you have a
9 law that reads as this law does, saying, if you
10 are sponsoring sexually explicit content online,
11 you must answer to an across-the-board
12 age-verification mandate, that, Your Honors, is
13 content-based discrimination. That is a
14 content-based burden. That should always
15 trigger strict scrutiny.

16 JUSTICE GORSUCH: Counsel --

17 JUSTICE ALITO: Well, the court --

18 JUSTICE GORSUCH: -- can I -- I'm
19 sorry. Just -- I just want to pin -- pin you
20 down a little bit if I can -- I'm going to try.

21 Do you agree that at least in theory
22 brick-and-mortar institutions shouldn't be
23 treated differently than online, and vice versa,
24 that that principle -- that we shouldn't have a
25 constitutional regime that prefers technology --

1 one technology over another? We said as much in
2 Wayfair.

3 MR. SHAFFER: Justice Gorsuch --

4 JUSTICE GORSUCH: Do you agree with
5 that principle? Or are --

6 MR. SHAFFER: -- I -- I think it's a
7 different medium, so I -- I don't -- I don't
8 want to be difficult with Your Honor's question.
9 I do agree -- oh, sorry.

10 JUSTICE GORSUCH: I -- I'm going to
11 press you, all right?

12 MR. SHAFFER: Okay.

13 JUSTICE GORSUCH: I understand they're
14 different media. But does the principle apply
15 that we should try and treat those two media as
16 equally as possible?

17 MR. SHAFFER: Yes. And I think --

18 JUSTICE GORSUCH: Okay.

19 MR. SHAFFER: -- in a way that is --

20 JUSTICE GORSUCH: Okay. I'll -- I'll
21 take it. I'll take it.

22 (Laughter.)

23 MR. SHAFFER: Okay. Okay. I'll stop
24 there.

25 JUSTICE GORSUCH: Yeah. Good idea.

1 Okay. What percentage of your
2 clients' materials would be considered obscene
3 for minors?

4 MR. SHAFFER: Your Honors, it's --
5 it's tough to arrive at that calculation.

6 JUSTICE GORSUCH: Well, your friends
7 on the other side say it's all.

8 MR. SHAFFER: I don't think -- no,
9 that -- that is not true, Your Honors. We
10 respectfully disagree.

11 JUSTICE GORSUCH: Virtually all?

12 MR. SHAFFER: No. Your Honors, if you
13 look --

14 JUSTICE GORSUCH: Okay. Then you give
15 me the number. What percentage?

16 MR. SHAFFER: I -- I cannot quantify
17 it because we're dealing with, I would
18 recognize, a very large universe of material. I
19 would note, Your Honor, that among that material
20 is blogs, it is podcasts, it is -- it is --

21 JUSTICE GORSUCH: I understand. I'm
22 asking you for a percentage.

23 MR. SHAFFER: Your Honor, I cannot
24 quantify that.

25 JUSTICE GORSUCH: More than

1 50 percent?

2 MR. SHAFFER: I think that's a fair --
3 that -- that's a fair guess.

4 JUSTICE GORSUCH: More than
5 70 percent?

6 MR. SHAFFER: Your Honors, I -- I
7 don't want to go out on a limb. I think that
8 may be correct, but I can't --

9 JUSTICE GORSUCH: More than that?

10 MR. SHAFFER: -- tell you with
11 assurance.

12 JUSTICE GORSUCH: More than
13 90 percent?

14 MR. SHAFFER: There, Your Honor, I
15 think we may be stretching upwards --

16 JUSTICE GORSUCH: Okay. So we --

17 MR. SHAFFER: -- as far as whether
18 it's sexually explicit.

19 JUSTICE GORSUCH: -- we got
20 70 percent, though. Okay. All right.

21 And then do you agree that there is a
22 compelling government interest in keeping
23 obscene materials from minors?

24 MR. SHAFFER: Yes, unequivocally.

25 JUSTICE GORSUCH: Okay. Thank you.

1 JUSTICE SOTOMAYOR: Counsel, can we --

2 JUSTICE ALITO: Well, why don't you --
3 to follow up on -- on Justice Gorsuch's
4 questions, why don't you talk about the most
5 popular porn sites, which I -- I gather you're
6 representing.

7 So one of the parties here is -- is
8 the owner of Pornhub, right?

9 MR. SHAFFER: Yes.

10 JUSTICE ALITO: And what percentage of
11 the material on that is not obscene as to
12 children?

13 MR. SHAFFER: Well, Your Honor, I --
14 I -- if we're talking about the youngest minors,
15 I would agree that most of it is, and we -- that
16 is how we read the law.

17 JUSTICE ALITO: But is it -- is it
18 like the old Playboy magazine? You have essays
19 there by the modern-day equivalent of Gore Vidal
20 and William F. Buckley, Junior?

21 MR. SHAFFER: Not in that sense. But,
22 in the sense you have sexual wellness posts
23 about women recovering from hysterectomies and
24 how they can enjoy sex, that's on -- on there.
25 Discussions of age-verification proposals and

1 where the industry lines up as far as what they
2 think should be legislated and what should not.

3 JUSTICE ALITO: All right. Let's go
4 down to, what's the second most popular porn
5 site?

6 MR. SHAFFER: I -- Your Honor, I
7 don't -- I don't have the exact rankings.

8 JUSTICE ALITO: You don't know? You
9 represent these people.

10 MR. SHAFFER: They -- we represent the
11 industry, Your Honor, the portion of the
12 industry that answers to U.S. laws and
13 jurisdiction, so that portion.

14 JUSTICE ALITO: Do you have -- are you
15 familiar with what they have?

16 MR. SHAFFER: Your Honor, somewhat so,
17 yes. And I think the record offers some
18 indications of that. But I'd also note that
19 some of it is soft core by any account. It's --
20 it's people who are wearing less rather than
21 more clothing, we would recognize, but not
22 anything that anyone would think to be obscene
23 as to adults and potentially for a 17-year-old.
24 That would be up to a parent to decide what's
25 appropriate for their -- their minor.

1 JUSTICE ALITO: I mean, the district
2 court was worried that this would have an effect
3 on something like Netflix, right?

4 MR. SHAFFER: Yes.

5 JUSTICE ALITO: I mean, is Netflix a
6 party here?

7 MR. SHAFFER: No, they're not. But --

8 JUSTICE ALITO: Is there any --
9 anything -- any business, other than hard-core
10 porn, a party here, concerned about the
11 application of this law to them?

12 MR. SHAFFER: Yes, Your Honor.

13 JUSTICE ALITO: I'm sorry, an amicus
14 here?

15 MR. SHAFFER: Well, Your Honor, you
16 have the American Booksellers Association. You
17 have O. School, which is devoted to sex
18 education.

19 JUSTICE ALITO: I think you have --
20 yeah. You don't have Netflix, you don't have
21 any -- anything -- anybody else like that who is
22 concerned that this would apply?

23 MR. SHAFFER: Even in terms of the
24 client base, Justice Alito, I want to be
25 precise, one of the client websites is solely

1 soft core. It's not anything that you would --
2 I think would answer to the description you were
3 suggesting earlier. And they are absolutely
4 going to be brought within the sweep.

5 JUSTICE ALITO: I mean, there are
6 two --

7 JUSTICE SOTOMAYOR: Counsel, can --
8 can we get to the question presented?

9 MR. SHAFFER: Yes, Justice Sotomayor.

10 JUSTICE SOTOMAYOR: The question
11 presented is not whether this law passes -- is
12 constitutional. The question is what level of
13 scrutiny, correct?

14 MR. SHAFFER: Correct.

15 JUSTICE SOTOMAYOR: And so the issue
16 that Justice Gorsuch asked you was what type of
17 scrutiny should we apply when content can be
18 obscene as to children but not obscene as to
19 adults, correct?

20 MR. SHAFFER: Correct.

21 JUSTICE SOTOMAYOR: And we have at
22 least five presidents -- precedents that have
23 answered that question directly?

24 MR. SHAFFER: Yes.

25 JUSTICE SOTOMAYOR: In Sable, some of

1 the material was obscene to children even if it
2 wasn't obscene as to adults because, with
3 respect to children, we have said that even
4 indecent materials can be regulated under
5 rational basis, correct?

6 MR. SHAFFER: Yes.

7 JUSTICE SOTOMAYOR: And in Sable, the
8 law applied to adults, and we said you had to
9 apply strict scrutiny.

10 MR. SHAFFER: Correct. And it was
11 invalid under --

12 JUSTICE SOTOMAYOR: So the answer to
13 Justice Gorsuch is let's treat every medium
14 under the scrutiny that applies to the people
15 affected, correct?

16 MR. SHAFFER: Yes, Justice Sotomayor.

17 JUSTICE SOTOMAYOR: So that's strict
18 scrutiny?

19 MR. SHAFFER: That is strict scrutiny.

20 JUSTICE SOTOMAYOR: For us to apply
21 anything else would be overturning at least five
22 precedents?

23 MR. SHAFFER: That's my count as well.

24 And --

25 JUSTICE SOTOMAYOR: All right. Now

1 let's move from there, okay?

2 Assuming all of the questions that
3 have been asked of you, whether because this
4 medium is different, more ubiquitous, whether
5 because the -- the effect on children might be
6 greater today than it was back when, we have --
7 that would go to whether strict scrutiny is met,
8 isn't that true?

9 MR. SHAFFER: That is exactly right.

10 JUSTICE SOTOMAYOR: And so, if content
11 filtering is no longer as effective as we
12 thought in Ashcroft -- and I spot my colleagues
13 that that's likely true -- that would go to
14 whether this law meets strict scrutiny because
15 age verification is more effective, correct?

16 MR. SHAFFER: Yes.

17 JUSTICE SOTOMAYOR: All right. Now,
18 having said all of that, there has been a
19 suggestion by the other side that, instead of
20 strict scrutiny, we should apply intermediate
21 scrutiny.

22 Assuming we applied a different level
23 of scrutiny -- I don't know why, because the
24 only two times that we've applied intermediate
25 scrutiny, one was Renton, where they were

1 dealing with the effects unrelated to speech,
2 correct?

3 MR. SHAFFER: Correct, secondary
4 effects.

5 JUSTICE SOTOMAYOR: Secondary effects,
6 traffic jams, noise, et cetera. But the one
7 case that might give me pause is Pacifica, all
8 right? And Pacifica had to do with a radio, and
9 we applied a different level of scrutiny because
10 of that, but it wasn't rational basis like this
11 Court did, correct?

12 MR. SHAFFER: Correct.

13 JUSTICE SOTOMAYOR: So it was at best
14 intermediate scrutiny?

15 MR. SHAFFER: Yes.

16 JUSTICE SOTOMAYOR: Why is this
17 different than Pacifica?

18 MR. SHAFFER: Two reasons I'll offer,
19 Justice Sotomayor.

20 Number one, broadcast is uniquely
21 regulated as a medium of expression, as the
22 Court has recognized, and -- and public
23 broadcasting in particular. The Internet is the
24 opposite of that, through all the precedents
25 that Your Honor went through, Reno and Ashcroft

1 and the way that the Internet has developed.

2 The second reason, the Court
3 emphasized just how much radio permeates the
4 entire house. If the radio is on, you may just
5 hear something. So there's no analogue for
6 content filtering, and you don't have a user
7 through the screen who is specifically electing
8 certain content.

9 And I would just note, Justice
10 Sotomayor, in *Pacifica*, it was even-handed
11 across-the-board regulation of the content
12 deemed inappropriate for kids. Here, you have
13 what Justice Kavanaugh and I were discussing in
14 terms of under-inclusiveness. I would say it is
15 so conspicuous, so inexplicable, it is
16 speaker-based discrimination. That is another
17 reason in our view why strict scrutiny would
18 apply here even more so than in the cases we
19 were just going through.

20 Sorry, Mr. Chief Justice.

21 CHIEF JUSTICE ROBERTS: No. Thank you
22 very much, counsel.

23 Sable, of course, was 35 years ago.
24 In that period, the technological access to
25 pornography, obviously, has exploded, right? I

1 mean, it was very difficult for 15-year-olds,
2 whatever, to get access -- access to the type of
3 things that is available with a push of a button
4 today. And the nature of the pornography, I
5 think, has also changed in -- in those 35 years.

6 And so are those the sort of
7 developments that suggest revisiting the
8 standard of scrutiny as -- as something that we
9 should at least consider, as opposed to keeping
10 a structure that was accepted and established in
11 an entirely different era?

12 MR. SHAFFER: I'd respectfully urge
13 you not to, Mr. Chief Justice, and for the same
14 reasons that Your Honors did in the Holder case,
15 in the Yulee case, in opinions that you wrote,
16 Mr. Chief Justice. The extent of the interest
17 does not change the standard of scrutiny. It
18 simply goes to whether the applicable scrutiny
19 is satisfied.

20 And we are here conceding explicitly
21 that there is a compelling interest that is at
22 work in this area. We encourage state efforts
23 to regulate in a way that is properly tailored,
24 is respectful of adults' rights, and is really
25 going to help protect kids.

1 And so that, Your Honors, is exactly
2 where strict scrutiny does its work. And I
3 think, for the reasons that we were discussing
4 with Justice Sotomayor, it is as well warranted
5 here as in the entire string of cases where Your
6 Honors have continuously applied strict scrutiny
7 even as there were new problems, new
8 technologies that government was trying to
9 tackle.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Alito?

14 JUSTICE ALITO: Justice Sotomayor
15 mentioned some of the precedents that have been
16 cited by the parties in this case. She didn't
17 mention Ginsberg versus New York, which was
18 perhaps the decision that the court of appeals
19 relied on most heavily.

20 So I would like you to explain why
21 rational basis was appropriate in Ginsberg and
22 not appropriate here. What you say in your
23 brief is: The law at issue in Ginsberg did not
24 place any restriction on adults' access to
25 sexual materials. It did not, for example,

1 require sellers to conduct age verification of
2 adult customers.

3 How can that be true? Suppose a
4 youngish-looking person went into Mr. Ginsberg's
5 store and wanted to buy a girly magazine.
6 Mr. Ginsberg faced the possibility of criminal
7 prosecution if he did not verify that that
8 person was not a minor. So why is there not age
9 verification built into the issue in Ginsberg?

10 MR. SHAFFER: Justice Alito, if it's
11 built in, it's tailored age verification, just
12 as you were suggesting with the question. Most
13 purchasers -- if I myself were the purchaser, I
14 don't think I would be carded. The -- the New
15 York law said that if there was a knowing sale
16 to a minor, someone whom the seller should
17 suspect to be a minor, that was the exceptional
18 instance where you might have, subject to the
19 seller's discretion, some reasonable effort to
20 ascertain the age. That --

21 JUSTICE ALITO: Well, if you're -- I
22 mean, if -- if what you're facing is possible
23 criminal liability, you may want to err on the
24 side of safety. I know that when I try to buy
25 wine at a supermarket, they require me to show

1 an ID. I take it -- it's kind of -- I'm
2 flattered by it.

3 (Laughter.)

4 MR. SHAFFER: I've had the same
5 experience. But, Justice Alito, I don't think
6 the senior citizen under the New York law would
7 be as likely to be asked to produce verification
8 of age. And it certainly wasn't an
9 across-the-board age verification mandate that
10 has costs and burdens and chills.

11 JUSTICE SOTOMAYOR: Counsel, I think
12 you're off on a tangent --

13 CHIEF JUSTICE ROBERTS: I'm sorry.

14 JUSTICE SOTOMAYOR: I'm sorry.

15 CHIEF JUSTICE ROBERTS: I'm sorry,
16 Justice Sotomayor.

17 MR. SHAFFER: Sorry.

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: Well, let me -- let me
20 move on to something else.

21 So you -- you agree that the state has
22 a compelling interest, but you say they have
23 other ways, less burdensome ways, of serving
24 that interest, and I just wanted you to go
25 through those.

1 So one is filtering. We've talked
2 about filtering. Another that you referred to
3 in passing was putting some kind of a blocking
4 device on every device. You want this built
5 into every smartphone? Is that the idea?

6 MR. SHAFFER: So it's available, yes,
7 Justice Alito, right there at the click of a
8 button.

9 JUSTICE ALITO: Why is that less
10 burdensome?

11 MR. SHAFFER: First of all, it's not
12 burdening speech. It's the conduct of producing
13 the device that's subject to the regulation.
14 You also don't have someone, when they're
15 accessing extremely sensitive content online,
16 merely by virtue of that, going through a
17 separate transaction where they're identifying
18 themselves in a way that is specific to that
19 content, the most sensitive, private,
20 compromising content. And -- and --

21 JUSTICE ALITO: You don't want -- your
22 clients don't want to pay for it. You want --
23 you want to put the -- the cost on -- on Apple
24 and Google, right?

25 MR. SHAFFER: Well, Your Honor --

1 JUSTICE ALITO: That's what's
2 involved?

3 MR. SHAFFER: -- I'd also note it's
4 not a tax on the speaker, which has been a
5 traditional paradigmatic concern of the First
6 Amendment. Here, it is the speaker of the
7 particular expression who, by virtue of that
8 content, is subject to the tax.

9 JUSTICE ALITO: And what other --

10 MR. SHAFFER: That is --

11 JUSTICE ALITO: -- what other ways of
12 furthering this interest do you think the state
13 should have adopted?

14 MR. SHAFFER: Two more. You could
15 have blocking at the Internet service provider
16 level subject to the election of the adult who's
17 in charge of the account so that you could have
18 it cut off at the source so it doesn't flow into
19 the household unless the adult has authorized
20 it.

21 And the other, as I was discussing
22 with Justice Thomas, if the state is to pursue
23 age verification and the Court is to suggest
24 that that is open to the state, notwithstanding
25 the availability of these other alternatives,

1 let them do that in a way that is well
2 considered and tailored so that the age
3 verification process is no more burdensome than
4 it needs to be.

5 You have guarantees about what that
6 age verification looks like. You have privacy
7 protections. You have confidentiality. You
8 have enforcement mechanisms that are available
9 to the aggrieved private party. This law, H.B.
10 1181, does not answer to any of those --

11 JUSTICE ALITO: Well, there are --
12 there are services that provide age verification
13 for lots of -- and -- and -- and they are used
14 for lots of purposes, for -- for online
15 gambling, for purchasing tobacco products, and
16 they have very tough privacy limitations built
17 into them. Isn't it open to your clients to use
18 those?

19 MR. SHAFFER: Actually, it's not,
20 Justice Alito, because, if you look at
21 Petitioners' Appendix 171, you can see the
22 provisions of the law that govern age
23 verification. It has to be one of three things,
24 either a digital ID, which everyone agrees is
25 not available in Texas, so that's -- the -- the

1 number one alternative is -- is -- is not there
2 to be used.

3 The second is a government-issued ID,
4 which everyone agrees is exceptionally chilling,
5 perhaps the most chilling way to identify
6 yourself to a hostile government.

7 And the third is dependent upon
8 commercially reasonable methods that rely upon
9 transactional data, Justice Alito, so that's
10 things like your mortgage application, your --
11 your --

12 JUSTICE ALITO: So you could not use
13 Yoti, for example?

14 MR. SHAFFER: We --

15 JUSTICE ALITO: Your clients could not
16 use that?

17 MR. SHAFFER: We don't think so,
18 Justice Alito. There -- by all indications,
19 that is ruled out. And I do think that that's
20 telling. You have Yoti's amicus brief, but they
21 don't pretend to marry up their proposed forms
22 of age verification with what Texas has
23 prescribed and, by implication, proscribed as an
24 available form of age verification.

25 JUSTICE ALITO: Is that something

1 that's been addressed by the Texas courts or by
2 the Texas AG, whether using a service like that
3 would satisfy the requirements of the statute?

4 MR. SHAFFER: I think the plain text
5 tells us you can't. Texas didn't suggest a
6 narrowing construction below. And, of course,
7 this was a pre-enforcement challenge that
8 resulted in a preliminary injunction. So there
9 just isn't an opportunity there to have the
10 narrowing construction.

11 One other point if I may, Justice
12 Alito, there have been hacks of age-verification
13 providers. That -- that is a real thing,
14 despite all of their assurances. And Yoti, as
15 you'll see in amicus briefs in support of us --

16 JUSTICE ALITO: There have been hacks
17 of everything.

18 MR. SHAFFER: Yes, yes. And that is
19 exactly why age verification has an inherent
20 chill to it. Everyone knows what Your Honor
21 just said.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: Ginsberg -- and

1 that's what the Court below relied upon --
2 Ginsberg wasn't -- was a child --

3 MR. SHAFFER: Yes.

4 JUSTICE SOTOMAYOR: -- objecting, not
5 a store.

6 MR. SHAFFER: Exactly right, Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: And it was a child
9 saying: I don't have -- I shouldn't be barred
10 from viewing indecent materials because adults
11 shouldn't, correct?

12 MR. SHAFFER: That's correct.

13 JUSTICE SOTOMAYOR: And so the only
14 rule there was what level of scrutiny do you
15 apply to a law that applies only to children,
16 correct?

17 MR. SHAFFER: That is exactly right.

18 JUSTICE SOTOMAYOR: And what the Court
19 said is what's indecent for an adult could be
20 obscene, basically, for a child. We -- and
21 obscene materials only have to -- for
22 children -- obscene or indecent materials only
23 have to satisfy rational basis?

24 MR. SHAFFER: That's right. And I
25 would just note that Justice Brennan's for

1 the -- Justice Brennan's opinion for the Court
2 was exceptionally clear about what you were just
3 going through, Justice Sotomayor, what was and
4 was not being addressed.

5 JUSTICE SOTOMAYOR: So, in terms of
6 Ginsberg being a precedent, it's not a precedent
7 involving a burden on adults?

8 MR. SHAFFER: Yes. And our challenge
9 is solely on behalf of adults. We are not
10 invoking the rights of minors for purposes of
11 our challenge.

12 JUSTICE SOTOMAYOR: Sable was a case
13 in which there was a burden on children and a
14 burden on adults. The Court applied rational
15 basis to the burden on children and explicitly
16 applied strict scrutiny to the burden on adults,
17 correct?

18 MR. SHAFFER: Yes.

19 JUSTICE SOTOMAYOR: So we have direct
20 precedent that says you'll apply different
21 scrutiny to each age category.

22 MR. SHAFFER: That's right. And I
23 would just note that in Reno, Justice O'Connor's
24 separate opinion there differentiated, just as
25 Your Honor's suggesting, between the rights of

1 minors versus the rights of adults, which were
2 separately addressed in that opinion too.

3 JUSTICE SOTOMAYOR: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: No.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: I had thought
9 Ginsberg was a conviction of an adult who sold
10 to minors, and it wasn't a minor asserting any
11 rights. It was -- he was charged and convicted
12 of a crime knowingly selling to minors, right?

13 MR. SHAFFER: Forgive me for agreeing
14 with both you and Justice Sotomayor.

15 JUSTICE GORSUCH: Yeah. I --

16 MR. SHAFFER: The challenge --

17 JUSTICE GORSUCH: But only one of us
18 can be right.

19 MR. SHAFFER: Well, here's -- here's
20 how I -- I square the circle. It was a
21 challenge by the seller, invoking the rights of
22 minors. So that was what the Court was
23 presented with.

24 JUSTICE GORSUCH: It was invoking his
25 right to sell to minors.

1 MR. SHAFFER: Justice Gorsuch, I --

2 JUSTICE GORSUCH: He was convicted of
3 a crime for knowingly selling to minors,
4 counsel.

5 MR. SHAFFER: As Your Honor knows, in
6 the -- in the First Amendment context, the
7 overbreadth -- the availability of the
8 overbreadth challenge can invoke the rights of
9 others. And that's exactly what I understood,
10 per Justice Brennan, the -- the challenger there
11 to have done --

12 JUSTICE GORSUCH: All right.

13 MR. SHAFFER: -- invoking the rights
14 of the minor.

15 JUSTICE GORSUCH: Okay. You agree he
16 was challenging his criminal conviction for
17 knowingly selling --

18 MR. SHAFFER: I -- I'm not going to
19 disagree with --

20 JUSTICE GORSUCH: You can't --

21 MR. SHAFFER: -- the procedural march,
22 Your Honor, just -- just the substance.

23 JUSTICE GORSUCH: All right. And your
24 distinction of Ginsberg is, there, he didn't
25 have to check every ID? Is that your -- is that

1 your distinction?

2 MR. SHAFFER: Correct. Liability
3 arose from a knowing sale.

4 JUSTICE GORSUCH: So you think that a
5 law that would require brick-and-mortar stores
6 to check all IDs would be impermissible?

7 MR. SHAFFER: I think it would be
8 subject to strict scrutiny potentially. If the
9 adult shows the sorts of burdens that we have
10 here, then I think --

11 JUSTICE GORSUCH: And you would argue
12 that -- undoubtedly, that it chills and,
13 therefore, it's a problem, right?

14 MR. SHAFFER: Justice Gorsuch, my
15 arguments would not be anywhere near as strong.
16 I don't envision any such challenge, and I don't
17 know of any such challenge being brought. I'm
18 not suggesting the Court should write its
19 opinion here in a way that invites those
20 challenges.

21 JUSTICE GORSUCH: And with respect to
22 age verification online, which you -- you treat
23 as a different kettle of fish, gambling, age ID
24 is required by a lot of states.

25 MR. SHAFFER: If it's not involving

1 expression -- protected expression, I'm not
2 bringing a First Amendment challenge.

3 JUSTICE GORSUCH: Okay. Applying to
4 get a gun, Second Amendment, got to do that
5 online?

6 MR. SHAFFER: Different standard.
7 We're not concerned with chill in the same way.
8 We don't have all the precedents that call for
9 strict scrutiny when you have burdens on adults
10 and -- and the concerns that are operative here.

11 JUSTICE GORSUCH: To vote in some
12 states, you have to show an ID, a
13 government-issued ID?

14 MR. SHAFFER: We're not suggesting
15 that's at issue here.

16 JUSTICE GORSUCH: Okay. All those are
17 okay, but this is different?

18 MR. SHAFFER: Your Honor, it is
19 different, and I think part of it's because of
20 the Internet, part of it's because of the law,
21 and part of it's because we're talking about a
22 content-based burden on the speaker.

23 JUSTICE GORSUCH: Okay. And then we
24 do have an amicus, you know, from the
25 age-verification providers saying that this can

1 be done now online, anticipating it talking
2 about Justice O'Connor's very thoughtful
3 concurrence in Reno saying this technology is
4 going to change, and they say it indeed has
5 changed.

6 And you point out that we don't have
7 much of a record given that this is on a PI.
8 What do we do about that?

9 MR. SHAFFER: I think it was incumbent
10 upon the Texas legislature to make a record and
11 show that it was wrestling with these
12 considerations.

13 JUSTICE GORSUCH: Or -- or -- or is it
14 incumbent upon the challenger to the law,
15 especially in a facial challenge, to make the
16 record?

17 MR. SHAFFER: I think, under strict
18 scrutiny, it's Texas that bears the burden. It
19 is a content-based burden on expression. You
20 have the instruction of this Court that was
21 clear as can be in Ashcroft and no consideration
22 by the Texas legislature about content
23 filtering. So I think that gives us likelihood
24 of success out of the gate.

25 But I would also note, Justice

1 Gorsuch, as found by the district court, we
2 showed that age verification, as implemented by
3 H. B. 1181, will chill and will be invading
4 privacy.

5 One last point. This is a one-third
6 trigger. And what Your Honor's positing is a
7 more targeted law, a more tailored law that
8 says: Here's a particular concern, and we're
9 regulating according to that.

10 JUSTICE GORSUCH: And then what do you
11 do about our statement in Moody that those who
12 bring facial challenges have an especially hard
13 row -- not road -- row to hoe?

14 (Laughter.)

15 MR. SHAFFER: Yes. We think we've --
16 we've -- we've done what Moody's would require
17 any First Amendment challenger to do. We've
18 shown that the heartland applications are
19 unconstitutional, particularly when it comes to
20 lack of tailoring. As you expand beyond these
21 particular challengers who are the avowed
22 targets of the law, the analysis only gets worse
23 for Texas.

24 We don't read Moody's to have
25 transformed First Amendment jurisprudence so

1 that you can never bring a First Amendment
2 challenge when you're dealing with certain
3 unknowns and a wide array of speech that's being
4 regulated.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: On Justice
9 Sotomayor's questions about what's before us, is
10 it just whether we apply heightened scrutiny, do
11 we go on to apply heightened scrutiny, you, in
12 your opening, asked us to restore the
13 preliminary injunction.

14 In order to restore the preliminary
15 injunction as you are asking, we have to make an
16 assessment of likelihood of success on how the
17 standard is applied, not just what the standard
18 is, correct?

19 MR. SHAFFER: Correct, Justice
20 Kavanaugh. So I'm -- I'm -- but I'm
21 respectfully making that ask of the Court, but
22 we recognize you could stop short.

23 JUSTICE KAVANAUGH: Okay. And do you
24 dispute the problem that Texas is targeting of
25 children's access to pornography?

1 MR. SHAFFER: We don't dispute the
2 underlying problem. We support efforts to solve
3 the problem --

4 JUSTICE KAVANAUGH: Do you --

5 MR. SHAFFER: -- as long as they're
6 properly tailored.

7 JUSTICE KAVANAUGH: -- do you dispute
8 the societal problems that are created both
9 short term and long term from the rampant access
10 to pornography for children?

11 MR. SHAFFER: Justice Kavanaugh, that
12 is a complicated question that I -- I don't know
13 that I can speak to definitively.

14 I would say this. I think that
15 there's a discussion, a robust discussion and a
16 healthy discussion, about whether all sorts of
17 things involving screens and the Internet and
18 social media and interactions over the Internet,
19 whether those are unhealthy for children.

20 JUSTICE KAVANAUGH: Okay.

21 MR. SHAFFER: And we understand that
22 this is part of that discussion. I just don't
23 think it's confined, as Your Honor was
24 suggesting with the court -- with the question,
25 to pornography.

1 JUSTICE KAVANAUGH: And then thinking
2 back to Ashcroft 20 years ago versus now, age
3 verification technology has become cheaper, more
4 effective in preventing circumvention. At least
5 that's what is represented to us.

6 Do you dispute that?

7 MR. SHAFFER: I think that the
8 technology has evolved. We don't dispute that.
9 I think the forms of age verification that are
10 built into the law are absolutely susceptible to
11 cheating because you can get the supposed proof
12 of age --

13 JUSTICE KAVANAUGH: The question was
14 whether it's improved since the time of
15 Ashcroft.

16 MR. SHAFFER: I think that it has
17 improved, Justice Kavanaugh. I don't know that
18 it's fit for purpose, but it has improved.

19 JUSTICE KAVANAUGH: And then European
20 countries, France and others, are requiring age
21 verification for this kind of thing?

22 MR. SHAFFER: Your Honor, they have
23 explored it. I would note that the U.K. has
24 actually suspended age verification pending
25 technological developments. And they do not --

1 to the extent that they require age
2 verification, the way that they're doing it
3 looks fundamentally different from Texas
4 because, as Your Honor knows, Europe builds in
5 all sorts of ferocious privacy protections and
6 penalties if there are violations.

7 JUSTICE KAVANAUGH: That's a fair
8 point there.

9 On the -- on the change in
10 technologies, how do we evaluate the ubiquitous
11 nature of smartphones that did not exist at the
12 time of Ashcroft?

13 MR. SHAFFER: I think it tells you
14 that this law is not going to accomplish its
15 aims because a smartphone can access the foreign
16 websites. It can access -- you can use VPNs at
17 the click of a button and it could seem like
18 you're not in Texas. You can go through the
19 search engines. You can go through social
20 media. You can access the same content in the
21 ways that kids are likeliest to do. And H. B.
22 1181, by its design, does nothing, I do mean
23 nothing, to address that.

24 JUSTICE KAVANAUGH: And, again, I'm
25 asking those questions because you are asking us

1 to restore the preliminary injunction, and,
2 therefore, we need to have some sense of those
3 questions.

4 MR. SHAFFER: I appreciate the
5 questions.

6 JUSTICE KAVANAUGH: Yeah. And, last,
7 on stare decisis, because that's been raised
8 appropriately, how do we think about stare
9 decisis with a case like Ashcroft as to its
10 evaluation of the facts on the ground as opposed
11 to its legal standard articulation?

12 MR. SHAFFER: I think Ashcroft was
13 exactly on point because it was predictive. It
14 was not the Court saying definitively that here
15 is the -- the way of the world for all time and
16 in a way --

17 JUSTICE KAVANAUGH: Do you think it's
18 permissible for the Court to say, you know,
19 looking at it now with the technology as it's
20 evolved with the smartphones, with the
21 experience of the problems caused by children's
22 access to pornography, that we now essentially
23 agree with Justice Breyer's evaluation of how to
24 apply this standard?

25 MR. SHAFFER: Respectfully no, Justice

1 Kavanaugh, because of the --

2 JUSTICE KAVANAUGH: And why is that?

3 MR. SHAFFER: Because of the posture
4 we're in. We're here on a preliminary
5 injunction that --

6 JUSTICE KAVANAUGH: Likelihood that we
7 would agree with Justice Breyer.

8 MR. SHAFFER: Well, but, Justice
9 Kavanaugh, I think the district court has work
10 to do, as reflected in its undisturbed,
11 unchallenged, well-substantiated findings about
12 what the record says about these --

13 JUSTICE KAVANAUGH: But do you agree,
14 to --

15 MR. SHAFFER: -- questions right now.

16 JUSTICE KAVANAUGH: -- to restore a
17 preliminary injunction by this Court, we would
18 have to find that you have a likelihood of
19 success on how whatever level of scrutiny is
20 applied, correct?

21 MR. SHAFFER: I have a friendly
22 amendment to that. You would find that the
23 district court did not abuse its discretion by
24 so concluding preliminarily in predicting likely
25 success based upon a preliminary record. That's

1 exactly what Ashcroft addressed. That's exactly
2 what Your Honors have before you in this case.

3 JUSTICE KAVANAUGH: Okay. Thank you
4 very much.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: A question about the
8 level of scrutiny. So this law is a little
9 bit -- well, there are significant differences
10 between the way this law works and the way the
11 law worked in Ashcroft II.

12 And we all agree, and I -- I
13 understood you to concede earlier that a
14 minor -- that only rational basis would apply if
15 a minor brought a First Amendment challenge to
16 this law because the law very specifically
17 tracks only the category of speech that minors
18 have no right -- that -- that's obscene for
19 minors, so that minors have no right to access,
20 right?

21 MR. SHAFFER: I do agree with that. I
22 would just note, Justice Barrett, that, here, we
23 don't know the age of the minor in question. So
24 I could -- I don't want to prejudice the right
25 of a 17-year-old --

1 JUSTICE BARRETT: Right.

2 MR. SHAFFER: -- to say I'm being
3 limited to the rights of a 3-year-old.

4 JUSTICE BARRETT: Point taken.

5 MR. SHAFFER: But we're not here
6 asserting any such theory.

7 JUSTICE BARRETT: Point taken. What
8 I'm getting at here is, and just in thinking
9 about whether strict scrutiny is the right
10 standard, the law draws a line between speech
11 that's entirely unprotected as to one class and
12 speech that is protected. It doesn't try to
13 infringe upon the ability of adults to get it.
14 I understand it burdens it with the age
15 verification, but it doesn't prohibit it.

16 The law in Ashcroft II was content
17 discrimination on its face because it actually
18 made it illegal to post it, right, absent the
19 age verification defense?

20 MR. SHAFFER: Subject to the
21 affirmative defense, as Your Honor says, yes.

22 JUSTICE BARRETT: Subject to the
23 defense.

24 MR. SHAFFER: So --

25 JUSTICE BARRETT: Right, right, right,

1 right, right. Yeah. I -- I agree and I -- I'm
2 just --

3 MR. SHAFFER: Yeah.

4 JUSTICE BARRETT: -- exploring this
5 with you. So this law works a little bit
6 differently because the content-based line that
7 it draws -- I mean, it's not altogether taking
8 this content off the table, right? You can
9 still display it. Pornhub can still have its
10 videos up. But there's -- the age verification
11 requirement is the burden.

12 I guess I'm wondering if there's an
13 argument for it not being strict scrutiny -- not
14 being rational basis, but maybe we should be
15 thinking of this as the age verification
16 requirement burdens the adult's right to access
17 the material but in a way that's not trying to
18 discriminate on the basis of content. I know
19 you have to see the content in order to decide
20 where the age verification requirement applies,
21 but, you know, City of Austin says not every
22 check of the billboard triggers content --
23 triggers strict -- strict scrutiny, excuse me.
24 What do you have to say to that?

25 MR. SHAFFER: Two points if I may.

1 The first is what Your Honor is
2 positing is dependent upon the premise that
3 they're not putting anyone out of business in
4 preventing them from showing their content. The
5 record says otherwise. I mean, the costs of age
6 verification are such that some speakers cannot
7 continue to speak here.

8 And -- and the second, Justice
9 Barrett, I do agree with Justice Sotomayor's
10 questions that in *Playboy*, in *Sable*, the Court
11 was dealing with restrictions that were not
12 total bans, especially in *Playboy*. It was just
13 an effort to essentially say we're going to
14 channel this expression for adults. It's still
15 available for adults. It's just in a way that
16 shields minors from it. That's exactly where
17 the Court said that the burden in that case was
18 analyzed no differently from the ban at least
19 for purposes of the applicable standard of
20 scrutiny.

21 JUSTICE BARRETT: Okay. Thanks.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: And in addition to
25 those cases, don't you also have *Reno*? I mean,

1 I guess I don't understand how Justice Barrett's
2 hypothesized standard would -- would be
3 consistent with what we said in Reno, where we
4 said, in order to deny minors access to
5 potentially harmful speech, the law at issue
6 there effectively suppresses a large amount of
7 speech that adults have a constitutional right
8 to receive, and, therefore, it received strict
9 scrutiny. Right?

10 MR. SHAFFER: That's right, Justice
11 Jackson.

12 JUSTICE JACKSON: The other thing I
13 was pretty surprised about was your concession
14 to Justice Kavanaugh that we have to be
15 evaluating the likelihood of success. I don't
16 really understand that in this circumstance.

17 I thought we had a district court that
18 issued a preliminary injunction and a court of
19 appeals that you say erroneously stayed it. I
20 don't know why, if we determine that the court
21 of appeals applied the wrong standard and vacate
22 its ruling, the district court's injunction
23 doesn't just come back into effect. I don't --
24 you're not asking us to issue a PI, is that
25 right?

1 MR. SHAFFER: That's right, Justice
2 Jackson. I just -- I'm sorry.

3 JUSTICE JACKSON: So we're in a
4 situation where we really don't have to be
5 reaching the merits of success. What we're
6 doing, as Justice Sotomayor suggested, is
7 evaluating whether the court of appeals was
8 correct when it said that this was supposed to
9 be evaluated under the rational basis standard
10 as opposed to strict scrutiny, right?

11 MR. SHAFFER: Yes. All I meant to
12 suggest to Justice Kavanaugh, that I think more
13 guidance, rather than less, from the Court in
14 its opinion as to why, ostensibly, the district
15 court did not abuse its discretion would be
16 helpful here --

17 JUSTICE JACKSON: But it may not be if
18 they disagree with you. So what --

19 (Laughter.)

20 JUSTICE JACKSON: -- what -- what -- I
21 mean, this is my other question. You know, you
22 differ from the government insofar as the
23 government says just decide that the wrong level
24 of scrutiny was applied here and send it back to
25 the Fifth Circuit to apply it.

1 You say no, we should be applying the
2 standard for strict scrutiny. And I think that
3 is what is opening the door to all the questions
4 that you're getting about whether or not this is
5 actually narrowly tailored, whether or not there
6 are -- you know, content-based -- the content
7 filtering software is working. It's because, it
8 seems to me, that you've asked us to apply
9 strict scrutiny in a circumstance in which it
10 would have been easy, as the government
11 suggests, to just say wrong standard, Fifth
12 Circuit, and send it back.

13 MR. SHAFFER: I never want to be
14 disagreeing with the United States unless I
15 must. So we don't have much disagreement with
16 them on -- on this, Justice Jackson.

17 I would just note that we're talking
18 about undisturbed, unchallenged findings by the
19 district court and -- and a determination that
20 follows, in our view, inexorably from this
21 Court's precedent. Given that there has been
22 the detour taken by the lower court, I think it
23 would be helpful, I think it would be
24 reaffirming of First Amendment --

25 JUSTICE JACKSON: And the Fifth

1 Circuit can -- can decide on remand whether or
2 not the district court's findings actually
3 sustain this under the proper standard, correct?

4 MR. SHAFFER: It can, Justice Jackson.

5 JUSTICE JACKSON: Finally, with
6 respect to Ginsberg and whether or not the Fifth
7 Circuit was correct to look at Ginsberg as the
8 precedent that tells us what standard is
9 supposed to apply, in your colloquy with Justice
10 Gorsuch, he did -- and you admitted that we're
11 talking about a person who was convicted, and he
12 himself was an adult.

13 But I understood the Court to have
14 told us what the issue is. Well, first of all,
15 the Court in the opinion says that his --
16 meaning the -- the plaintiff -- the person's
17 contention, is the broad proposition that the
18 scope of the constitutional freedom of
19 expression secured to a citizen to read or see
20 material concerned with sex cannot be made to
21 depend on whether the citizen is an adult or a
22 minor. So he was saying this is
23 unconstitutional because it varies between adult
24 and minor.

25 And then the Court says: It's enough

1 for the purposes of this case that we inquire
2 whether it was constitutionally impermissible
3 for New York to accord minors under 17 a more
4 restricted right than that assured to adults to
5 judge and determine for themselves what sex
6 material they read.

7 So, really, this was a rights of
8 minors case where the person appeared to be
9 arguing that you can't have this law because it
10 burdens the rights of minors. So is that the
11 situation that we have here today in this case?

12 MR. SHAFFER: This is a fundamentally
13 different challenge. And I disagree with you --
14 I agree with you, Your Honor, that the Court was
15 exceptionally clear in Ginsberg about
16 adjudicating only the rights of minors in -- in
17 the face of a challenge that it understood to be
18 confined to the rights of minors.

19 JUSTICE JACKSON: And, here, we have a
20 challenge in which the person is saying: Fine,
21 whatever you do with minors, what we are
22 suggesting is that requiring adults to do
23 something, to do this thing, to access this
24 material burdens our First Amendment right. So
25 that's a different issue, is it not?

1 MR. SHAFFER: Exactly right, adults
2 and speakers. Also the -- the websites that
3 sponsor this content. All of which have to
4 answer to the age-verification mandate at great
5 cost.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Fletcher.

10 ORAL ARGUMENT OF BRIAN H. FLETCHER
11 FOR THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING VACATUR

13 MR. FLETCHER: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 We agree with Petitioners that the
16 Fifth Circuit was wrong to apply only rational
17 basis review because Texas's law imposes a
18 content-based burden on speech that is protected
19 for adults.

20 Our office acknowledged that strict
21 scrutiny applied to a similar federal law in
22 Ashcroft II. This Court agreed. And we haven't
23 identified a basis for applying a different
24 standard here.

25 Critically, though, that should not

1 prevent Congress or the states from restricting
2 the distribution of pornography to children
3 online, just as states have traditionally done
4 it in brick-and-mortar stores and theaters.

5 In remanding for the application of
6 strict scrutiny, we'd urge the Court to
7 emphasize three points.

8 First, the government has a compelling
9 interest in protecting children from harmful
10 sexual material online.

11 Second, a law serving that interest is
12 valid as long as it does not burden adult access
13 more than necessary to exclude children.

14 And, third, Ashcroft II's preliminary
15 application of strict scrutiny 20 years ago does
16 not prevent courts from upholding
17 age-verification requirements today now that
18 verification require -- has become less
19 burdensome and experience has shown that other
20 approaches are not working.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: In the laws that
23 you -- that the Justice Department was arguing
24 in favor of in Playboy and Ashcroft, in either
25 of those, did you ever suggest or argue that

1 there should be a lower standard?

2 MR. FLETCHER: We did in every one of
3 those cases before Ashcroft.

4 In Sable, which was the first one of
5 them, we argued for something like intermediate
6 scrutiny under *Pacifica*.

7 In *Reno*, which was the next one, we
8 again invoked *Pacifica* and also made a *Renton*
9 argument very similar to the secondary effects
10 argument that my friends from Texas make here.

11 And then, in *Playboy*, we again invoked
12 an argument based upon *Pacifica*, and Justice
13 Breyer, in dissent, made an argument based on
14 *Renton*.

15 So we made a pitch for intermediate
16 scrutiny repeatedly in this context. We were
17 rebuffed. And I think that's the history that
18 led us to concede in *Ashcroft II* that this was a
19 content-based restriction that demanded strict
20 scrutiny.

21 JUSTICE THOMAS: So do you think that
22 it's appropriate in this context of protecting
23 children to compromise the strict scrutiny
24 standard?

25 MR. FLETCHER: I wouldn't describe it

1 as compromising the strict scrutiny standard at
2 all, Justice Thomas. But I do think it would be
3 appropriate for the Court to emphasize that it's
4 going to be easier for states to satisfy strict
5 scrutiny in this context because of the very
6 unique nature of the interest here.

7 Normally, the government does not have
8 a legitimate, much less a compelling interest in
9 restricting speech based on its content. That's
10 a fundamental principle.

11 Here, though, there's a specific
12 category of speech defined by its content,
13 speech that is obscene as to the minors, where
14 everyone agrees that the state not only has a
15 legitimate interest but a compelling interest in
16 making sure that minors do not access that
17 speech that is defined by its content.

18 So I think it's going to be much
19 easier for states to show that restrictions that
20 are based on that content are narrowly tailored
21 to a compelling interest.

22 JUSTICE KAGAN: But will it be easy
23 enough for this law to pass?

24 MR. FLETCHER: I don't know about this
25 law. We haven't taken a position on that.

1 JUSTICE KAGAN: I know. But, I mean,
2 you've been staring at this law for a long time.
3 And -- and -- and this law is pretty similar to
4 20 other laws that are out there. So you must
5 have some sense even if you don't want to say
6 particularly this law.

7 MR. FLETCHER: Yeah.

8 JUSTICE KAGAN: There are 20 laws out
9 there. Are some of them going to pass through
10 the -- the eye of the needle here or not?

11 MR. FLETCHER: So let me say, if the
12 question were framed the way Justice Thomas did,
13 is there some version of age verification that
14 is good enough, my answer is yes, we --

15 JUSTICE KAGAN: I'm not really talking
16 about some imaginable version. I'm talking
17 about, like, some version that states have
18 enacted.

19 MR. FLETCHER: So let me be -- give
20 you a specific example. We defended COPA, the
21 law this Court looked at in Ashcroft II, even
22 after remand, in the district court, in the
23 Third Circuit, and in the cert petition in this
24 Court.

25 I have no reason to think that we

1 would come to any other conclusion about a law
2 that looked like that today.

3 The reason I'm hesitating about state
4 laws is that I don't know that there's actually
5 that much variation in the state laws. And all
6 of them raise some questions that we have about
7 Texas's law that we think are questions of what
8 the law means that would inform the First
9 Amendment analysis.

10 So one is this one-third requirement.
11 I think Petitioners say the law requires
12 age-gating of an entire website even if it has a
13 substantial amount of content that's protected.

14 My friends from Texas say in the red
15 brief that the -- if you segregate out the --
16 the obscene-as-to-minors content behind an age
17 gate, you don't have to age-gate the rest of the
18 content of the website. That seems highly
19 relevant to us.

20 The second one is the -- the -- the
21 issue that my friend alluded to earlier about
22 which methods of age verification are allowed.
23 The amicus briefs and Texas highlight some of
24 these newer biometric methods that seem
25 significantly less restrictive, but there's a

1 question, as the colloquy earlier illustrated,
2 whether Texas law would allow those methods or
3 would instead require some sort of physical
4 identification or transaction records of some
5 kind.

6 And then the last one, which has also
7 already come up, is which minors are we talking
8 about when we say "obscene as to minors." I
9 take it that the plaintiffs say that means
10 obscene even as to the youngest minors.

11 When we were defending a similar law
12 in COPA, in Ashcroft II, we took the position
13 that "obscene as to minors" means obscene as to
14 all minors, as in inappropriate and lacking in
15 value even as to older minors. I think the law
16 becomes much easier to defend if Texas courts
17 would adopt the same interpretation of the Texas
18 law here.

19 If I could add one thought. You know,
20 I think that this Court has said in a series of
21 recent First Amendment cases that tradition can
22 be a very important guidepost in deciding both
23 what standard of review applies and also in
24 thinking about how to apply that standard in
25 particular circumstances.

1 I think, here, the tradition that
2 applies in brick-and-mortar contexts that's
3 reflected in Ginsberg, to be sure, but also in a
4 much broader family of laws that restrict the
5 distribution of this material, as Justice
6 O'Connor explained in Footnotes 1 and 2 of her
7 opinion in Reno, adult theaters, adult
8 bookstores, books and magazines, there's a long
9 tradition of restricting this material through
10 age-verification methods that are less formal
11 because, as Justice Alito indicated, it's just a
12 requirement: Don't sell to minors. And that
13 means that a clerk in the physical world can do
14 it by looking at the person and only requiring
15 ID if the person isn't obviously of age.

16 But there's a long tradition of
17 imposing age restrictions on the distribution of
18 this material. So I think that supports the
19 idea that --

20 JUSTICE GORSUCH: And on that point,
21 Mr. Fletcher, I mean, that -- that -- that -- so
22 you do take Ginsberg to be more than we're just
23 dealing with the rights of minors. It -- it
24 does also impact how we think about the burden
25 placed on people, adults, to ensure that minors

1 don't have access. It speaks to that, as do our
2 traditions with respect to adult theaters and
3 many other things.

4 MR. FLETCHER: I agree with that
5 wholeheartedly as to the tradition that's
6 reflected in the law --

7 JUSTICE GORSUCH: Yeah. Okay.

8 MR. FLETCHER: -- that was at issue in
9 Ginsberg. I think I read Ginsberg the same way
10 that Justice Jackson does.

11 JUSTICE GORSUCH: No, I understand
12 that. But it -- it -- it's a necessary
13 implication of the decision.

14 MR. FLETCHER: Right. No one thought
15 that that law was invalid.

16 JUSTICE GORSUCH: Right.

17 MR. FLETCHER: I think everybody
18 understood it's a content-based law. But
19 everyone understands that the burden on adults
20 is okay --

21 JUSTICE GORSUCH: And --

22 MR. FLETCHER: -- because requiring ID
23 is the least restrictive way of keeping the
24 material away from children.

25 JUSTICE GORSUCH: And, in Sable,

1 there's burdens on speakers that we think are
2 okay to protect against obscenity, right?

3 MR. FLETCHER: Right. And the Court
4 suggests in Sable -- I think, there, it was a
5 ban on the Dial-a-Porn messages, and the Court
6 suggested some sort of age verification or
7 something like that would be a better way to do
8 it.

9 JUSTICE GORSUCH: And that would be a
10 burden on the speaker.

11 MR. FLETCHER: Exactly. Yes.

12 JUSTICE GORSUCH: And the same thing
13 with adult theaters and all, so on and so forth.

14 MR. FLETCHER: Right.

15 JUSTICE GORSUCH: Okay. If we -- if
16 we were to vacate the Fifth Circuit, as -- as --
17 as you've suggested, there's some question in
18 discussion about what that -- what -- what the
19 world looks like then.

20 MR. FLETCHER: Mm-hmm.

21 JUSTICE GORSUCH: Would the
22 preliminary injunction of the district court
23 spring back into effect, so this law that's
24 already taken effect will now no longer be
25 enforceable?

1 MR. FLETCHER: So I think that'll be a
2 question for the Fifth Circuit in the first
3 instance. If this Court vacates and sends it
4 back to the Fifth Circuit, when the Court's
5 mandate issues, the appeal would spring back to
6 life in the Fifth Circuit and it would be -- go
7 back to the state of the world before the Fifth
8 Circuit issued its opinion.

9 The state of the world was that the
10 Fifth Circuit had granted a stay of the
11 preliminary injunction pending appeal. I think
12 it would be open to the Fifth Circuit, with the
13 benefit of whatever guidance this Court provided
14 in its opinion, to decide in the first instance
15 whether to reinstate that same stay pending its
16 further consideration of the case on remand.

17 JUSTICE GORSUCH: How could it do that
18 if we've told them they've done the wrong
19 standard? I suppose they'd have to go back and
20 do the right standard. But, in the interim,
21 what happens?

22 MR. FLETCHER: Well, I think, you
23 know, there would be some period of time, I
24 think it's 35 days, before this Court's mandate
25 issues. If I were Texas, I would go to the

1 Fifth Circuit in the meantime and ask to
2 reinstate the stay. And I think Texas -- the
3 Fifth Circuit should look at it with the benefit
4 of this Court's guidance.

5 And I note that as the parties have
6 informed the Court on Monday, a panel of the
7 Sixth Circuit stayed a preliminary injunction of
8 Tennessee's very similar law and said that they
9 concluded that a stay was appropriate even on
10 the assumption that strict scrutiny applied.

11 JUSTICE BARRETT: Mr. Fletcher, I
12 share some of Justice Thomas's discomfort with
13 watering down strict scrutiny.

14 MR. FLETCHER: Mm-hmm.

15 JUSTICE BARRETT: And I think it's
16 common ground even with Petitioners that the
17 state has a compelling interest in protecting
18 minors and -- I mean, I think Petitioners would
19 be back here challenging even a different law as
20 failing strict scrutiny, but they've left open
21 the door to the possibility of it satisfying
22 strict scrutiny, but, you know, come on, fatal,
23 in fact.

24 And I -- I think there's a sense here
25 that the state should be able to protect minors

1 from some of this, but there's not a whole lot
2 of room in the way we traditionally understand
3 strict scrutiny for that to happen.

4 What is your reaction to spill-over
5 effects and whether this really would be kind of
6 loosening strict scrutiny?

7 MR. FLETCHER: So I -- I appreciate
8 the concern. And I guess I'll say, just as a
9 matter of first principles, some of your earlier
10 questions got at wouldn't intermediate scrutiny
11 make sense here.

12 I have a lot of sympathy for that
13 because, if we were writing on a blank slate, as
14 I said to Justice Thomas, the government was
15 arguing for something like intermediate scrutiny
16 in this context. So as a matter of first
17 principles, I think there's a lot of force to
18 that.

19 But we're not writing on a blank
20 slate. We have this series of precedents. And
21 so then I think the question is can we find room
22 for this intuition within the parameters that
23 the Court's decisions set. I think you can, as
24 some of the reasons I was explaining earlier
25 explain. This is the case where the state has a

1 compelling interest in restricting speech based
2 on its content. That is exceedingly unusual.
3 Right?

4 And so I think for the Court to say
5 states have room here even under strict scrutiny
6 but that is because of the particular and unique
7 nature of the interest here, I think would give
8 states the room that they need in this context
9 but without watering down the strict scrutiny
10 inquiry in other contexts where that's just not
11 going to be true.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 In terms of the precedents that you're
15 -- you're talking about, there are cases where
16 the technological developments caused the Court
17 to reconsider the precedents that were developed
18 under, you know, not quite the horse-and-buggy
19 days but -- but prior to very significant
20 changes.

21 Why -- why isn't that a pertinent
22 factor to consider here?

23 MR. FLETCHER: So I think it might be
24 pertinent, Mr. Chief Justice, but the Court has
25 also said more recently, including in NetChoice

1 last term, that the principles of the First
2 Amendment don't change with technology and has
3 tried to maintain the same fundamental First
4 Amendment principles and apply them to new
5 technology.

6 And so, at least to me, all of the
7 technological developments, which I agree are
8 incredibly relevant to this question, fit more
9 naturally in deciding how scrutiny applies and
10 explaining why states are likely to be able to
11 satisfy strict scrutiny in this space than it
12 does to revisiting what the fundamental standard
13 for a content-based restriction on speech ought
14 to be.

15 CHIEF JUSTICE ROBERTS: Well, the
16 principles of the First Amendment don't change
17 with technology, but the application of
18 technology to the First Amendment questions can
19 alter the perspective in terms of what is
20 affecting the principles and what isn't. How
21 you apply speech protections face-to-face might
22 be different if you're in a -- situations where
23 you're talking about the telephone or all sorts
24 of other things. Historically, there have been
25 changes in the applications of a law even if

1 you're -- I'll correct it, the basic principles
2 are -- are the same.

3 MR. FLETCHER: So --

4 CHIEF JUSTICE ROBERTS: And I -- and I
5 guess, repeat it, one of the things that's
6 striking about the case is the dramatic change
7 in the technology of brick-and-mortar stores to
8 the -- the access to pornography, which also
9 seems to be dramatically different from what it
10 was 40, whatever, years ago.

11 MR. FLETCHER: So let me try answering
12 that two ways. One is that I -- I do think
13 there's force to the idea that there has been a
14 lot of change, but that argument sounds a little
15 bit like the argument that Texas and Florida
16 made last term in NetChoice, where they said the
17 content that's going on on social media
18 platforms is totally different than the
19 editorial page of the Miami Herald. That calls
20 for a different standard of scrutiny. And this
21 Court said no, we're going to keep the same
22 standard of scrutiny but acknowledge that the
23 application might be different because of the
24 different facts. I think the way to be
25 consistent with that here would be to stick with

1 the same standard.

2 The second thing is if that doesn't
3 persuade you, I -- I think it might be a reason
4 to revisit the standard of scrutiny if you reach
5 the conclusion that strict scrutiny does not
6 give states the -- the window, the freedom to
7 solve this problem.

8 We think that there is reason to
9 believe that it does leave them that freedom.
10 And if that's true, then I think that's another
11 reason not to revisit precedent in this area.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas?

14 JUSTICE THOMAS: But you would admit,
15 though, that we're in an entirely different
16 world, and Playboy was about squiggly lines on
17 cable TV.

18 MR. FLETCHER: I don't disagree with
19 that, Your Honor.

20 JUSTICE THOMAS: And the world of
21 Ashcroft was a world of dial-up Internet.

22 MR. FLETCHER: Exactly. Ashcroft was
23 worried about children accessing this material
24 on -- you know, at home on home computers, in
25 libraries, in schools. Now every child has a

1 Smartphone in their pocket with a high-speed
2 Internet connection.

3 JUSTICE THOMAS: And didn't change in
4 technology affect our opinion from the reversal
5 from Quill to Wayfair?

6 MR. FLETCHER: I don't know, Justice
7 Thomas. That -- that wasn't a First Amendment
8 case --

9 JUSTICE THOMAS: I -- I understand
10 that.

11 MR. FLETCHER: So I -- I don't mean to
12 be trying to lay down bright-line rules or to
13 suggest that technology is never a reason when
14 the Court is revisiting a precedent, as it was
15 doing there. You know, here we think Texas
16 hasn't really squarely teed up a request to
17 overrule precedent in the way that this Court
18 usually expects before it takes that step. And,
19 instead, the Fifth Circuit thought that it was
20 applying and being consistent with this Court's
21 precedent.

22 We don't agree with that. Again, I
23 think if you were going to take another look at
24 Ashcroft based on a party coming in and making a
25 pitch to overrule it and the other line of

1 precedent that it stands on, then technological
2 change might be relevant. Our submission here
3 is just that you don't need to do that.

4 JUSTICE THOMAS: Well, but as well as
5 the fact that you thought that your argument in
6 some of the earlier cases, like Reno -- you
7 suggested a lower standard of scrutiny, and you
8 thought it would certainly play a role here now.

9 MR. FLETCHER: We did, you know, but,
10 again, this Court disagreed and --

11 JUSTICE THOMAS: Yeah, you threw in
12 the towel but, you know --

13 (Laughter.)

14 MR. FLETCHER: Well, we got -- we got
15 told no three times.

16 (Laughter.)

17 JUSTICE THOMAS: Well, and that's just
18 -- you shouldn't feel offended by that.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: Well, I don't want to
22 belabor Ginsberg too much, but it is a precedent
23 of the Court. And do you want us -- you don't
24 want us to overrule it, do you?

25 MR. FLETCHER: No, not at all.

1 JUSTICE ALITO: All right. So you
2 then have to explain why it is not very
3 important, if not controlling here. And what
4 I've heard from you -- you'll correct me if I'm
5 wrong -- is that Ginsberg did not consider the
6 burden on the seller or the burden on adults who
7 wanted to purchase these magazines. Is that how
8 you distinguish it?

9 MR. FLETCHER: I agree with the second
10 part. I do think it was -- as Justice Gorsuch
11 explained, it was a conviction of the seller,
12 but the argument he was making -- I think this
13 is clearest on 636 to 637 of the Court's
14 opinion -- was children have the same First
15 Amendment rights as adults. And the way the
16 Court framed its rejection of that argument --
17 and this is a quote -- was the law does not
18 invade, quote, "the area of freedom of
19 expression constitutionally secured to minors."

20 JUSTICE ALITO: Well, I -- I don't
21 think that's exactly the argument that was
22 actually made, and Mr. Ginsberg was represented
23 by some very sophisticated attorneys.

24 Here's something that they said in
25 their brief: The policing problem would become

1 an impossible burden, leading the bookseller to
2 abandon sale even to adults, thus the adults
3 would be deprived of such literature because it
4 was not available for distribution to
5 adolescents.

6 So the argument was before the Court.
7 The Court presumably was aware of it, took
8 account of it in its decision, and said --
9 Justice Brennan's writing for the Court -- the
10 proper standard of review here is rational
11 basis.

12 MR. FLETCHER: So I don't see that in
13 the Court's opinion. I don't disagree that the
14 parties may have put it before it, but we
15 usually read the Court's precedents for the
16 arguments and the issues that the Court actually
17 decides.

18 The other thing that I'll say is that
19 the Court did confront arguments that were
20 squarely framed in terms of the rights of adults
21 that were burdened when Congress was attempting
22 to protect minors from this material in cases
23 like Sable and Playboy and Reno and Ashcroft and
24 reached a different conclusion.

25 And the last thing I'll say, you know,

1 I mentioned to several justices why we've argued
2 for something like intermediate scrutiny before.
3 As I said to Justice Barrett, I think there was
4 force to that if we were writing on a blank
5 slate. The reason I think we haven't argued for
6 rational basis review is because they would lead
7 to results that I think even my friends from
8 Texas would be hard-pressed to defend.

9 Banning the speech entirely would be a
10 rational basis of keeping it away from children.
11 Even just in the realm of age verification,
12 requiring you to register with the state to get
13 a special card to get this material and to keep
14 records of who is viewing what might be a
15 rational way of keeping it away from children.
16 But those are very hard laws to defend, and I
17 think that's another reason why we've shied away
18 from arguing that Ginsberg means rational basis
19 in this space.

20 JUSTICE ALITO: I want to go back to
21 your assertion that if we thought that the Fifth
22 Circuit applied the wrong standard of review, we
23 would be required to cause the preliminary
24 injunction issued by the district court to
25 spring back into effect. Why would that be

1 true?

2 The question before us is whether we
3 should reverse a decision that stays that
4 preliminary injunction. So would we not have
5 the power to reverse the decision insofar as it
6 said that rational basis was the proper standard
7 of review, but leave it in place because we
8 thought, hypothetically, that this law would
9 satisfy even strict scrutiny? Would that be
10 beyond our power?

11 MR. FLETCHER: Just to get the
12 procedural posture exactly right, I don't think
13 what's before you is a decision on the stay.
14 What's before you is the Fifth Circuit's final
15 decision reversing the preliminary injunction --

16 JUSTICE ALITO: Correct. All right.

17 MR. FLETCHER: -- in this part.

18 JUSTICE ALITO: Yes.

19 MR. FLETCHER: And so if you -- if you
20 vacate that decision, I think normally it would
21 return the case, the appeal, to the Fifth
22 Circuit, and the ball would be in the Fifth
23 Circuit's court in the first instance.

24 JUSTICE ALITO: Well, it would be --
25 it would return the case to the Fifth Circuit on

1 the terms that we thought were -- were
2 appropriate --

3 MR. FLETCHER: And --

4 JUSTICE ALITO: -- in returning it to
5 the Fifth Circuit.

6 MR. FLETCHER: And, again, I'm not --
7 I don't suggest the Court lacks the power to, if
8 it wanted, to grant some sort of relief -- a
9 stay itself. I -- I'm sure that there's a way
10 for the Court to do that. If the Court wanted
11 to provide guidance in its opinion, including
12 very prescriptive guidance, I'm sure the Fifth
13 Circuit would follow that guidance in deciding
14 what the status quo ought be while the
15 litigation continues.

16 JUSTICE ALITO: All right. Just so
17 that I have them freshly in -- fresh in mind,
18 you mentioned certain matters that you thought
19 would be important to clarify under state law to
20 -- in making a judgment about whether this law
21 satisfies strict scrutiny.

22 Could you just tick those off again
23 for me?

24 MR. FLETCHER: Sure. There are three.

25 One is the one-third requirement and

1 whether that compels age-gating of material that
2 is protected even as to minors if it's on a site
3 that is otherwise covered.

4 The second question is the permitted
5 methods of age verification and, in particular,
6 whether the sorts of biometric methods that are
7 highlighted in the amicus briefs comply with
8 Texas law.

9 And the third is the question about,
10 when Texas law refers to "obscene as to minors,"
11 which minors are we talking about. Are we
12 talking about even the youngest minors, or are
13 we talking about all minors such that material
14 that is appropriate to older minors is
15 prohibited?

16 JUSTICE ALITO: All right. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: I'm not sure I
20 understand your first point, so what do -- could
21 you go through that again?

22 MR. FLETCHER: Sure. So I think one
23 of the points that Petitioners make is that the
24 Texas law requires age-gating of a website if
25 more than one-third of the material on that

1 website is sexual material that's harmful to
2 minors.

3 JUSTICE SOTOMAYOR: Yes.

4 MR. FLETCHER: And Petitioners say
5 that means we have to age-gate material even
6 if -- or age-gate a website even if up to
7 two-thirds of the material is constitutionally
8 protected even as to minors. And they say that
9 means that the statute isn't narrowly tailored
10 and that it restricts speech unnecessarily.

11 I understand my Texas -- my friends
12 from Texas -- although, of course, the general
13 can correct me -- to say that Texas law doesn't
14 necessarily mean that and that a website might
15 be able to comply by age-gating only the
16 material that is harmful sexual material and
17 obscene as to minors and not limiting minors'
18 access to the other protected material.

19 I think the law is easier to defend if
20 you accept a construction along those lines.

21 JUSTICE SOTOMAYOR: All right. With
22 respect to the privacy -- or the -- the
23 permitted methods of ID, counsel for Petitioner
24 says that the more secure methods -- I don't
25 even know what Yoti is -- but the more secure

1 methods are prohibited by this law.

2 Do you think that that is ambiguous?

3 MR. FLETCHER: I don't know the answer
4 to that.

5 JUSTICE SOTOMAYOR: Mm-hmm.

6 MR. FLETCHER: And I defer to the
7 parties on that. I -- I think, as counsel for
8 Petitioners said, the Texas law seems to say
9 that you need to have a commercially reasonable
10 method that -- that relies on public or private
11 transactional data.

12 And I think the question would be --
13 although, again, I welcome correction on this --
14 whether something that requires -- that relies
15 on biometric, face recognition, voice
16 recognition, something like that, satisfies that
17 requirement. And we just haven't taken a
18 position on that.

19 JUSTICE SOTOMAYOR: That's what -- so,
20 to the extent that what -- whatever methods are
21 found to be permitted under Texas law, if they
22 have greater risk to the user, that would be
23 part of the calculus?

24 MR. FLETCHER: I do think the concerns
25 for the user are part of the calculus, yes.

1 JUSTICE SOTOMAYOR: All right. Thank
2 you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Mr. Fletcher, I want
5 to talk to you about life on a blank slate.

6 So pretend that the precedents don't
7 exist for a moment. I -- I do want to come back
8 and ask you about the precedents, but pretend
9 that they don't.

10 And -- and make it really blank.
11 Like, it doesn't seem to me that you're required
12 to say: Well, we first argued it in a
13 non-strict scrutiny way, because, obviously, you
14 argued it in that way. You were defending
15 federal statutes. That was the most natural way
16 to defend them.

17 So I want to take out the fact that
18 your first argument was the not-strict-scrutiny
19 argument and -- and really say as you're
20 standing here on a blank slate. It seems to me
21 that there are possible spill-over dangers
22 either way.

23 MR. FLETCHER: Yeah.

24 JUSTICE KAGAN: One is the spill-over
25 danger of you relax strict scrutiny in one place

1 and all of a sudden strict scrutiny gets relaxed
2 in other places.

3 The other is the spill-over danger of
4 you treat a clearly content-based law as not
5 requiring strict scrutiny, and all of a sudden
6 you start seeing more content-based restrictions
7 that don't have to satisfy strict scrutiny.

8 And I just want to ask you, like, how
9 you weigh those dangers and -- and, you know --
10 you know, I read you as saying: It's just got
11 to be the case that states can do some
12 regulation in this area. And the question is:
13 How does that happen? Does it happen by
14 notching down the strict scrutiny standard, or
15 does it happen by saying, for some reason, which
16 we'll figure out how to articulate, this -- this
17 set of restrictions comes outside it?

18 MR. FLETCHER: Yeah. So you read me
19 correctly. And I think writing completely on a
20 blank slate, I genuinely think there would have
21 been two reasonable ways to deal with this
22 problem.

23 It really is a unique feature in the
24 First Amendment where you have the same speech
25 that's protected as to some people and not

1 protected as to others. And, in fact, everyone
2 agrees the government has a compelling interest
3 in restricting access to that speech based on
4 its content. It's a special, I think, unique
5 problem.

6 One way to approach it would have
7 been, as you say, to say something less than
8 strict scrutiny even though it's content-based.

9 Another approach, the one I'm
10 advocating here, would be to say strict scrutiny
11 applies a little bit differently. I would
12 resist the idea that it's watering it down. I
13 think it would be to say the regular strict
14 scrutiny standard just applies differently
15 because of the special features here.

16 As a matter of first principles,
17 I'm -- I'm not trying to duck the question.
18 I'm -- I'm genuinely saying I think either of
19 those would have been sort of equally workable.
20 But we're not writing on a blank slate, so this
21 is fighting the hypo a little bit, but I think
22 this is what tips the scales.

23 JUSTICE KAGAN: No, it's the -- it's
24 the next question I was going to ask, which is,
25 you know: What about Ashcroft and all our other

1 decisions makes you think that they're simply
2 not distinguishable in the way one might want to
3 distinguish them?

4 MR. FLETCHER: I mean, I think
5 Ashcroft is particularly hard because that was a
6 law that looked in terms almost exactly like the
7 law at issue here.

8 I take Justice Barrett's point that
9 there, age verification was an affirmative
10 defense rather than part of the law, but the
11 substantive requirements that the law imposed,
12 in effect, were basically exactly the same.

13 And also, I think just the -- the
14 logic of the Court's opinions leading up to that
15 in the earlier line was defining sexual material
16 that is harmful to children, this category of --
17 of material that kids can be prohibited from
18 seeing.

19 That, the Court said over and over
20 again, was a content-based restriction. And I
21 think that then starts to bring in -- and this
22 gets to my -- complete my answer to your earlier
23 question about why I'm more worried about -- I
24 think it was the second category of spill-over
25 effects than the first.

1 That starts to bring in not just this
2 particular corner of the First Amendment law but
3 also this Court's cases like City of Austin and
4 Reed and all of the other places where the Court
5 has laid down this is what it means to have a
6 content-based law.

7 And I worry a little bit that if you
8 start now trying to carve back on Ashcroft and
9 those other cases, you would have spill-over
10 into those broader areas of First Amendment law,
11 whereas recognizing, as we've suggested, that
12 strict scrutiny functions differently here is
13 very limited to this particular corner of the
14 law.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: I guess I just want
19 to follow up on -- on -- on Ashcroft just a
20 little bit, and you seem to think that's the
21 major impediment.

22 MR. FLETCHER: The most direct one,
23 sure.

24 JUSTICE GORSUCH: Yeah. That was a
25 PI, right --

1 MR. FLETCHER: Mm-hmm.

2 JUSTICE GORSUCH: -- where the
3 government didn't contest the level of scrutiny?
4 It had given up by then, as you point out.

5 MR. FLETCHER: Mm-hmm.

6 JUSTICE GORSUCH: What do we -- does
7 that help?

8 MR. FLETCHER: So I don't -- I
9 think -- it was a PI, and I think the Court was
10 very self-consciously tentative in some parts of
11 its analysis, especially the application of
12 strict scrutiny towards the tail end of the
13 opinion.

14 I don't think the Court was tentative
15 about what the relevant level of scrutiny was.
16 And I read it to say at 660, 665, 670: We've
17 got a content-based restriction of speech, and
18 so strict scrutiny applies.

19 JUSTICE GORSUCH: Also an incomplete
20 factual record, which it repeatedly emphasized
21 too, right?

22 MR. FLETCHER: Completely agree and I
23 think all the more reason why I think lower
24 courts have gone overboard in treating its
25 application of strict scrutiny as controlling

1 even now 20 years later. But I would put the
2 standard of scrutiny in a somewhat different
3 category.

4 JUSTICE GORSUCH: What do you think
5 about Justice O'Connor's concurrence in Reno?

6 MR. FLETCHER: I think there's a lot
7 of force to her ideas. I -- I take her idea to
8 be a lot like Justice Kagan's, like this is a
9 thing that states have been able to do in the
10 physical world, and there ought to be a way to
11 translate that same idea into the world of the
12 Internet.

13 We very much agree with that. We have
14 not advocated for the same standard that she
15 advocated for there because we view the Court's
16 precedents as requiring a different and higher
17 standard. But, in terms of the thrust of her
18 logic and her concerns about what states ought
19 to be able to do, we agree.

20 JUSTICE GORSUCH: Do you agree with
21 the principle there that if there's a compelling
22 government interest, there must be some way in
23 the world presently to effectuate that interest?

24 MR. FLETCHER: I think there's a lot
25 of force to that. I hesitate to say that's

1 always true in every circumstance because --

2 JUSTICE GORSUCH: In this -- in -- in
3 this area, right?

4 MR. FLETCHER: But, in -- in -- in
5 this area, yes.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: Just to follow up
9 on Justice Gorsuch and Justice Alito's questions
10 about, if we vacated, exactly what the state of
11 play is. There was a stay before --

12 MR. FLETCHER: Yeah.

13 JUSTICE KAVANAUGH: -- the decision.
14 So is a PI in effect or not in effect after our
15 mandate issues?

16 MR. FLETCHER: I would think that
17 absent further action -- and, again, we're just
18 an amicus here, and so I don't want to speak for
19 the parties if there's something that I'm
20 missing. But I would think that absent further
21 action from the Fifth Circuit, if this Court
22 vacates the Fifth Circuit's decision and remands
23 and its mandate issues, the result would be that
24 the preliminary injunction would come back into
25 effect.

1 JUSTICE KAVANAUGH: Okay.

2 MR. FLETCHER: But, if I were
3 defending the law, before that happened, I would
4 renew my previously granted motion for a stay
5 pending appeal and I would make arguments about
6 why a stay ought to be entered pending the Fifth
7 Circuit's further consideration.

8 JUSTICE KAVANAUGH: Okay. And do you
9 think a stay should be issued?

10 MR. FLETCHER: We haven't taken a
11 position on that because it's bound up in some
12 degree with some of the uncertain questions
13 about what the Texas law means.

14 JUSTICE KAVANAUGH: But you -- I mean,
15 the Court's going to have to make a
16 likelihood-of-success determination, and as
17 Justice Kagan said earlier, you've been looking
18 and thinking about this for a long time. You
19 don't have a likelihood-of-success assessment?

20 MR. FLETCHER: We don't, no.

21 JUSTICE KAVANAUGH: Okay. On Ashcroft
22 II, how do you think we should handle
23 specifically the application of the strict
24 scrutiny standard? Should we just say that's
25 overtaken by events? It's no longer valid?

1 Tell us how you think we should phrase that.

2 MR. FLETCHER: Yeah. You mentioned
3 stare decisis earlier in your question to my
4 friend. I don't think the Court's application
5 of scrutiny is a holding -- a legal holding of
6 the sort that's entitled to stare decisis
7 effect. I read it as self-consciously very
8 tentative. The Court emphasizes we're on a PI,
9 it's abuse of discretion, we have a record
10 that's five years old. At page -- at the last
11 couple of pages of the opinion, the court says
12 nothing that we're saying forecloses even the
13 district court and the Third Circuit in this
14 very case from concluding that strict scrutiny
15 is satisfied.

16 And I think the Court can say, given
17 that, it's obviously true that nothing in that
18 part of the opinion forecloses courts from
19 deciding 20 years later, with the benefit of 20
20 years more experience, that strict scrutiny is
21 satisfied by laws that share some of the same
22 features as the law at issue there.

23 JUSTICE KAVANAUGH: Then one question
24 on how you would apply strict scrutiny.

25 It seems to me one of the tricky parts

1 of that, because everyone agrees compelling
2 interest, then you say in your brief appropriate
3 tailoring, which I think is a good phrase.

4 One thing that concerns me is
5 oftentimes someone will say, well, there's a
6 less restrictive alternative. I think it's
7 really important to make clear that any less
8 restrictive alternative has to serve the
9 compelling interest, or important interest if
10 it's intermediate --

11 MR. FLETCHER: Yeah.

12 JUSTICE KAVANAUGH: -- to the same
13 degree.

14 MR. FLETCHER: Yeah.

15 JUSTICE KAVANAUGH: Am I right in
16 saying that?

17 MR. FLETCHER: I think you're right in
18 saying that. I think we know -- and Ashcroft
19 said that. And I do agree that's important.

20 JUSTICE KAVANAUGH: Okay. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 Justice Jackson?

24 JUSTICE JACKSON: And those are the
25 sort of things that the Fifth Circuit could say

1 on remand and, in fact, would, right? In other
2 words, they would go through the record and they
3 would try to assess whether the district court
4 got it right with respect to other alternatives
5 and that sort of thing?

6 MR. FLETCHER: Yes.

7 JUSTICE JACKSON: And that's why the
8 government is saying why don't you remand it
9 instead of us trying to take on that kind of
10 burden?

11 MR. FLETCHER: Yeah. In deference to
12 the Court's usual practice. It's a court of
13 review, not of first view. Here there are some
14 uncertainties about the law that we think are
15 additional reasons for the Court not to wade
16 into it now. So yes, exactly.

17 JUSTICE JACKSON: With respect to the
18 technology question that came up earlier, I
19 guess I'm just trying to figure out which way it
20 cuts, that we've now advanced in technology. I
21 could see that it cuts both ways.

22 On the one hand, we have a -- a new
23 set of circumstances that allow for minors to
24 get this material very easily, and it's
25 ubiquitous. But I think Petitioners' argument

1 is that the technology really heightens the
2 risks and burdens on adults who are trying to
3 access this material if they have to do a
4 biometric scan or they have to do certain kinds
5 of things that are very -- you know, impinging
6 on privacy in the way that technology now
7 allows.

8 Is it -- so it's not clear to me that
9 just the fact that we have new technology is all
10 -- is running in favor of allowing this law to
11 stand as is.

12 MR. FLETCHER: So I agree with that,
13 that technology doesn't necessarily just cut in
14 one direction and you would want to ask both of
15 those questions. What I'd say about technology
16 and the burden is two observations, one factual
17 and one a little bit more legal.

18 The factual observation is I do think
19 that the world now includes more options to
20 verify your identity than existed in Ashcroft
21 II, that are more broadly used. I think one of
22 the things that gives us some confidence in this
23 is that it's being used in the gambling industry
24 and buying alcohol and wine. It's just a much
25 more common part of society. And I think that

1 can give courts more confidence in saying this
2 is a -- an appropriate method of age
3 verification.

4 The second one is just a legal point.
5 I think there's some tendency from my friends on
6 Petitioners' side and the district court to say
7 that the relevant burden is: Will people be
8 chilled from doing this? And I think burdens on
9 privacy are important, but I think the Court
10 should ask those questions objectively, not
11 subjectively.

12 There might be people who are
13 embarrassed to show an ID to buy an adult
14 magazine or to take something out of the blinder
15 rack in the store. That's not enough. The
16 question is, is the burden that's being imposed
17 on speech, objectively speaking, excessive or
18 unnecessary?

19 JUSTICE JACKSON: Okay. And one
20 question, I -- I noticed that your brief didn't
21 say anything about whether the facial nature of
22 this Petitioners' challenge affects the
23 analysis. And I know there's a small part of
24 Respondent's brief that goes into it. And I
25 presume, in thinking about it, that that's

1 because the distinction between facial and as
2 applied really doesn't have any bearing on the
3 question of the level of scrutiny. Is that
4 right?

5 MR. FLETCHER: That's exactly right.
6 That -- as -- before deciding whether or not the
7 law is facially invalid, you have to figure out
8 what are the relevant standards, as the Court
9 did in NetChoice. And that's the question we
10 take to be squarely presented to this Court now.
11 And that's why we focused on that and not how
12 the answer to that might cash out on a facial
13 versus as-applied basis.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Nielson.

18 ORAL ARGUMENT OF AARON L. NIELSON

19 ON BEHALF OF THE RESPONDENT

20 MR. NIELSON: Mr. Chief Justice, and
21 may it please the Court:

22 Petitioners don't dispute that their
23 websites are not meant for children, that they
24 harm children, and that children are watching.
25 The Court faced the same situation with broken

1 -- brick-and-mortar stores and applied rational
2 basis to a law limiting adult content to adults.

3 This case is a digital version of
4 Ginsberg. Three cases prove the point.
5 Ginsberg itself applies rational basis where a
6 store can only avoid liability by making, quote,
7 "a reasonable, bona fide attempt to ascertain
8 the true age of customers." Sable applies
9 rational basis where speakers must separate
10 their audience before speaking a message obscene
11 to some but not all. And in Ashcroft II, the
12 Court didn't apply rational basis because
13 Congress, limited by 1990s technology, went well
14 beyond Ginsberg and Sable. To understand
15 Ashcroft II, you have to understand Ashcroft I
16 and look how the Court in Ashcroft I treated
17 Sable.

18 Age verification today, however, is
19 simple, safe, and common, including
20 non-identifying means. Petitioners' view of
21 Texas's law is contrary to Texas's view of
22 Texas's law and the Fifth Circuit's view of
23 Texas's law.

24 Regardless, if strict scrutiny applies
25 here, Texas would have to satisfy strict

1 scrutiny to keep kids out of strip clubs. This
2 Court's cases do not require that. Neither do
3 history, tradition, or common sense. In all
4 events, even if heightened scrutiny applies,
5 Texas easily satisfies it, especially facially.
6 We've tried content filtering for decades, and
7 the problem has only gotten worse.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: The -- Ginsberg
10 sounds simple, but in the tech cases we've had
11 recently, we're talking about hundreds of
12 millions of members to certain sites; billions
13 of visits; multibillions, if not trillions, of
14 exchanges.

15 How do we determine what burden --
16 assuming we agree with you, and I think most
17 people do, that kids are to be protected, how
18 much of a burden is permissible on adults' First
19 Amendment rights?

20 MR. NIELSON: So long as Sable -- so
21 long as Ginsberg is part of this Court's canon,
22 any burden less than the burden at issue in
23 Ginsberg necessarily must be okay.

24 JUSTICE THOMAS: So how does that
25 translate in a world in which you're not talking

1 about one-on-one transactions, but billions of
2 transactions?

3 MR. NIELSON: Yeah, that cuts in favor
4 of Texas. One of the important parts of modern
5 age verification technology is that you can do
6 it without identification at all. The Fifth
7 Circuit was clear that under Texas law,
8 biometric scanning is okay. In other words, you
9 -- there's no ID or anything like that. It's
10 just a face scan.

11 If that's too much, I would point the
12 Court to the brief of the Age Verification
13 Providers Association. You can do a hand scan.
14 There's all sorts of things you do that have no
15 identifying information.

16 JUSTICE THOMAS: Yeah, but you're
17 talking about rational basis. And you would
18 think that rational basis would permit quite a
19 high burden on the First Amendment rights of
20 adults versus strict scrutiny.

21 MR. NIELSON: So this is where I think
22 it's important to understand the scope of
23 Ginsberg. Ashcroft II is precedent. We're not
24 fighting that. Ginsberg, as I read it, is
25 saying so long as what you are doing is

1 verifying that this person is a kid, that's
2 rational basis. If you start doing other stuff
3 beyond that, then you're in the world of
4 Ashcroft II. That --

5 JUSTICE JACKSON: What if verifying
6 that this person is a kid took the form of a law
7 that the state says what we'd like to have is
8 everyone who comes in here needs to present a
9 copy of their passport, a copy of their birth
10 certificate, and an affidavit from their
11 biological parent.

12 MR. NIELSON: Yeah.

13 JUSTICE JACKSON: Is that also
14 rational basis in terms of the burden that it
15 imposes on adults?

16 MR. NIELSON: No, Your Honor.

17 JUSTICE JACKSON: Why not?

18 MR. NIELSON: Because that's far in
19 excess of what the Court recognized in Ginsberg.

20 JUSTICE JACKSON: But the Court in
21 Ginsberg wasn't analyzing the means by which age
22 verification was being -- was occurring. You
23 see my -- my hypothetical is turning on, fine,
24 if the Court is allowing for age verification,
25 how far can a state go in terms of burdening

1 adults showing how old they are?

2 MR. NIELSON: Yeah.

3 JUSTICE JACKSON: And it seems to me
4 that you're conceding that at some point a state
5 would not be able to require an adult to jump
6 through a million hoops to prove their age. And
7 if that's the case, isn't that the work of
8 strict scrutiny?

9 I mean, I thought that what strict
10 scrutiny was doing was assuring that the burden
11 that's being imposed is one that is necessary
12 because we understand that adults would
13 ordinarily have access to this -- to this
14 material. We appreciate the state's interest in
15 protecting children, but we're not going to let
16 the state, you know, impose, like, a thousand
17 things that would make it really, really hard
18 for adults when there are other alternatives to
19 protect children.

20 I thought that was like the whole
21 point of the strict scrutiny analysis.

22 MR. NIELSON: Yeah. So there are two
23 precedents that the Court has to give weight to
24 both of them; there's Ginsberg and there's
25 Ashcroft II.

1 JUSTICE JACKSON: I understand. But
2 you're reading Ginsberg to suggest that the
3 Court is -- has blessed every kind of age
4 verification that a state could require of an
5 adult. To the extent that Ginsberg, you say, is
6 focused on minors and states protecting minors
7 and the fact that the burden on -- falls on
8 adults to prove their age is really not a big
9 deal. I'm just testing your contention that a
10 state looking at Ginsberg could do something
11 very, very burdensome in order to protect
12 minors.

13 MR. NIELSON: Yeah. What I'm trying
14 to say, I'm not suggesting that you could do
15 anything under this. And I know that because of
16 Ashcroft II. There are two cases, both of which
17 are precedents of this Court, both of which have
18 meaning.

19 JUSTICE JACKSON: But -- but wouldn't
20 rational basis allow you to do anything? I
21 mean, the state would say it's rationale that we
22 have a parent's affidavit because people can lie
23 about their age and what we want is to make sure
24 that minors are protected.

25 MR. NIELSON: And Ashcroft II says at

1 some point you've gone beyond Ginsberg.
2 Ginsberg we know -- unless you're writing
3 Ginsberg out of the law, if it's -- the burden
4 is no greater than showing an ID in Ginsberg,
5 that's not strict scrutiny.

6 JUSTICE KAGAN: Well, I think what the
7 question really --

8 MR. NIELSON: Yup.

9 JUSTICE KAGAN: -- was, like, what is
10 that point? What is the point at which you
11 cross over the Ginsberg/Ashcroft line in your
12 view?

13 MR. NIELSON: Yeah. So this is where
14 I think you can't understand Ashcroft II without
15 understanding Ashcroft I. And in Ashcroft I,
16 the fight between the plurality and the rest of
17 the Court was, hey, does Sable mean that it
18 applies whatever the technology is, in other
19 words, whatever the burden, if you can't do it,
20 who cares or does the -- or does Sable mean that
21 it has to be technologically and reasonably
22 possible?

23 The Court disagreed with that. I
24 don't know what the answer is, or where the
25 Court is on that extension of Sable.

1 I do know that Ginsberg is a holding
2 of this Court that says so long as the burden
3 is, you know, showing an ID, that doesn't
4 trigger strict scrutiny. We are less than that.
5 So I don't know the exact line.

6 JUSTICE KAVANAUGH: Can you --

7 JUSTICE KAGAN: Can I ask you General
8 -- and this is -- I'm shifting ground some, but
9 you've now heard Mr. Fletcher's three concerns
10 or three questions --

11 MR. NIELSON: Yeah.

12 JUSTICE KAGAN: -- about your law.

13 MR. NIELSON: Yeah.

14 JUSTICE KAGAN: I think you heard them
15 twice, so you probably --

16 MR. NIELSON: I wrote them down.

17 JUSTICE KAGAN: How do we -- okay.
18 How does Texas's law fare, given those three
19 concerns? Are those genuine concerns? Do you
20 pass them or fail them?

21 MR. NIELSON: Yeah. They are not
22 genuine concerns. First, the one-third
23 requirement -- I have two points on that.
24 That's how states generally define
25 sexually-oriented businesses. Illinois says

1 you're an adult bookstore if 25 percent of
2 you're your content. That's how San Francisco
3 defines whether you're an adult bookstore. So
4 that's point 1 just generally.

5 But specific to this statute, I urge
6 the Court to look at the language. One-third
7 requirement applies to whether they have to
8 satisfy whether the law kicks in, but it's not
9 referring to the content at issue. I'm looking
10 at the language here in Section 129B.002. The
11 key words are "the material." Is that referring
12 back to all the material on the website or the
13 sexually harmful material to minors?

14 No Texas court has had an opportunity
15 to look at this. This is a facial
16 pre-enforcement challenge. But our reading of
17 that is it's going to be limited to the sexually
18 harmful material.

19 JUSTICE KAGAN: Okay. Number 2?

20 MR. NIELSON: Number 2 is the
21 permitted methods, biometric. We have a holding
22 from the Fifth Circuit on this. This is at
23 Petition Appendix 11A. Biometric scanning is
24 fine under Fifth Circuit law -- under Texas law.
25 We agree with that. That's in our brief. That

1 is the position of the Attorney General's
2 Office.

3 And Number 3 is obscene as to minors.
4 Again, two points. This was the fight or one of
5 the fights at issue in Ashcroft I. The Court
6 said we followed the same language. And the
7 Court said that was fine in Ashcroft I, but our
8 reading, again, in Texas, I'll tell you Texas
9 courts read statutes carefully. They follow the
10 text of the statutes.

11 I am looking at our definition of
12 sexually material harmful to minors. That is
13 Section 129B.001.

14 The third part is we define minors as
15 those under 18. Taken as a whole, lacks serious
16 literary, artistic, political, or scientific
17 value for minors. In other words, that includes
18 up to people -- people who are 17. So their
19 idea that --

20 JUSTICE KAGAN: So if I understand you
21 correctly as to those three, as to Number 2 and
22 Number 3, you say: Well, even if that's a legit
23 concern, our law is -- is okay with respect to
24 it.

25 MR. NIELSON: Yes, Your Honor.

1 JUSTICE KAGAN: And I don't think that
2 that's quite your answer with respect to Number
3 1. Is that right or is that wrong?

4 MR. NIELSON: No. I think we're fine
5 with Number 1. My point is that even if I'm
6 wrong about how Texas law works, we're still
7 okay because then we're like Illinois and San
8 Francisco, but I don't think I'm wrong about how
9 Texas law works.

10 JUSTICE KAGAN: I see.

11 MR. NIELSON: If you take the content
12 and you put it behind an age screen, we're not
13 counting that.

14 JUSTICE KAVANAUGH: Your --

15 JUSTICE ALITO: So if you -- keep --

16 JUSTICE KAVANAUGH: No. I apologize.

17 JUSTICE ALITO: Just to clarify with
18 respect to point 1, so if a particular website
19 has some hard core pornography that is obscene
20 as to minors and then it has, you know, videos
21 of somebody reading Lady Chatterley's Lover or
22 something like that, does -- can the -- the
23 latter be segregated?

24 MR. NIELSON: So I have to argue with
25 one hand behind my back because no Texas court

1 has an opportunity to look at any of this. I'm
2 just giving you my reading of the statute and
3 based on what I know about Texas courts, and the
4 answer would be yes, it could be segregated.

5 JUSTICE SOTOMAYOR: But no Court has
6 said that yet?

7 MR. NIELSON: Correct. And that's
8 part of the problem. I know the Court has had
9 some unhappiness with these facial
10 pre-enforcement challenges. This should be
11 Exhibit 1 in the case against them.

12 JUSTICE SOTOMAYOR: This law doesn't
13 protect someone or -- or says you can't retain
14 this information. The other side in its brief
15 argues that that doesn't mean you can't sell
16 it --

17 MR. NIELSON: Yeah.

18 JUSTICE SOTOMAYOR: -- or give it
19 away.

20 MR. NIELSON: Some responses to that.
21 One, I don't know if that's even technologically
22 possible. I don't know how you send the
23 information without having at least
24 instantaneously retained it. That doesn't make
25 any sense to me.

1 Also --

2 JUSTICE SOTOMAYOR: Well, you have to
3 receive it to make a choice. Someone is
4 receiving it to make a choice. And presumably
5 the law says after you've made the choice, is
6 this an adult or a child, you've got to delete
7 it.

8 MR. NIELSON: Correct.

9 JUSTICE SOTOMAYOR: But in that
10 interim when I receive the information, before I
11 make the choice, I could just give it away to
12 another entity. My name when I visit a website,
13 unless I've prohibited the website from doing
14 that, my viewing history, everything is
15 automatically transferred to other people.

16 MR. NIELSON: Yeah. So let's say that
17 I'm wrong about that. Again, I don't know the
18 technology.

19 JUSTICE SOTOMAYOR: Well, that's the
20 point.

21 MR. NIELSON: I -- I -- I --

22 JUSTICE SOTOMAYOR: I don't know.

23 MR. NIELSON: I don't know, but I win
24 anyway. So this is why it's important.

25 JUSTICE SOTOMAYOR: That's once you

1 get to a trial and somebody figures this out.

2 MR. NIELSON: Well, I'm saying that
3 under the Fifth Circuit's view of the law, which
4 this Court did not grant cert to review,
5 biometric scanning is okay. So there is no
6 identifying information to even turn over. So
7 it wouldn't make sense -- so even if you
8 transferred it, you're not transferring
9 identifying information.

10 And even if you did have identifying
11 information, it's -- no one does it. Like,
12 again, I point to the brief to the Age
13 Verification Associations --

14 JUSTICE SOTOMAYOR: You -- we're
15 talking in a vacuum because I don't know the
16 record. I -- I do understand --

17 MR. NIELSON: Yeah.

18 JUSTICE SOTOMAYOR: -- that biometrics
19 sort of looks at a face. Mr. Fletcher said it
20 looks at a hand or someone said it looks at a
21 hand. I have no idea how it works.

22 But I do know that the DNA evidence
23 can be picked up from the paper I just touched.
24 And I don't know if biometric information can be
25 used to create other things. I don't know any

1 of this. None of us do.

2 So the question is before any judge
3 can determine whether this law and the extent of
4 its burden or lack thereof, someone has to
5 determine that, doesn't it?

6 MR. NIELSON: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: That's my only
8 point.

9 MR. NIELSON: Sorry, can I just --

10 JUSTICE KAVANAUGH: Keep going.

11 MR. NIELSON: Just one more second.

12 The last point about all of that is, of course,
13 the Petitioners get to choose who the age
14 verification provider is. So if they don't like
15 the age verification provider's policies about
16 that, well, they can stop that too. It's within
17 their power. They have self-help measures.

18 JUSTICE KAVANAUGH: I think, earlier,
19 when you were discussing Ginsberg, you said
20 Ginsberg applies to age verification
21 requirements, and, thus, age verification
22 requirements get rational basis review and
23 that's how you distinguish. But then you said
24 not if they're too burdensome, which doesn't
25 sound anymore like rational basis review. But

1 I'm actually not interested in whether we call
2 it intermediate scrutiny --

3 MR. NIELSON: Mm-hmm.

4 JUSTICE KAVANAUGH: -- or strict
5 scrutiny or rational basis for purposes of this
6 question.

7 Is the statement of principle, First
8 Amendment principle, that you're seeking at a
9 broad level age verification requirements are
10 permissible so long as they're not overly
11 burdensome on adult access?

12 MR. NIELSON: Yes. Yes, Your Honor.
13 That's how I understand those cases.

14 JUSTICE KAVANAUGH: And those are the
15 exact adverbs and adjectives, "overly
16 burdensome," or do you have a preferred
17 statement?

18 MR. NIELSON: I mean, I guess I would
19 say so long as it's incidental to verifying age.
20 Again, I don't know what "overly burdensome"
21 means.

22 JUSTICE KAVANAUGH: That's a little
23 different. Exactly. Okay.

24 MR. NIELSON: Yeah.

25 JUSTICE KAVANAUGH: And then you have

1 to look at how much burden is there on the adult
2 access, which I think you've conceded -- not --
3 "conceded" is the wrong word, but just
4 acknowledged that that is going to necessarily
5 be part of the inquiry because you've said a few
6 times, if it's more than the Ginsberg burden,
7 you know, at some point, it may cross into too
8 much.

9 MR. NIELSON: Correct, Your Honor,
10 because we are trying to reconcile Ashcroft II
11 and Ginsberg.

12 JUSTICE KAVANAUGH: And you've con- --
13 and, again --

14 MR. NIELSON: Yeah, I don't think I
15 conceded, but --

16 JUSTICE KAVANAUGH: Yeah, you
17 haven't -- I'm not using the word "conceded"
18 now. You acknowledge that a law, for example,
19 that Mr. Fletcher identified that just banned
20 all pornography on the idea that that would
21 serve the interests of preventing children from
22 accessing it, that's --

23 MR. NIELSON: That that's --

24 JUSTICE KAVANAUGH: -- impermissible?

25 MR. NIELSON: Correct. That's the

1 second part of Sable.

2 JUSTICE KAVANAUGH: Right. And then
3 also to Justice Jackson, if the requirements for
4 age verification were so onerous and unnecessary
5 that they burdened adult -- really prevented
6 many adults from accessing constitutionally
7 protected speech as to adults, you also
8 acknowledge that would be impermissible?

9 MR. NIELSON: Yes, Your Honor,
10 because, again, that's how we read Ashcroft II.

11 JUSTICE KAVANAUGH: Yeah.

12 JUSTICE JACKSON: But, Mr. Nielson,
13 why --

14 JUSTICE BARRETT: Mr. Nielson, are you
15 saying that it's like a carveout from content
16 discrimination? Because, you know, you heard my
17 interchange with Mr. Fletcher, you know, and --
18 and also with your friend on the other side when
19 I was trying to see if there was a way, just
20 exploring how do we think about Ashcroft II.
21 And, you know, there is some content
22 discrimination here, right? Because you do have
23 to look at the content to decide whether the age
24 verification requirement applies.

25 So I take your answer to Justice

1 Kavanaugh when you say no, no, no, no, it
2 wouldn't be what Mr. Fletcher said, that if
3 rational basis review applied, they could ban
4 the whole category, because that would be a
5 rational way of protecting adult -- protecting
6 children. You say that's not the case because
7 we look at Ginsberg and it's just age
8 verification.

9 MR. NIELSON: Yes, Your Honor.

10 JUSTICE BARRETT: So is this like an
11 age verification carveout? Like, it's --
12 content discrimination doesn't trigger strict
13 scrutiny if we're talking about age
14 verification? Is that the argument?

15 MR. NIELSON: I guess there's two
16 conceptual ways to understand it. I'm not sure
17 what Ginsberg -- which one they did. I mean,
18 one is, if it's just gatekeeping, as long as
19 you're allowed to have two different groups, you
20 have to have some way to tell the difference
21 between the two. And if it's just incidental,
22 the gatekeeping, that doesn't itself trigger
23 strict scrutiny. That's one theory of Ginsberg.

24 The other theory of Ginsberg is that
25 just looking at identification just isn't a

1 constitutionally cognizable burden. That would
2 fit in with the Crawford line of cases for
3 voting. That would fit with the American
4 Library Association, where they say going to the
5 librarian, that's embarrassing, that's just not
6 a constitutionally cognizable burden.

7 JUSTICE KAGAN: But, if I --

8 JUSTICE KAVANAUGH: But you've said --

9 JUSTICE KAGAN: -- understand you
10 correctly, you are saying -- and this is -- goes
11 back to Justice Jackson's hypothetical -- that
12 when the burden gets too great, right, when, you
13 know, they're asking you to do all these
14 unreasonable things --

15 MR. NIELSON: Mm-hmm.

16 JUSTICE KAGAN: -- right, that's the
17 point at which, if I understand you correctly --
18 tell me if I don't -- it -- it -- it flips into
19 not rational basis review but into heightened
20 review, strict scrutiny?

21 MR. NIELSON: Correct, Your Honor.
22 That's how we read Ashcroft II.

23 JUSTICE KAGAN: Okay. So, I mean,
24 that is a little bit peculiar, isn't it? I
25 mean, it's -- it's -- it's obviously the case

1 that the extent of the burden should matter a
2 lot in the constitutional analysis, but it
3 usually matters when you're applying whatever
4 standard you're applying. It doesn't usually,
5 you know, push you -- like, oh, the burden is
6 really -- this -- this -- this -- this burden
7 is -- you know, it's very hard to make this age
8 verification -- to meet this age verification
9 requirement, so because that's true, it pushes
10 you into a different standard of scrutiny.

11 I -- I don't know if I can think of
12 anything like that in our law.

13 MR. NIELSON: Yeah, I agree. That is
14 a curious effect of reconciling Ginsberg and
15 Ashcroft II.

16 JUSTICE KAVANAUGH: But it's just
17 inherent in having an age -- you know, one
18 category that can't access and one -- another
19 category of people that can, and you have to
20 have some mechanism, as you just said, for
21 determining it.

22 But I think, in reply to Justice
23 Jackson and Justice Kagan, you've said yes, it
24 could get too burdensome. In other words, even
25 age verification -- I think Justice Kagan was

1 just saying this. Even age verification could
2 get too burdensome if you did things like
3 passport or something like that? I mean, you --

4 MR. NIELSON: Correct, Your Honor.
5 Again, there's cases --

6 JUSTICE KAVANAUGH: And I don't --

7 JUSTICE JACKSON: But is it --

8 JUSTICE KAVANAUGH: Again, whether you
9 call it --

10 MR. NIELSON: Yeah.

11 JUSTICE KAVANAUGH: -- whatever you
12 call it --

13 JUSTICE JACKSON: But I think what you
14 call it is important, I think.

15 (Laughter.)

16 JUSTICE KAVANAUGH: Well, I'm just
17 going to ask, whatever you call it, it can't get
18 too burdensome, right?

19 MR. NIELSON: Yeah. So --

20 JUSTICE KAVANAUGH: Yeah.

21 MR. NIELSON: -- I mean, the north
22 star here is, so long as Ginsberg has some
23 meaning, so long as the burden is not greater
24 than the burden in Ginsberg, rational basis
25 applies.

1 JUSTICE JACKSON: But, Mr. Nielson,
2 the burden was not the issue in Ginsberg.
3 That's my -- my --

4 MR. NIELSON: Yeah, yeah.

5 JUSTICE JACKSON: My only problem with
6 what you have said is that I took Ginsberg to be
7 establishing the initial principle that you
8 start with, that it's okay to treat minors
9 differently than adults, period, that that's the
10 holding of Ginsberg.

11 It wasn't talking about the extent to
12 which figuring that out was going to burden
13 adults and how much the -- the adults' First
14 Amendment rights were impinged by operating that
15 principle. It was the first case to establish
16 in this context that minors don't have the same
17 rights as adults to access this material.

18 Then we go on in other cases, in the
19 cases that Justice Sotomayor raises, to -- to
20 evaluate, okay, now that we know that we can
21 separate these two categories of people, you're
22 absolutely right that we have to have some way
23 of doing that.

24 But these other cases are about how
25 burdensome the way of doing that is and to what

1 extent -- I mean -- and you seem to be agreeing
2 that there's a point at which the burden that
3 you're imposing on adults are going to be too
4 much. And my only point about the standard
5 mattering is that I thought the work of rational
6 basis review and strict scrutiny was to evaluate
7 whether this is too burdensome, that we say,
8 because the adults have a certain scope of First
9 Amendment rights, you can only impose a burden
10 that is the least restrictive way of reaching
11 your compelling interest.

12 So we don't need a new set of
13 principles or tests. We have a test. The test
14 is strict scrutiny. And Mr. -- the government
15 says, Mr. Fletcher says, there might be a way in
16 which this actually satisfies that.

17 MR. NIELSON: Yeah. So that test
18 can't be right, and the reason why it can't be
19 right is it would mean that if a state wants to
20 stop kids from going into a strip club, they
21 have to satisfy strict scrutiny.

22 JUSTICE JACKSON: No, because the --
23 the kids going into a strip club poses no burden
24 on adults. Why -- why -- that was going to be
25 my other question for you. Why would, you know,

1 saying a kid can't go into the strip club pose
2 any burden on an adult who wanted to?

3 MR. NIELSON: If we said you need to
4 look at IDs if you have somebody you can't tell
5 they're an adult or not to go into a strip
6 club --

7 JUSTICE JACKSON: So we apply strict
8 scrutiny?

9 MR. NIELSON: You would apply strict
10 scrutiny to that.

11 JUSTICE JACKSON: And then we say is
12 this the least restrictive means? And you say
13 yes. Fine, you can do it.

14 MR. NIELSON: That is not at all
15 consistent with our tradition and history. As I
16 understand strict scrutiny -- again, I know
17 there's different views on this. As I
18 understand strict scrutiny, the idea is this is
19 generally not okay, but sometimes we'll make an
20 exception if there's really extraordinary
21 reasons for it.

22 But, in our history, we have always
23 said kids can't come and look at this stuff. So
24 it seems not correct to me as a historical
25 matter to say, well, actually, it's always been

1 presumptively unconstitutional, but on this one
2 thing, well, we've done it forever, strict
3 scrutiny somehow has always been satisfied.

4 JUSTICE BARRETT: Mr. Nielson, I want
5 to take you to the questions that Justice Kagan
6 was asking Mr. Fletcher about the dangers. I
7 just want you to --

8 MR. NIELSON: Yeah.

9 JUSTICE BARRETT: -- to posit this.
10 This is all just pretend.

11 Let's imagine that you should win,
12 that Texas should win. And Justice Kagan asked,
13 if that were so, you know, if there is a way
14 that states should be able to regulate -- and
15 the federal government should be able to
16 regulate this, we have to decide how our First
17 Amendment precedent might accommodate that.

18 And Justice Kagan identified for
19 Mr. Fletcher two options. One would be to say
20 that this can satisfy -- this kind of regulation
21 can satisfy strict scrutiny, and the other might
22 be to say, in this context, intermediate
23 scrutiny makes more sense. I just want to take
24 rational basis --

25 MR. NIELSON: Yeah.

1 JUSTICE BARRETT: -- off the table.

2 MR. NIELSON: Yeah.

3 JUSTICE BARRETT: What do you think
4 about that? Mr. Fletcher told us what he
5 thought about the dangers that would lie in
6 either approach.

7 MR. NIELSON: Yeah. So I am very
8 worried not about this law. I think we're going
9 to pass strict scrutiny. I hope that that is
10 where the Court is, that this law passes strict
11 scrutiny. I am worried about my strip club
12 example or any other sexually oriented
13 businesses. If we start saying that the
14 standard is strict scrutiny, I hope this Court
15 says, oh, that's okay, it passes strict
16 scrutiny.

17 But there's a whole bunch of law on
18 strict scrutiny, and a whole bunch of different
19 judges across this country are going to apply
20 it. There's a bunch of cases that say fatal in
21 fact. And we're going to have a lot of PIs and
22 a lot of emergency litigation. That's a
23 problem. A real --

24 JUSTICE KAGAN: But that wouldn't be
25 true necessarily if we wrote the kind of opinion

1 that Mr. Fletcher had in mind. Right? Because
2 then you would say: This is the kind of strict
3 scrutiny we're talking about. This is what will
4 pass it. You know, take us seriously.

5 MR. NIELSON: So that's within the
6 control of this Court for language to be. I
7 hope, if such opinion gets written, it is very,
8 very clear that we shouldn't get these PIs like
9 this.

10 JUSTICE ALITO: General Nielson, let
11 me see if this is consistent with what you're
12 saying.

13 Whenever -- if a law prohibits or
14 regulates a type of speech that is not entitled
15 to any constitutional protection, the content of
16 the speech does have to be examined at the
17 outset to determine whether it falls within that
18 category.

19 And the fact that that preliminary
20 examination is necessary does not mean that the
21 law is content-based and, therefore, subject to
22 strict scrutiny.

23 MR. NIELSON: Yes, Your Honor.

24 JUSTICE ALITO: So what that may
25 suggest is that this -- while this preliminary

1 examination does not render the law
2 content-based, so long as it is not too
3 excessive, then strict scrutiny is not
4 triggered.

5 But if it crosses a certain point and
6 it becomes too burdensome, so that it is more
7 than is reasonably necessary to make that
8 threshold determination about whether the speech
9 is constitutionally protected, then you go into
10 another level of -- of scrutiny.

11 MR. NIELSON: Yes, Your Honor. And I
12 think that Ginsberg is consistent with that
13 view.

14 JUSTICE JACKSON: What about
15 Packingham?

16 JUSTICE SOTOMAYOR: The problem is
17 that the speech here is not just about obscene
18 speech, which is not subject to any rational
19 basis scrutiny, only because it's -- I'm not
20 even thinking rational basis -- because obscene
21 speech is illegal for adults or minors, correct?

22 MR. NIELSON: It can be -- it can be
23 made illegal, yes, Your Honor.

24 JUSTICE SOTOMAYOR: It can be made
25 illegal. Not automatically, but it's not

1 protected speech. Obscene speech is not
2 protected speech.

3 MR. NIELSON: Exactly, Your Honor,
4 yes.

5 JUSTICE SOTOMAYOR: The problem is
6 that this law doesn't protect -- doesn't make
7 illegal just obscene speech, it makes illegal
8 obscene and indecent speech that might affect
9 children. But adults can view indecent speech,
10 correct?

11 MR. NIELSON: Yes, Your Honor. But
12 not if children are there.

13 JUSTICE SOTOMAYOR: No, I don't --
14 let's not quibble. Not when children are there.

15 But you now have to look further than
16 determining whether something's obscene. You
17 have to figure out whether it's indecent for
18 children, correct?

19 MR. NIELSON: Yes, Your Honor, I think
20 so.

21 JUSTICE SOTOMAYOR: Yeah. So it's not
22 merely checking to see if something doesn't have
23 curse words or some fighting words or something
24 like that. You're actually asking adults to not
25 look at something until they do something else,

1 something that's legal for them to look at.

2 MR. NIELSON: Yes, Your Honor. And
3 I'm saying that so long as Ginsberg has any
4 meaning --

5 JUSTICE SOTOMAYOR: Counsel, you keep
6 saying "Ginsberg," all right? I look at the
7 Court's decision. The facts are that a
8 bookseller was criminally -- found criminally
9 liable for selling -- I think it was to a
10 16-year-old. The age doesn't matter right now.
11 But an underage child.

12 And "his attack" -- and this is the
13 Court saying -- "is not that New York was
14 without power to draw the line at age 17.
15 Rather, his contention is the broad proposition
16 that the scope of the constitutional freedom of
17 expression secured to a" child -- "to a citizen
18 to read or see material concerned with sex
19 cannot be made to depend upon whether the
20 citizen is an adult or minor."

21 And the Court -- "he insists that the
22 denial to minors under 17 of access to materials
23 condemned by [the law], insofar as that material
24 is not obscene for persons" of age -- of "17
25 ... or older, constitutes an unconstitutional

1 deprivation of protected liberty."

2 So it wasn't the age verification that
3 was at issue in Ginsberg at all. The Court had
4 no reason to address it. The claim there, and
5 what the Court was speaking to as involving
6 rational basis, was whether obscene, indecent
7 materials could be made -- had to be made
8 accessible to kids under 17.

9 MR. NIELSON: Yeah, I --

10 JUSTICE SOTOMAYOR: So I -- I -- I'm
11 -- I'm having a -- I mean, we can all read
12 Ginsberg, but do you have any language in
13 Ginsberg that even addresses the age
14 verification issue?

15 Point me to one line in the entire
16 petition, other than describing the law --

17 MR. NIELSON: Yeah.

18 JUSTICE SOTOMAYOR: -- that talks
19 about the burden of the age verification.

20 MR. NIELSON: Well, look at the very
21 last paragraph of the opinion. That's when they
22 are discussing whether Mr. Ginsberg had notice
23 about his obligations were under this statute.

24 The Court was very clear -- to be
25 sure, that was framed as a due-process-type

1 claim. It was very clear that they said: No,
2 you know --

3 JUSTICE SOTOMAYOR: It was a due
4 process.

5 MR. NIELSON: Well, they said very
6 clear: You know what you're supposed to do.

7 I would also point to the language
8 from the brief that Justice Alito already
9 mentioned earlier.

10 I have not heard of a court limiting a
11 case to less than its facts. And there, he
12 raised the argument, saying: If this happens,
13 I'm not going to be able to sell it to adults.
14 And the Court said, essentially, rational basis.
15 That's how I read that.

16 JUSTICE SOTOMAYOR: Thank you,
17 counsel.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 Justice Thomas? Anything?

20 Justice Alito?

21 Anything further, Justice Sotomayor?

22 Justice Kagan?

23 Justice Gorsuch?

24 JUSTICE GORSUCH: One quick question
25 on Ashcroft. It crossed the line, in your view,

1 because -- and I want you to fill in the blank.

2 And -- and one possibility, of course,
3 might be that the law there made it illegal to
4 post, that is, to even create, to disseminate
5 the information, with the age verification being
6 only an affirmative defense.

7 MR. NIELSON: Yes, that is one of
8 them. There is three points on this. Again,
9 Ashcroft doesn't -- Ashcroft II doesn't say what
10 the burden was.

11 JUSTICE GORSUCH: Yeah.

12 MR. NIELSON: So you have to, like,
13 read into it.

14 One is that. That was clear from the
15 -- from the opinion, and Justice Stevens
16 concurrence. That's a big problem.

17 Another problem, if you go back to the
18 district court, was to do this, you had to have
19 databases of credit cards. This is not the law
20 in Texas. You can't keep the data. So there
21 are no databases.

22 And the third is, again, to go back to
23 Ashcroft I, because you can't separate
24 communities under 1990s technology, if you send
25 it out to the world, this is to the whole world,

1 it effectively meant some places, content that's
2 not even obscene as to minors would be behind
3 age screens. And that's a burden that is not
4 existing here.

5 We know for a fact that they can
6 segregate by geography. When Texas's law went
7 into effect, Pornhub left Texas. They're still
8 operating in Louisiana with age verification.
9 So we know that that's no longer true.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: Just to follow up
14 on Justice Alito's formulation, which I thought
15 was helpful.

16 So the rule, then, age-verification
17 requirement's generally permissible, but they
18 can become too excessive, to use his
19 formulation. Or I think you and I discussed
20 "or can become overly burdensome."

21 And then --

22 MR. NIELSON: Yeah, and that's why I
23 used "incidental."

24 JUSTICE KAVANAUGH: Right. And if so,
25 impermissible, but otherwise, they're generally

1 permissible and commonsensical.

2 I think that's the basic framework
3 you're --

4 MR. NIELSON: Yes, Your Honor.

5 JUSTICE KAVANAUGH: Okay. And then
6 just maybe to piggyback on Justice Gorsuch, this
7 law is not too excessive or overly burdensome
8 because? And fill in the blank.

9 MR. NIELSON: Because it's less than
10 in Ginsberg. And we know that because you don't
11 even have to provide identifying information.

12 So in Ginsberg, if there was a
13 marginal case, you couldn't tell if it was a kid
14 or an adult, you had to look at the ID.

15 You don't have to do that under
16 Texas's law. So whatever -- however you read
17 Ginsberg, we are less than that.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: Mr. Nielson, there's
22 been some discussion about what happens to the
23 PI if we vacated and remanded to the Fifth
24 Circuit. Can you just say what you -- your view
25 on that is?

1 MR. NIELSON: Yeah. So the view of
2 Texas is if this Court were to vacate the Fifth
3 Circuit's decision, then the Fifth Circuit's
4 stay would go back into effect, because it was
5 only the Fifth Circuit's decision that took out
6 the stay. That would take a separate order.

7 Now, I know the other side is going to
8 fight me on that one. So we probably would do
9 what Mr. Fletcher suggests and go back to the
10 Fifth Circuit for clarification.

11 I ask, you know, if anything else,
12 that the language is clear to the Fifth Circuit
13 that it knows it can reinstitute the stay. That
14 gets lost in translation sometimes, when you get
15 a decision from this Court. They're like: Oh,
16 I guess -- I guess we can't do that anymore. We
17 don't want to get sum rep'd. We respect the
18 Court.

19 If that were to happen, I urge the
20 Court, please let the Fifth Circuit know. But
21 our view is that because it was this decision
22 that the Court is reviewing that vacated the
23 Fifth Circuit's stay, the stay would then spring
24 back to life.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yeah. Your last
3 colloquy with Justice Alito suggests that your
4 argument is that rational basis review applies
5 to state laws that serve merely to screen
6 certain people from accessing online content
7 that they have no constitutional right to
8 access. Or at least it could be sort of thought
9 of in that way.

10 And I guess -- I mean, neither party
11 cited this case in their briefs, but I wonder
12 whether this would run afoul of Packingham. I
13 don't know if you're familiar with that case,
14 but it's one in which we looked at convicted sex
15 offenders who were trying to access social media
16 websites, a state law precluding that, and we
17 applied heightened scrutiny even though it sort
18 of raised the same kind of dynamic that you say
19 rational basis review would apply to.

20 So I -- I think we would have to try
21 to figure out how the standard or the principle
22 that Justice Alito articulated would be
23 consistent with that case as well.

24 MR. NIELSON: Yeah. I confess I've
25 probably thought I read every one of this

1 Court's recent First Amendment cases, preparing
2 for today's argument. I did not read
3 Packingham. I -- I don't know, Your Honor. But
4 I do know that that's -- we are in the exact
5 same context as in Ginsberg. So whatever the
6 scope of Ginsberg, we fall within it.

7 JUSTICE JACKSON: And -- and -- and it
8 turns in a way on whether or not we agree that
9 Ginsberg was speaking to the burden or speaking
10 to the age requirement, as opposed to making the
11 sort of initial determination that minors can't
12 be treated -- or minors can be treated
13 differently than adults?

14 MR. NIELSON: Yeah, I trust Your Honor
15 on that one.

16 JUSTICE JACKSON: Yeah.

17 MR. NIELSON: I would also say the
18 other way that you could think about Ginsberg,
19 of course, is that an ID requirement is just not
20 a constitutionally cognizable burden at all,
21 which would be consistent with some of this
22 Court's other cases, and not fall within the
23 Packingham --

24 JUSTICE JACKSON: Well, the Fifth
25 Circuit didn't hold that, right? That that

1 would be --

2 MR. NIELSON: No, Your Honor.

3 JUSTICE JACKSON: The Fifth Circuit at
4 least saw that the First Amendment was
5 implicated by this. And, in fact, I thought
6 they thought it was a content-based restriction
7 but that Ginsberg still applied to sort of have
8 a different rule in this situation.

9 MR. NIELSON: All I'm saying is that
10 you can conceptualize Ginsberg in multiple ways.
11 We are okay under all of them. But, if there
12 are problems that way, I would urge the Court
13 just to think, well, look at the -- the voting
14 ID cases and that sort. We are okay under those
15 line of cases too.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal, Mr. Shaffer?

20 REBUTTAL ARGUMENT OF DEREK L. SHAFFER
21 ON BEHALF OF THE PETITIONERS

22 MR. SHAFFER: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 Let me start with Ginsberg if I may.
25 We've talked a lot about the fact that that

1 opinion was addressing only the rights of minors
2 as invoked there. I would just also note it was
3 not an across-the-board age verification
4 mandate. It was not operating in a context
5 where you had a way to screen out minors from
6 specific content. And it didn't say, if more
7 than one-third of a store is inappropriate for
8 minors, minors have to be kept out of the store.
9 This law differs in all of those respects.

10 The question about let's wipe away for
11 the moment, Justice Kagan, the precedents that
12 this Court has laid down for decades about
13 sexually indecent speech that's inappropriate
14 for minors via electronic media and via the
15 Internet. Let's wipe it away for a moment. I
16 strongly urge this Court to stick with strict
17 scrutiny as the applicable standard of review
18 when we're talking about content-based burdens
19 on speakers.

20 This Court has an area of law that is
21 clear, that is well understood, that is
22 reliable, that will withstand mounting and
23 varied attacks because we all know when strict
24 scrutiny applies. It applies here. And I would
25 urge the Court to stick with it even if we

1 forget about the on-point precedents for the
2 moment. There are -- there are principles that
3 I think are important, reliable principles that
4 will serve us well going forward, yes, in this
5 context, but also in others.

6 And so that brings me, Justice Kagan,
7 to your question about what about 20 other laws
8 that, by some views, may look a lot like
9 Texas's? I can tell Your Honors this is the
10 worst of them. This is the worst of the laws.
11 It has the health warnings where Texas is
12 telling these targeted speakers and their users
13 that pornography is, among other things,
14 contributing to prostitution, child
15 exploitation, child pornography. You have a
16 hostile regulator who's saying to adults, you
17 should not be here.

18 You have no consideration whatsoever
19 of content filtering as the number one
20 alternative that this Court had called out. You
21 have age verification that just, respectfully,
22 does not answer the description that Texas's
23 amici are offering and that Mr. Nielson is
24 collapsing to today, which is age verification
25 different from what the plain terms of the law

1 would permit. And you have none of the
2 protections that you would expect from a
3 responsible regulator who's concerned about
4 adults' interests here.

5 You don't have enforceable rights for
6 them. You do not have privacy protection. You
7 do not have confidentiality of information. You
8 do not have the government saying we cannot pry
9 open this information and use it against you.

10 All of that, Your Honors, you should
11 await a state or the federal government doing
12 its work, showing its homework, having something
13 other than the ill-tailored law that you have
14 here and a blank legislative record that tells
15 you nothing about why Texas would have arrived
16 at a law that looks like this unless it was out
17 to chill adults and chill speakers when it comes
18 to expression that is clearly protected as to
19 adults.

20 And I want to offer the Ashcroft law
21 if I may as a point of comparison. We think
22 that this is the a fortiori case, Your Honors.
23 There, the Court was looking at federal
24 legislation on a well-developed, comprehensive
25 legislative record where you could see what

1 Congress was doing and why it was doing it. And
2 it was a serious, genuine effort to regulate,
3 Justice Kavanaugh, as we were discussing, to
4 protect kids from all of the content that was
5 deemed inappropriate for minors regardless of
6 its source.

7 Texas's law is not fit for that
8 purpose for reasons that have gone conceded, I
9 think, effectively by Texas and by its amici,
10 and you can find in a well-substantiated set of
11 findings from the district court about how
12 under-inclusive this law is.

13 Your Honors have room and -- and --
14 and I understand sympathy for a state that is
15 trying to do its job to regulate in this area
16 conscientiously. And I want to assure you,
17 Justice Barrett, when we talk about scrutiny
18 that is strict in theory and fatal in fact -- I
19 was lucky enough to learn constitutional law
20 from Gerry Gunther -- that resonates. None of
21 us is suggesting that in this context strict
22 scrutiny is fatal. It is not. It should not
23 be. We've conceded that there is a compelling
24 interest here.

25 The question will always be, has the

1 government tried to arrive at a less restrict --
2 has it tried to do this in a way that is not
3 unduly burdening adults and is truly protecting
4 kids? Once this law answers to strict scrutiny
5 as it -- as it has long been understood, I do
6 think, respectfully, this becomes an easy case.

7 The last point. From -- from
8 Mr. Fletcher, and I agree with so much of what
9 he says, he talked about tradition as a
10 guidepost here. And I would just note the
11 tradition that we have on the Internet, on the
12 Internet. Yes, Justice Kagan, we've come a long
13 way from -- from when we were first talking
14 about the Internet and had to explain what it
15 was. But Reno and Ashcroft have been absolutely
16 fundamental to how the Internet has developed as
17 a free medium of -- of expression, as our modern
18 public square. And -- and the tradition on the
19 Internet is to say that it will be free and that
20 it is incumbent upon parents to screen out
21 content that is inappropriate for their kids.
22 That's where the law should stay.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 12:19 p.m., the case
2 was submitted.)
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