

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 in -- Texas's intention
9 to deter adults, even assuming they've cleared
10 the age -- age verification hurdle, from
11 accessing 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 -- a 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 client -- that protect
4 minors across the board.

5 And so, Your Honors, if -- if -- if we
6 start with 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 that 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 -- Joint Appendix 275-76,
23 282-285, you can see Mr. Allen testifying for
24 Texas about content filtering today being fit
25 for purpose. 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 Petitioners'
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 a 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 nine --

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 of it.

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 president -- 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 that
25 Your Honor went through, Reno and Ashcroft and

1 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 -- and I do think that
20 that's telling. You have Yoti's amicus brief,
21 but they don't pretend to marry up their
22 proposed forms of age verification with what
23 Texas has prescribed and, by implication,
24 proscribed as an available form of age
25 verification.

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

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

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

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

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

23 JUSTICE ALITO: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Ginsberg -- and
2 that's what the Court below relied upon --
3 Ginsberg wasn't -- was a child --

4 MR. SHAFFER: Yes.

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

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

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

13 MR. SHAFFER: That's correct.

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

18 MR. SHAFFER: That is exactly right.

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

25 MR. SHAFFER: That's right. And I

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

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

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

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

19 MR. SHAFFER: Yes.

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

23 MR. SHAFFER: That's right. And I
24 would just note that in Reno, Justice O'Connor's
25 separate opinion there differentiated, just as

1 Your Honor's suggesting, between the rights of
2 minors versus the rights of adults, which were
3 separately addressed in that opinion too.

4 JUSTICE SOTOMAYOR: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: No.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

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

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

16 JUSTICE GORSUCH: Yeah. I --

17 MR. SHAFFER: The challenge --

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

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

25 JUSTICE GORSUCH: It was invoking his

1 right to sell to minors.

2 MR. SHAFFER: Justice Gorsuch, I --

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

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

13 JUSTICE GORSUCH: All right.

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

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

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

21 JUSTICE GORSUCH: You can't --

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

24 JUSTICE GORSUCH: All right. And your
25 distinction of Ginsberg is, there, he didn't

1 have to check every ID? Is that your -- is that
2 your distinction?

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

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

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

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

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

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

1 MR. SHAFFER: If it's not involving
2 expression -- protected expression, I'm not
3 bringing a First Amendment challenge.

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

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

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

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

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

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

24 JUSTICE GORSUCH: Okay. And then we
25 do have an amicus, you know, from the

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

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

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

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

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

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

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

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

15 (Laughter.)

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

25 We don't read Moody's to have

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

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

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

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

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

24 JUSTICE KAVANAUGH: Okay. And do you
25 dispute the problem that Texas is targeting of

1 children's access to pornography?

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

5 JUSTICE KAVANAUGH: Do you --

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

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

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

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

21 JUSTICE KAVANAUGH: Okay.

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

1 to pornography.

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

7 Do you dispute that?

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

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

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

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

23 MR. SHAFFER: Your Honor, they have
24 explored it. I would note that the U.K. has
25 actually suspended age verification pending

1 technological developments. And they do not --
2 to the extent that they require age
3 verification, the way that they're doing it
4 looks fundamentally different from Texas
5 because, as Your Honor knows, Europe builds in
6 all sorts of ferocious privacy protections and
7 penalties if there are violations.

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

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

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

25 JUSTICE KAVANAUGH: And, again, I'm

1 asking those questions because you are asking us
2 to restore the preliminary injunction, and,
3 therefore, we need to have some sense of those
4 questions.

5 MR. SHAFFER: I appreciate the
6 questions.

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

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

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

1 MR. SHAFFER: Respectfully, no,
2 Justice Kavanaugh, because of the --

3 JUSTICE KAVANAUGH: And why is that?

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

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

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

14 JUSTICE KAVANAUGH: But you agree,
15 to --

16 MR. SHAFFER: -- questions right now.

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

22 MR. SHAFFER: I have a friendly
23 amendment to that. You would find that the
24 district court did not abuse its discretion by
25 so concluding preliminarily in predicting likely

1 success based upon a preliminary record. That's
2 exactly what Ashcroft addressed. That's exactly
3 what Your Honors have before you in this case.

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

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

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

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

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

1 of a 17-year-old --

2 JUSTICE BARRETT: Right.

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

5 JUSTICE BARRETT: Point taken.

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

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

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

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

23 JUSTICE BARRETT: Subject to the
24 defense.

25 MR. SHAFFER: So --

1 JUSTICE BARRETT: Right, right, right,
2 right, right. Yeah. I -- I agree and I -- I'm
3 just --

4 MR. SHAFFER: Yeah.

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

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

1 MR. SHAFFER: Two points if I may.

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

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

22 JUSTICE BARRETT: Okay. Thanks.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: And in addition to

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

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

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

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

1 right?

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

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

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

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

20 (Laughter.)

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

1 the Fifth Circuit to apply it.

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

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

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

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

5 MR. SHAFFER: It can, Justice Jackson.

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

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

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

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

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

21 JUSTICE JACKSON: And, here, we have a
22 challenge in which the person is saying: Fine,
23 whatever you do with minors, what we are
24 suggesting is that requiring adults to do
25 something, to do this thing, to access this

1 material, burdens our First Amendment right. So
2 that's a different issue, is it not?

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

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Fletcher.

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

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

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

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

1 standard here.

2 Critically, though, that should not
3 prevent Congress or the states from restricting
4 the distribution of pornography to children
5 online, just as states have traditionally done
6 it in brick-and-mortar stores and theaters.

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

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

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

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

23 I welcome the Court's questions.

24 JUSTICE THOMAS: In the laws that
25 you -- that the Justice Department was arguing

1 in favor of in *Playboy* and *Ashcroft*, in either
2 of those, did you ever suggest or argue that
3 there should be a lower standard?

4 MR. FLETCHER: We did in every one of
5 those cases before *Ashcroft*.

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

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

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

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

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

1 standard?

2 MR. FLETCHER: I wouldn't describe it
3 as compromising the strict scrutiny standard at
4 all, Justice Thomas. But I do think it would be
5 appropriate for the Court to emphasize that it's
6 going to be easier for states to satisfy strict
7 scrutiny in this context because of the very
8 unique nature of the interest here.

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

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

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

24 JUSTICE KAGAN: But will it be easy
25 enough for this law to pass?

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

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

9 MR. FLETCHER: Yeah.

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

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

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

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

1 Court.

2 I have no reason to think that we
3 would come to any other conclusion about a law
4 that looked like that today.

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

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

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

22 The second one is the -- the -- the
23 issue that my friend alluded to earlier about
24 which methods of age verification are allowed.
25 The amicus briefs and Texas highlight some of

1 these newer biometric methods that seem
2 significantly less restrictive, but there's a
3 question, as the colloquy earlier illustrated,
4 whether Texas law would allow those methods or
5 would instead require some sort of physical
6 identification or transaction records of some
7 kind.

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

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

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

1 thinking about how to apply that standard in
2 particular circumstances.

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

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

22 JUSTICE GORSUCH: And on that point,
23 Mr. Fletcher, I mean, that -- that -- that -- so
24 you do take Ginsberg to be more than we're just
25 dealing with the rights of minors. It -- it

1 does also impact how we think about the burden
2 placed on people, adults, to ensure that minors
3 don't have access. It speaks to that, as do our
4 traditions with respect to adult theaters and
5 many other things.

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

9 JUSTICE GORSUCH: Yeah. Okay.

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

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

16 MR. FLETCHER: Right. No one thought
17 that that law was invalid.

18 JUSTICE GORSUCH: Right.

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

23 JUSTICE GORSUCH: And --

24 MR. FLETCHER: -- because requiring ID
25 is the least restrictive way of keeping the

1 material away from children.

2 JUSTICE GORSUCH: And, in Sable,
3 there's burdens on speakers that we think are
4 okay to protect against obscenity, right?

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

11 JUSTICE GORSUCH: And that would be a
12 burden on the speaker in that.

13 MR. FLETCHER: Exactly. Yes.

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

16 MR. FLETCHER: Right.

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

22 MR. FLETCHER: Mm-hmm.

23 JUSTICE GORSUCH: Would the
24 preliminary injunction of the district court
25 spring back into effect, so this law that's

1 already taken effect will now no longer be
2 enforceable?

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

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

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

24 MR. FLETCHER: Well, I think, you
25 know, there would be some period of time, I

1 think it's 35 days, before this Court's mandate
2 issues. If I were Texas, I would go to the
3 Fifth Circuit in the meantime and ask to
4 reinstate the stay. And I think Texas -- the
5 Fifth Circuit should look at it with the benefit
6 of this Court's guidance.

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

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

16 MR. FLETCHER: Mm-hmm.

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

1 And I -- I think there's a sense here
2 that the state should be able to protect minors
3 from some of this, but there's not a whole lot
4 of room in the way we traditionally understand
5 strict scrutiny for that to happen.

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

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

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

21 But we're not writing on a blank
22 slate. We have this series of precedents. And
23 so then I think the question is can we find room
24 for this intuition within the parameters that
25 the Court's decisions set. I think you can, as

1 some of the reasons I was explaining earlier
2 explain. This is the case where the state has a
3 compelling interest in restricting speech based
4 on its content. That is exceedingly unusual,
5 right?

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

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

23 Why -- why isn't that a pertinent
24 factor to consider here?

25 MR. FLETCHER: So I think it might be

1 pertinent, Mr. Chief Justice, but the Court has
2 also said more recently, including in NetChoice
3 last term, that the principles of the First
4 Amendment don't change with technology and it
5 has tried to maintain the same fundamental First
6 Amendment principles and apply them to new
7 technology.

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

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

1 of other things. Historically, there have been
2 changes in the applications of the law even if
3 you're -- I'll correct it, the basic principles
4 are -- are the same.

5 MR. FLETCHER: So --

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

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

1 different facts. I think the way to be
2 consistent with that here would be to stick with
3 the same standard.

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

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

14 CHIEF JUSTICE ROBERTS: Thank you.

15 Justice Thomas?

16 JUSTICE THOMAS: But you would admit,
17 though, that we're in an entirely different
18 world? I mean, Playboy was about squiggly lines
19 on cable TV.

20 MR. FLETCHER: I don't disagree with
21 that, Your Honor.

22 JUSTICE THOMAS: And the world of
23 Ashcroft was a world of dial-up Internet.

24 MR. FLETCHER: Exactly. Ashcroft was
25 worried about children accessing this material

1 on -- you know, at home on home computers, in
2 libraries, in schools. Now every child has a
3 smartphone in their pocket with a high-speed
4 Internet connection.

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

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

11 JUSTICE THOMAS: I -- I understand
12 that.

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

24 We don't agree with that. You know,
25 again, I think, if you were going to take

1 another look at Ashcroft based on a party coming
2 in and making a pitch to overrule it and the
3 other line of precedent that it -- it stands on,
4 then technological change might be relevant.

5 Our submission here is just that you
6 don't need to do that.

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

12 MR. FLETCHER: We did, you know, but,
13 again, this Court disagreed and the record --

14 JUSTICE THOMAS: Yeah, you threw in
15 the towel, but, you know --

16 (Laughter.)

17 MR. FLETCHER: Well, we got -- we got
18 told no three times.

19 (Laughter.)

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

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Justice Alito?

24 JUSTICE ALITO: Well, I don't want to
25 belabor Ginsberg too much, but it is a precedent

1 of the Court, and do you want us -- you don't
2 want us to overrule it, do you?

3 MR. FLETCHER: No, not at all.

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

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

23 JUSTICE ALITO: Well, I -- I don't
24 think that's exactly the argument that was
25 actually made, and Mr. Ginsberg was represented

1 by some very sophisticated attorneys.

2 Here's something that they said in
3 their brief: "The policing problem would become
4 an impossible burden, leading the bookseller to
5 abandon sale even to adults. Thus, the adults
6 would be deprived of such literature because it
7 was not available for distribution to
8 adolescents."

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

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

21 The other thing that I'll say is that
22 the Court did confront arguments that were
23 squarely framed in terms of the rights of adults
24 that were burdened when Congress was attempting
25 to protect minors from this material in cases

1 like Sable and Playboy and Reno and Ashcroft and
2 reached a different conclusion.

3 And the last thing I'll say, you know,
4 I mentioned to several Justices why we've argued
5 for something like intermediate scrutiny before.
6 As I said to Justice Barrett, I think there was
7 force to that if we were writing on a blank
8 slate. The reason I think we haven't argued for
9 rational basis review is because that would lead
10 to results that I think even my friends from
11 Texas would be hard-pressed to defend.

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

23 JUSTICE ALITO: I want to go back to
24 your assertion that if we thought that the Fifth
25 Circuit applied the wrong standard of review, we

1 would be required to cause the preliminary
2 injunction issued by the district court to
3 spring back into effect.

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

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

18 JUSTICE ALITO: Correct. All right.

19 MR. FLETCHER: -- in this part.

20 JUSTICE ALITO: Yes.

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

1 JUSTICE ALITO: Well, it would be --
2 it would return the case to the Fifth Circuit on
3 the terms that we thought were -- were
4 appropriate --

5 MR. FLETCHER: And --

6 JUSTICE ALITO: -- in returning it to
7 the Fifth Circuit.

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

18 JUSTICE ALITO: All right. Just so
19 that I have them freshly in -- fresh in mind,
20 you mentioned certain matters that you thought
21 would be important to clarify under state law
22 to -- in making a judgment about whether this
23 law satisfies strict scrutiny. Could you just
24 tick those off again for me?

25 MR. FLETCHER: Sure. There are three.

1 One is the one-third requirement and
2 whether that compels age-gating of material that
3 is protected even as to minors if it's on a site
4 that is otherwise covered.

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

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

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

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

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

1 more than one-third of the material on that
2 website is sexual material that's harmful to
3 minors.

4 JUSTICE SOTOMAYOR: Yes.

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

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

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

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

1 even know what Yoti is -- but the more secure
2 methods are prohibited by this law.

3 Do you think that that is ambiguous?

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

6 JUSTICE SOTOMAYOR: Mm-hmm.

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

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

19 JUSTICE SOTOMAYOR: That's what --

20 MR. FLETCHER: -- taken a position on
21 that.

22 JUSTICE SOTOMAYOR: So, to the extent
23 that what -- whatever methods are found to be
24 permitted under Texas law, if they have greater
25 risk to the user, that would be part of the

1 calculus?

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

4 JUSTICE SOTOMAYOR: All right. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

1 MR. FLETCHER: Yeah.

2 JUSTICE KAGAN: One is the spill-over
3 danger of you relax strict scrutiny in one place
4 and all of a sudden strict scrutiny gets relaxed
5 in other places.

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

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

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

1 It really is a unique feature in the
2 First Amendment where you have the same speech
3 that's protected as to some people and not
4 protected as to others. And, in fact, everyone
5 agrees the government has a compelling interest
6 in restricting access to that speech based on
7 its content. It's a special, I think, unique
8 problem.

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

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

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

1 JUSTICE KAGAN: No, it's the -- it's
2 the next question I was going to ask, which is,
3 you know: What about Ashcroft and all our other
4 decisions makes you think that they're simply
5 not distinguishable in the way one might want to
6 distinguish them?

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

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

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

22 That, the Court said over and over
23 again, was a content-based restriction. And I
24 think that then starts to bring in -- and this
25 gets to my -- complete my answer to your earlier

1 question about why I'm more worried about I
2 think it was the second category of spill-over
3 effects than the first.

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

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

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

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

25 MR. FLETCHER: The most direct one,

1 sure.

2 JUSTICE GORSUCH: Yeah. That was a
3 PI, right --

4 MR. FLETCHER: Mm-hmm.

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

8 MR. FLETCHER: Mm-hmm.

9 JUSTICE GORSUCH: What do we -- does
10 that help?

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

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

22 JUSTICE GORSUCH: Also an incomplete
23 factual record, which it repeatedly emphasized
24 too, right?

25 MR. FLETCHER: Completely agree and I

1 think all the more reason why I think lower
2 courts have gone overboard in treating its
3 application of strict scrutiny as controlling
4 even now 20 years later. But I would put the
5 standard of scrutiny in a somewhat different
6 category.

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

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

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

23 JUSTICE GORSUCH: Do you agree with
24 the principle there that if there's a compelling
25 government interest, there must be some way in

1 the world presently to effectuate that interest?

2 MR. FLETCHER: I think there's a lot
3 of force to that. I hesitate to say that's
4 always true in every circumstance because --

5 JUSTICE GORSUCH: In this -- in -- in
6 this area, right?

7 MR. FLETCHER: But, in -- in -- in
8 this area, yes.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

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

15 MR. FLETCHER: Yeah.

16 JUSTICE KAVANAUGH: -- the decision.
17 So is a PI in effect or not in effect after our
18 mandate issues?

19 MR. FLETCHER: I would think that
20 absent further action -- and, again, we're just
21 an amicus here, and so I don't want to speak for
22 the parties if there's something that I'm
23 missing. But I would think that absent further
24 action from the Fifth Circuit, if this Court
25 vacates the Fifth Circuit's decision and remands

1 and its mandate issues, the result would be that
2 the preliminary injunction would come back into
3 effect.

4 JUSTICE KAVANAUGH: Okay.

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

11 JUSTICE KAVANAUGH: Okay. And do you
12 think a stay should be issued?

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

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

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

24 JUSTICE KAVANAUGH: Okay. On Ashcroft
25 II, how do you think we should handle

1 specifically the application of the strict
2 scrutiny standard? Should we just say that's
3 overtaken by events? It's no longer valid?
4 Tell us how you think we should phrase that.

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

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

1 JUSTICE KAVANAUGH: Then one question
2 on how you would apply strict scrutiny.

3 It seems to me one of the tricky parts
4 of that, because everyone agrees compelling
5 interest, is then you say in your brief
6 appropriate tailoring, which I think is a good
7 phrase.

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

15 MR. FLETCHER: Yeah.

16 JUSTICE KAVANAUGH: -- to the same
17 degree.

18 MR. FLETCHER: Yeah.

19 JUSTICE KAVANAUGH: Am I right in
20 saying that?

21 MR. FLETCHER: I think you're right in
22 saying that. I think Reno and Ashcroft said
23 that. And I do agree that's important.

24 JUSTICE KAVANAUGH: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: And those are the
4 sort of things that the Fifth Circuit could say
5 on remand and, in fact, would, right? In other
6 words, they would go through the record and they
7 would try to assess whether the district court
8 got it right with respect to other alternatives
9 and that sort of thing?

10 MR. FLETCHER: Yes.

11 JUSTICE JACKSON: And that's why the
12 government is saying why don't you remand it
13 instead of us trying to take on that kind of
14 burden?

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

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

1 On the one hand, we have a -- a new
2 set of circumstances that allow for minors to
3 get this material very easily and it's
4 ubiquitous. But I think Petitioners' argument
5 is that the technology really heightens the
6 risks and burdens on adults who are trying to
7 access this material if they have to do a
8 biometric scan or they have to do certain kinds
9 of things that are very -- you know, impinging
10 on privacy in the way that technology now
11 allows.

12 Is that -- so it's not clear to me
13 that just the fact that we have new technology
14 is all -- is running in favor of allowing this
15 law to stand as is.

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

22 The factual observation is I do think
23 that the world now includes more options to
24 verify your identity than existed in Ashcroft
25 II, that are more broadly used. I think one of

1 the things that gives us some confidence in this
2 is that it's being used in the gambling industry
3 and buying alcohol and wine. It's just a much
4 more common part of society. And I think that
5 can give courts more confidence in saying this
6 is a -- an appropriate method of age
7 verification.

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

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

23 JUSTICE JACKSON: Okay. And one
24 question, I -- I noticed that your brief didn't
25 say anything about whether the facial nature of

1 this -- Petitioners' challenge affects the
2 analysis. And I know there's a small part of
3 Respondent's brief that goes into it. And I
4 presume, in thinking about it, that that's
5 because the distinction between facial and as
6 applied really doesn't have any bearing on the
7 question of the level of scrutiny.

8 Is that right?

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

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Nielson.

22 ORAL ARGUMENT OF AARON L. NIELSON

23 ON BEHALF OF THE RESPONDENT

24 MR. NIELSON: Mr. Chief Justice, and
25 may it please the Court:

1 Petitioners don't dispute that their
2 websites are not meant for children, that they
3 harm children, and that children are watching.
4 The Court faced the same situation with
5 broken -- brick-and-mortar stores and applied
6 rational basis to a law limiting adult content
7 to adults.

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

22 Age verification today, however, is
23 simple, safe, and common, including
24 non-identifying means. Petitioners' view of
25 Texas's law is contrary to Texas's view of

1 Texas's law and the Fifth Circuit's view of
2 Texas's law.

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

12 I welcome the Court's questions.

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

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

24 MR. NIELSON: Well, so long as
25 Sable -- so long as Ginsberg is part of this

1 Court's canon, any burden less than the burden
2 at issue in Ginsberg necessarily must be okay.

3 JUSTICE THOMAS: So how does that
4 translate in a world in which you're not talking
5 about one-on-one transactions but billions of
6 transactions?

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

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

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

25 MR. NIELSON: Yeah. So this is where

1 I think it's important to understand the scope
2 of Ginsberg. Ashcroft II is precedent. We're
3 not fighting that. Ginsberg, as I read it, is
4 saying, so long as what you are doing is
5 verifying that this person is a kid, that's
6 rational basis. If you start doing other stuff
7 beyond that, then you're in the world of
8 Ashcroft II. That --

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

16 MR. NIELSON: Yeah.

17 JUSTICE JACKSON: Is that also
18 rational basis in terms of the burden that it
19 imposes on adults?

20 MR. NIELSON: No, Your Honor.

21 JUSTICE JACKSON: Why not?

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

24 JUSTICE JACKSON: But the Court in
25 Ginsberg wasn't analyzing the means by which age

1 verification was being -- was occurring. You
2 see, my -- my hypothetical is turning on, fine,
3 if the Court is allowing for age verification,
4 how far can a state go in terms of burdening
5 adults showing how old they are?

6 MR. NIELSON: Yeah.

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

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

24 I thought that was, like, the whole
25 point of the strict scrutiny analysis.

1 MR. NIELSON: Yeah. So there are two
2 precedents that the Court has to give weight to
3 both of them: There's Ginsberg and there's
4 Ashcroft II.

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

17 MR. NIELSON: Yeah. What I'm trying
18 to say, I'm not suggesting that you could do
19 anything under this, and I know that because of
20 Ashcroft II. There are two cases, both of which
21 are precedents of this Court, both of which have
22 meaning.

23 JUSTICE JACKSON: But -- but wouldn't
24 rational basis allow you to do anything? I
25 mean, the state would say it's rational that we

1 have a parent's affidavit because people can lie
2 about their age, and what we want is to make
3 sure that minors are protected.

4 MR. NIELSON: And Ashcroft II says, at
5 some point, you've gone beyond Ginsberg.
6 Ginsberg we know -- unless we're writing
7 Ginsberg out of the law, if it's -- the burden
8 is no greater than showing an ID in Ginsberg,
9 that's not strict scrutiny.

10 JUSTICE KAGAN: Well, I think what the
11 question really --

12 MR. NIELSON: Yup.

13 JUSTICE KAGAN: -- was, like, what is
14 that point? What is the point at which you
15 cross over the Ginsberg/Ashcroft line in your
16 view?

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

1 possible?

2 The Court disagreed about that. I
3 don't know what the answer is, where the Court
4 is on that extension of Sable.

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

10 JUSTICE KAGAN: Can I --

11 JUSTICE KAVANAUGH: In your --

12 JUSTICE KAGAN: -- can I ask you,
13 General -- and this is -- I'm shifting ground
14 some, but you've now heard Mr. Fletcher's three
15 concerns or three --

16 MR. NIELSON: Yeah.

17 JUSTICE KAGAN: -- questions about
18 your law.

19 MR. NIELSON: Yeah.

20 JUSTICE KAGAN: I think you heard them
21 twice, so you probably --

22 MR. NIELSON: I wrote them down.

23 JUSTICE KAGAN: -- I mean -- okay.
24 How does -- how does Texas's law fare given
25 those three concerns? Are those genuine

1 concerns? Do you pass them or fail them?

2 MR. NIELSON: Yeah. They are not
3 genuine concerns.

4 First, the one-third requirement -- I
5 have two points on that. That's how states
6 generally define sexually oriented businesses.
7 Illinois says you're an adult bookstore if
8 25 percent of your content. That's how San
9 Francisco defines whether you're an adult
10 bookstore. So that's point one just generally.

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

20 No Texas court has had an opportunity
21 to look at this. This is a facial
22 pre-enforcement challenge. But our reading of
23 that is it's going to be limited to the sexually
24 harmful material.

25 JUSTICE KAGAN: Okay. Number two?

1 MR. NIELSON: Number two is the
2 permitted methods, biometric. We have a holding
3 from the Fifth Circuit on this. This is at
4 Petition Appendix 11A. Biometric scanning is
5 fine under Fifth Circuit law -- under Texas law.
6 We agree with that. That's in our brief. That
7 is the position of the Attorney General's
8 Office.

9 And number three is obscene as to
10 minors. Again, two points. This was the fight
11 or one of the fights at issue in Ashcroft I.
12 The Court said we followed the same language.
13 And the Court said that was fine in Ashcroft I.
14 But our reading, again, in Texas, I'll tell you
15 Texas courts read statutes carefully. They
16 follow the text of the statutes.

17 I am looking at our definition of
18 sexually material harmful to minors. That's
19 Section 129B.001.

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

1 JUSTICE KAGAN: So, if I understand
2 you correctly as to those three, as to number
3 two and number three, you say: Well, even if
4 that's a legit concern, our law is -- is okay
5 with respect to it?

6 MR. NIELSON: Yes, Your Honor.

7 JUSTICE KAGAN: And then I don't think
8 that that's quite your answer with respect to
9 number one. Is that right or is that wrong?

10 MR. NIELSON: No. I think we're fine
11 with number one. My point is that even if I'm
12 wrong about how Texas law works, we're still
13 okay because then we're like Illinois and San
14 Francisco, but I don't think I'm wrong about how
15 Texas law works.

16 JUSTICE KAGAN: I see.

17 MR. NIELSON: If you take the content
18 and you put it behind an age screen, we're not
19 counting that.

20 JUSTICE KAVANAUGH: Your --

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

22 JUSTICE KAVANAUGH: Go ahead because
23 you're --

24 JUSTICE ALITO: Just to clarify with
25 respect to point one, so if a particular website

1 has some hard-core pornography that is obscene
2 as to minors and then it has, you know, videos
3 of somebody reading Lady Chatterley's Lover or
4 something like that, does -- can the -- the
5 latter be segregated?

6 MR. NIELSON: So I have to argue with
7 one hand behind my back because no Texas court
8 has an opportunity to look at any of this. I'm
9 just giving you my reading of the statute based
10 on what I know about Texas courts, and the
11 answer would be yes, it could be segregated.

12 JUSTICE SOTOMAYOR: But no Court has
13 said that yet?

14 MR. NIELSON: Correct. And that's
15 part of the problem. I know the Court has had
16 some unhappiness with these facial
17 pre-enforcement challenges. This should be
18 Exhibit 1 in the case against them.

19 JUSTICE SOTOMAYOR: This law doesn't
20 protect someone or -- or says you can't retain
21 this information. The other side in its brief
22 argues that that doesn't mean you can't sell
23 it --

24 MR. NIELSON: Yeah.

25 JUSTICE SOTOMAYOR: -- or give it

1 away.

2 MR. NIELSON: Yeah. So some responses
3 to that. One, I don't know if that's even
4 technologically possible. I don't know how you
5 send the information without having at least
6 instantaneously retained it. That doesn't make
7 any sense to me.

8 Also --

9 JUSTICE SOTOMAYOR: Well, you have to
10 receive it to make a choice. Someone is
11 receiving it to make a choice. And, presumably,
12 the law says, after you've made the choice is
13 this an adult or a child, you've got to delete
14 it.

15 MR. NIELSON: Correct.

16 JUSTICE SOTOMAYOR: All right. But,
17 in that interim when I receive the information,
18 before I make the choice, I could just give it
19 away to another entity. My name when I visit a
20 website, unless I've prohibited the website from
21 doing that, my viewing history, everything is
22 automatically transferred to other people.

23 MR. NIELSON: Yeah. So let's say that
24 I'm wrong about that. Again, I don't know the
25 technology.

1 JUSTICE SOTOMAYOR: Well, that's the
2 point --

3 MR. NIELSON: I -- I don't know how
4 you do it.

5 JUSTICE SOTOMAYOR: -- which I don't
6 know.

7 MR. NIELSON: But I -- I win anyway.
8 So this is why it's important.

9 JUSTICE SOTOMAYOR: That's once you
10 get to a trial and somebody figures this out.

11 MR. NIELSON: Well, I'm saying that
12 under the Fifth Circuit's view of the law, which
13 this Court did not grant cert to review,
14 biometric scanning is okay. So there's no
15 identifying information for it to even turn
16 over. So it wouldn't make sense -- so, even if
17 you transferred it, you're not transferring
18 identifying information.

19 And even if you did have identifying
20 information, it's -- no one does it. I --
21 again, I'd point to the brief of the Age
22 Verification Associations --

23 JUSTICE SOTOMAYOR: You -- we're
24 talking in a vacuum because I don't know the
25 record. I -- I do understand --

1 MR. NIELSON: Yeah.

2 JUSTICE SOTOMAYOR: -- that biometrics
3 sort of looks at a face. Mr. Fletcher said it
4 looks at a hand or someone said it looks at a
5 hand. I have no idea how it works.

6 But I do know that DNA evidence can be
7 picked up from the paper I just touched. And I
8 don't know if biometric information can be used
9 to create other things. I don't know any of
10 this. None of us do.

11 So the question is, before any judge
12 can determine whether this law and the extent of
13 its burden or lack thereof, someone has to
14 determine that, doesn't it?

15 MR. NIELSON: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: That's my only
17 point.

18 MR. NIELSON: Sorry, can I have just
19 one -- one --

20 JUSTICE KAVANAUGH: And on --

21 MR. NIELSON: I'm sorry.

22 JUSTICE KAVANAUGH: Keep going.

23 MR. NIELSON: Just one more second.

24 The last point about all of that is, of course,
25 the Petitioners get to choose who the age

1 verification provider is. So, if they don't
2 like the age verification provider's policies
3 about that, well, they can stop that too. It's
4 within their power. They have self-help
5 measures.

6 JUSTICE KAVANAUGH: I think, earlier,
7 when you were discussing Ginsberg, you said
8 Ginsberg applies to age-verification
9 requirements, and, thus, age-verification
10 requirements get rational basis review and
11 that's how you distinguish. But then you said
12 not if they're too burdensome, which doesn't
13 sound anymore like rational basis review. But
14 I'm actually not interested in whether we call
15 it intermediate scrutiny --

16 MR. NIELSON: Mm-hmm.

17 JUSTICE KAVANAUGH: -- or strict
18 scrutiny or rational basis for purposes of this
19 question.

20 Is the statement of principle, First
21 Amendment principle, that you're seeking at a
22 broad level age verification requirements are
23 permissible so long as they're not overly
24 burdensome on adult access?

25 MR. NIELSON: Yes. Yes, Your Honor.

1 That's how I understand those cases.

2 JUSTICE KAVANAUGH: And those are the
3 exact adverbs and adjectives, "overly
4 burdensome," or do you have a preferred
5 statement?

6 MR. NIELSON: I mean, I guess I would
7 say so long as it's incidental to verifying age.
8 Again, I don't know what "overly burdensome"
9 means.

10 JUSTICE KAVANAUGH: That's a little
11 different. Exactly. Okay.

12 MR. NIELSON: Yeah.

13 JUSTICE KAVANAUGH: And then you have
14 to look at how much burden is there on the adult
15 access, which I think you've conceded -- not --
16 "conceded" is the wrong word, but just
17 acknowledged that that is going to necessarily
18 be part of the inquiry because you've said a few
19 times, if it's more than the Ginsberg burden,
20 you know, at some point, it may cross into too
21 much.

22 MR. NIELSON: Correct, Your Honor,
23 because we are trying to reconcile Ashcroft II
24 and Ginsberg.

25 JUSTICE KAVANAUGH: And you've con- --

1 and, again --

2 MR. NIELSON: Yeah, I don't think I
3 conceded, but --

4 JUSTICE KAVANAUGH: Yeah, you
5 haven't -- I'm not using the word "conceded"
6 now. You acknowledge that a law, for example,
7 that Mr. Fletcher identified that just banned
8 all pornography on the idea that that would
9 serve the interests of preventing children from
10 accessing it, that's --

11 MR. NIELSON: That that's --

12 JUSTICE KAVANAUGH: -- impermissible?

13 MR. NIELSON: Correct. That's the
14 second part of Sable.

15 JUSTICE KAVANAUGH: Right. And then,
16 also to Justice Jackson, if the requirements for
17 age verification were so onerous and unnecessary
18 that they burdened adult -- really prevented
19 many adults from accessing constitutionally
20 protected speech as to adults, you also
21 acknowledge that would be impermissible?

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

24 JUSTICE KAVANAUGH: Yeah.

25 JUSTICE JACKSON: But, Mr. Nielson,

1 why --

2 JUSTICE BARRETT: Mr. Nielson, are you
3 saying that it's like a carveout from content
4 discrimination? Because, you know, you heard my
5 interchange with Mr. Fletcher, you know, and --
6 and also with your friend on the other side when
7 I was trying to see if there was a way, just
8 exploring how do we think about Ashcroft II.
9 And, you know, there is some content
10 discrimination here, right, because you do have
11 to look at the content to decide whether the
12 age-verification requirement applies.

13 So I take your answer to Justice
14 Kavanaugh when you say no, no, no, no, it
15 wouldn't be what Mr. Fletcher said, that if
16 rational basis review applied, they could ban
17 the whole category, because that would be a
18 rational way of protecting adult -- protecting
19 children. You say that's not the case because
20 we look at Ginsberg and it's just age
21 verification.

22 MR. NIELSON: Yes, Your Honor.

23 JUSTICE BARRETT: So is this like an
24 age-verification carveout? Like, it's --
25 content discrimination doesn't trigger strict

1 scrutiny if we're talking about age
2 verification? Is that the argument?

3 MR. NIELSON: I guess there's two
4 conceptual ways to understand it. I'm not sure
5 what Ginsberg -- which one they did. I mean,
6 one is, if it's just gatekeeping, as long as
7 you're allowed to have two different groups, you
8 have to have some way to tell the difference
9 between the two. And if it's just incidental,
10 the gatekeeping, that doesn't itself trigger
11 strict scrutiny. That's one theory of Ginsberg.

12 The other theory of Ginsberg is that
13 just looking at identification just isn't a
14 constitutionally cognizable burden. That would
15 fit in with the Crawford line of cases for
16 voting. That would fit with the American
17 Library Association, where they say going to the
18 librarian, that's embarrassing. That's just not
19 a constitutionally cognizable burden.

20 JUSTICE KAGAN: But, if I --

21 JUSTICE KAVANAUGH: But you've said --

22 JUSTICE KAGAN: -- understand you
23 correctly, you are saying -- and this is -- goes
24 back to Justice Jackson's hypothetical -- that
25 when the burden gets too great, right, when, you

1 know, they're asking you to do all these
2 unreasonable things --

3 MR. NIELSON: Mm-hmm.

4 JUSTICE KAGAN: -- right, that's the
5 point at which, if I understand you correctly --
6 tell me if I don't -- it -- it -- it flips into
7 not rational basis review but into heightened
8 review, strict scrutiny?

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

11 JUSTICE KAGAN: Okay. So, I mean,
12 that is a little bit peculiar, isn't it? I
13 mean, it's -- it's -- it's obviously the case
14 that the extent of the burden should matter a
15 lot in the constitutional analysis, but it
16 usually matters when you're applying whatever
17 standard you're applying. It doesn't usually,
18 you know, push you -- like, oh, the burden is
19 really -- this -- this -- this -- this burden
20 is -- you know, it's very hard to make this age
21 verification -- to meet this age-verification
22 requirement, so, because that's true, it pushes
23 you into a different standard of scrutiny.

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

1 MR. NIELSON: Yeah, I agree. That is
2 a curious effect of reconciling Ginsberg and
3 Ashcroft II.

4 JUSTICE KAVANAUGH: But it's just
5 inherent in having an age -- you know, one
6 category that can't access and one -- another
7 category of people that can, and you have to
8 have some mechanism, as you just said, for
9 determining it.

10 But I think, in reply to Justice
11 Jackson and Justice Kagan, you've said yes,
12 it -- it could get too burdensome. In other
13 words, even age verification -- I think Justice
14 Kagan was just saying this. Even age
15 verification could get too burdensome if you did
16 things like a passport or something like that?
17 I mean, you --

18 MR. NIELSON: Correct, Your Honor.
19 Again, there's cases --

20 JUSTICE KAVANAUGH: And I don't --

21 JUSTICE JACKSON: But is it --

22 JUSTICE KAVANAUGH: Again, whether you
23 call it --

24 MR. NIELSON: Yeah.

25 JUSTICE KAVANAUGH: -- whatever you

1 call it --

2 JUSTICE JACKSON: But I think what you
3 call it is important, I think.

4 (Laughter.)

5 JUSTICE KAVANAUGH: Well, I'm just
6 going to ask, whatever you call it, it can't get
7 too burdensome, right?

8 MR. NIELSON: Yeah. So --

9 JUSTICE KAVANAUGH: Yeah.

10 MR. NIELSON: -- I mean, the north
11 star here is, so long as Ginsberg has some
12 meaning, so long as the burden is not greater
13 than the burden in Ginsberg, rational basis
14 applies.

15 JUSTICE JACKSON: But, Mr. Nielson,
16 the burden was not the issue in Ginsberg.
17 That's my -- my -- my only problem --

18 MR. NIELSON: Yeah, yeah.

19 JUSTICE JACKSON: -- with what you
20 have said is that I took Ginsberg to be
21 establishing the initial principle that you
22 start with, that it's okay to treat minors
23 differently than adults, period, that that's the
24 holding of Ginsberg.

25 It wasn't talking about the extent to

1 which figuring that out was going to burden
2 adults and how much the -- the adults' First
3 Amendment rights were impinged by operating that
4 principle. It was the first case to establish
5 in this context that minors don't have the same
6 rights as adults to access this material.

7 Then we go on in other cases, in the
8 cases that Justice Sotomayor raises, to -- to
9 evaluate, okay, now that we know that we can
10 separate these two categories of people, you're
11 absolutely right that we have to have some way
12 of doing that.

13 But these other cases are about how
14 burdensome the way of doing that is and to what
15 extent -- I mean -- and you seem to be agreeing
16 that there's a point at which the burden that
17 you're imposing on adults are going to be too
18 much. And my only point about the standard
19 mattering is that I thought the work of rational
20 basis review and strict scrutiny was to evaluate
21 whether this is too burdensome, that we say,
22 because the adults have a certain scope of First
23 Amendment rights, you can only impose a burden
24 that is the least restrictive way of reaching
25 your compelling interest.

1 So we don't need a new set of
2 principles or tests. We have a test. The test
3 is strict scrutiny. And Mr. -- the government
4 says, Mr. Fletcher says, there might be a way in
5 which this actually satisfies that.

6 MR. NIELSON: Yeah. So that test
7 can't be right, and the reason why it can't be
8 right is it would mean that if a state wants to
9 stop kids from going into a strip club, they
10 have to satisfy strict scrutiny.

11 JUSTICE JACKSON: No, because the --
12 the kids going into a strip club poses no burden
13 on adults. Why -- why -- that was going to be
14 my other question for you. Why would, you know,
15 saying a kid can't go into the strip club pose
16 any burden on an adult who wanted to?

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

21 JUSTICE JACKSON: So we apply strict
22 scrutiny?

23 MR. NIELSON: You would apply strict
24 scrutiny to that.

25 JUSTICE JACKSON: And then we say is

1 this the least restrictive means? And you say
2 yes. Fine. You can do it.

3 MR. NIELSON: That is not at all
4 consistent with our tradition and history. As I
5 understand strict scrutiny -- again, I know
6 there's different views on this. As I
7 understand strict scrutiny, the idea is this is
8 generally not okay, but sometimes we'll make an
9 exception if there's really extraordinary
10 reasons for it.

11 But, in our history, we have always
12 said kids can't come and look at this stuff. So
13 it seems not correct to me as a historical
14 matter to say, well, actually, it's always been
15 presumptively unconstitutional, but on this one
16 thing, well, we've done it forever, strict
17 scrutiny somehow has always been satisfied.

18 JUSTICE BARRETT: Mr. Nielson, I want
19 to take you to the questions that Justice Kagan
20 was asking Mr. Fletcher about the dangers. I
21 just want you to --

22 MR. NIELSON: Yeah.

23 JUSTICE BARRETT: -- to posit this.
24 This is all just pretend.

25 Let's imagine that you should win,

1 that Texas should win. And Justice Kagan asked,
2 if that were so, you know, if there is a way
3 that states should be able to regulate -- and
4 the federal government should be able to
5 regulate this, we have to decide how our First
6 Amendment precedent might accommodate that.

7 And Justice Kagan identified for
8 Mr. Fletcher two options. One would be to say
9 that this can satisfy -- this kind of regulation
10 can satisfy strict scrutiny, and the other might
11 be to say, in this context, intermediate
12 scrutiny makes more sense. I just want to take
13 rational basis --

14 MR. NIELSON: Yeah.

15 JUSTICE BARRETT: -- off the table.

16 MR. NIELSON: Yeah.

17 JUSTICE BARRETT: What do you think
18 about that? Mr. Fletcher told us what he
19 thought about the dangers that would lie in
20 either approach.

21 MR. NIELSON: Yeah. So I am very
22 worried not about this law. I think we're going
23 to pass strict scrutiny. I hope that that is
24 where the Court is, that this law passes strict
25 scrutiny. I am worried about my strip club

1 example or any other sexually oriented
2 businesses. If we start saying that the
3 standard is strict scrutiny, I hope this Court
4 says, oh, that's okay, it passes strict
5 scrutiny.

6 But there's a whole bunch of law on
7 strict scrutiny, and a whole bunch of different
8 judges across this country are going to apply
9 it. There's a bunch of cases that say fatal in
10 fact. And we're going to have a lot of PIs and
11 a lot of emergency litigation. That's a
12 problem. A real --

13 JUSTICE KAGAN: But that wouldn't be
14 true necessarily if we wrote the kind of opinion
15 that Mr. Fletcher had in mind, right? Because
16 then you would say: This is the kind of strict
17 scrutiny we're talking about. This is what will
18 pass it. You know, take us seriously.

19 MR. NIELSON: So that's within the
20 control of this Court for that language to be.
21 I hope, if such opinion gets written, it is
22 very, very clear that we shouldn't get these PIs
23 like this.

24 JUSTICE ALITO: General Nielson, let
25 me see if this is consistent with what you're

1 saying.

2 Whenever -- if a law prohibits or
3 regulates a type of speech that is not entitled
4 to any constitutional protection, the content of
5 the speech does have to be examined at the
6 outset to determine whether it falls within that
7 category. And the fact that that preliminary
8 examination is necessary does not mean that the
9 law is content-based and, therefore, subject to
10 strict scrutiny.

11 MR. NIELSON: Yes, Your Honor.

12 JUSTICE ALITO: So what that may
13 suggest is that this -- while this preliminary
14 examination does not render the law
15 content-based, so long as it is not too
16 excessive, then strict scrutiny is not
17 triggered.

18 But, if it crosses a certain point and
19 it becomes too burdensome so that it is more
20 than is reasonably necessary to make that
21 threshold determination about whether the speech
22 is constitutionally protected, then you go into
23 another level of -- of scrutiny.

24 MR. NIELSON: Yes, Your Honor. And I
25 think that Ginsberg is consistent with that

1 view.

2 JUSTICE JACKSON: What about
3 Packingham?

4 JUSTICE SOTOMAYOR: The problem is
5 that the speech here is not just about obscene
6 speech, which is not subject to any rational
7 basis scrutiny only because it's -- I'm not even
8 thinking rational basis -- because obscene
9 speech is illegal for adults or minors, correct?

10 MR. NIELSON: It can be -- it can be
11 made illegal, yes, Your Honor.

12 JUSTICE SOTOMAYOR: It can be made
13 illegal. Not automatically, but it's not
14 protected speech. Obscene speech is not
15 protected speech.

16 MR. NIELSON: Exactly, Your Honor,
17 yes.

18 JUSTICE SOTOMAYOR: The problem is
19 that this law doesn't protect -- doesn't make
20 illegal just obscene speech, it makes illegal
21 obscene and indecent speech that might affect
22 children. But adults can view indecent speech,
23 correct?

24 MR. NIELSON: Yes, Your Honor, but not
25 if children are there.

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

3 But you now have to look further than
4 determining whether something's obscene. You
5 have to figure out whether it's indecent for
6 children, correct?

7 MR. NIELSON: Yes, Your Honor, I think
8 so.

9 JUSTICE SOTOMAYOR: Yeah. So it's not
10 merely checking to see if something doesn't have
11 curse words or some fighting words or something
12 like that. You're actually asking adults to not
13 look at something until they do something else,
14 something that's legal for them to look at.

15 MR. NIELSON: Yes, Your Honor. And
16 I'm saying that so long as Ginsberg has any
17 meaning --

18 JUSTICE SOTOMAYOR: Counsel, you keep
19 saying Ginsberg, all right? I look at the
20 Court's decision. The facts are that a
21 bookseller was criminally -- found criminally
22 liable for selling -- I think it was to a
23 16-year-old. The age doesn't matter right now.
24 But an underage child.

25 And "his attack" -- and this is the

1 Court saying -- "is not that New York was
2 without power to draw the line at age 17.
3 Rather, his contention is the broad proposition
4 that the scope of the constitutional freedom of
5 expression secured to a" child -- "to a citizen
6 to read or see material concerned with sex
7 cannot be made to depend upon whether the
8 citizen is an adult or minor."

9 And the Court -- "he insists that the
10 denial to minors under 17 of access to materials
11 condemned by [the law], insofar as that material
12 is not obscene for persons" of age -- of "17
13 ... or older, constitutes an unconstitutional
14 deprivation of protected liberty."

15 So it wasn't the age verification that
16 was at issue in Ginsberg at all. The Court had
17 no reason to address it. The claim there and
18 what the Court was speaking to as involving
19 rational basis was whether obscene, indecent
20 materials could be made access -- had to be made
21 accessible to kids under 17.

22 MR. NIELSON: Yeah, I --

23 JUSTICE SOTOMAYOR: So I -- I -- I --
24 I'm having a -- I mean, we can all read
25 Ginsberg, but do you have any language in

1 Ginsberg that even addresses the
2 age-verification issue?

3 Point me to one line in the entire
4 petition, other than describing the law --

5 MR. NIELSON: Yeah.

6 JUSTICE SOTOMAYOR: -- that talks
7 about the burden of the age verification.

8 MR. NIELSON: Look at the very last
9 paragraph of the opinion. That's when they're
10 discussing whether Mr. Ginsberg had notice about
11 his obligations were under the statute.

12 The Court was very clear -- to be
13 sure, that was framed as a due-process-type
14 claim. It was very clear that they said: No,
15 you know --

16 JUSTICE SOTOMAYOR: It was a due
17 process.

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

20 I would also point to the language
21 from the brief that Justice Alito already
22 mentioned earlier.

23 I've not heard of a court limiting a
24 case to less than its facts. And, there, he
25 raised the argument, saying: If this happens,

1 I'm not going to be able to sell it to adults.
2 And the Court said, essentially, rational basis.
3 That's how I read it.

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 Justice Thomas, anything?

8 Justice Alito?

9 Anything further, Justice Sotomayor?

10 Justice Kagan?

11 Justice Gorsuch?

12 JUSTICE GORSUCH: One quick question
13 on Ashcroft. It crossed the line in your view
14 because -- and I want you to fill in the blank.

15 And -- and one possibility, of course,
16 might be that the law there made it illegal to
17 post, that is, to even create, to disseminate
18 the information, with the age verification being
19 only an affirmative defense.

20 MR. NIELSON: Yes, that is one of
21 them. There's three points on this. Again,
22 Ashcroft doesn't -- Ashcroft II doesn't say what
23 the burden was.

24 JUSTICE GORSUCH: Yeah.

25 MR. NIELSON: So you have to, like,

1 read into it.

2 One is that. That was clear from
3 the -- from the opinion and Justice Stevens's
4 concurrence. That's a big problem.

5 Another problem, if you go back to the
6 district court, was, to do this, you had to have
7 databases of credit cards. This is not the law
8 in Texas. You can't keep the data. So there
9 are no databases.

10 And the third is, again, to go back to
11 Ashcroft I, because you can't separate
12 communities under 1990s technology, if you send
13 it out to the world, this is the whole world, it
14 effectively meant some places, content that's
15 not even obscene as to minors would be behind
16 age screens, and that's a burden that is not
17 existing here.

18 We know for a fact that they can
19 segregate by -- by geography. When Texas's law
20 went into effect, Pornhub left Texas. They're
21 still operating in Louisiana with age
22 verification. So we know that that's no longer
23 true.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: Just to follow up
3 on Justice Alito's formulation, which I thought
4 was helpful.

5 So the rule then, age-verification
6 requirements, generally permissible, but they
7 can become too excessive, to use his
8 formulation. Or I think you and I discussed
9 "or can become overly burdensome."

10 And then --

11 MR. NIELSON: Yeah, and that's why I
12 used "incidental."

13 JUSTICE KAVANAUGH: Right. And if so,
14 impermissible, but, otherwise, they're generally
15 permissible and common-sensical.

16 I think that's the basic framework
17 you're --

18 MR. NIELSON: Yes, Your Honor.

19 JUSTICE KAVANAUGH: Okay. And then
20 just maybe to piggyback on Justice Gorsuch, this
21 law is not too excessive or overly burdensome
22 because -- and fill in the blank.

23 MR. NIELSON: Because it's less than
24 in Ginsberg, and we know that because you don't
25 even have to provide identifying information.

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

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

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: Mr. Nielson, there's
11 been some discussion about what happens to the
12 PI if we vacated and remanded to the Fifth
13 Circuit. Can you just say what you -- your view
14 on that is?

15 MR. NIELSON: Yeah. So the view of
16 Texas is, if this Court were to vacate the Fifth
17 Circuit's decision, then the Fifth Circuit's
18 stay would go back into effect because it was
19 only the Fifth Circuit's decision that took out
20 the stay. That would take a separate order.

21 Now I know that the other side is
22 going to fight me on that one, so we probably
23 would do what Mr. Fletcher suggests and go back
24 to the Fifth Circuit for clarification.

25 I ask, you know, if anything else,

1 that the language is clear to the Fifth Circuit
2 that it knows it can reinstitute the stay. That
3 gets lost in translation. Sometimes, when you
4 get a decision from this Court, they're like:
5 Oh, I guess -- I guess we can't do that anymore.
6 We don't want to get sum rep'd. We respect the
7 Court.

8 If that were to happen, I urge the
9 Court, please let the Fifth Circuit know. But
10 our view is that because it was this decision
11 that the Court is reviewing that vacated the
12 Fifth Circuit's stay, the stay would then spring
13 back to life.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: Yeah. Your last
17 colloquy with Justice Alito suggests that your
18 argument is that rational basis review applies
19 to state laws that serve merely to screen
20 certain people from accessing online content
21 that they have no constitutional right to
22 access, or at least it could be sort of thought
23 of in that way.

24 And I guess -- I mean, neither party
25 cited this case in their briefs, but I wonder

1 whether this would run afoul of Packingham. I
2 don't know if you're familiar with that case,
3 but it's one in which we looked at convicted sex
4 offenders who were trying to access social media
5 websites, a state law precluding that, and we
6 applied heightened scrutiny even though it sort
7 of raised the same kind of dynamic that you say
8 rational basis review would apply to.

9 So I -- I think we would have to try
10 to figure out how the standard or the principle
11 that Justice Alito articulated would be
12 consistent with that case as well.

13 MR. NIELSON: Yeah. I confess I've
14 probably thought I read every one of this
15 Court's recent First Amendment cases, preparing
16 for today's argument. I did not read
17 Packingham. I -- I don't know, Your Honor. But
18 I do know that that's -- we are in the exact
19 same context as in Ginsberg. So whatever the
20 scope of Ginsberg, we fall within it.

21 JUSTICE JACKSON: And -- and -- and it
22 turns in a way on whether or not we agree that
23 Ginsberg was speaking to the burden or speaking
24 to the age requirement, as opposed to making the
25 sort of initial determination that minors can't

1 be treated -- or minors can be treated
2 differently than adults?

3 MR. NIELSON: Yeah, I trust Your Honor
4 on that one.

5 JUSTICE JACKSON: Yeah.

6 MR. NIELSON: I would also say the
7 other way that you could think about Ginsberg,
8 of course, is that an ID requirement is just not
9 a constitutionally cognizable burden at all,
10 which would be consistent with some of this
11 Court's other cases and not fall within the
12 Packingham --

13 JUSTICE JACKSON: Well, the Fifth
14 Circuit didn't hold that, right? That that
15 would be --

16 MR. NIELSON: No, Your Honor.

17 JUSTICE JACKSON: The Fifth Circuit at
18 least saw that the First Amendment was
19 implicated by this, and, in fact, I thought they
20 thought it was a content-based restriction but
21 that Ginsberg still applied to sort of have a
22 different rule in this situation.

23 MR. NIELSON: All I'm saying is that
24 you can conceptualize Ginsberg in multiple ways.
25 We are okay under all of them. But, if there

1 are problems that way, I would urge the Court
2 just to think, well, look at the -- the voting
3 ID cases and that sort. We are okay under those
4 line of cases too.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Rebuttal, Mr. Shaffer?

9 REBUTTAL ARGUMENT OF DEREK L. SHAFFER
10 ON BEHALF OF THE PETITIONERS

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

13 Let me start with Ginsberg if I may.
14 We've talked a lot about the fact that that
15 opinion was addressing only the rights of minors
16 as invoked there. I would just also note it was
17 not an across-the-board age-verification
18 mandate. It was not operating in a context
19 where you had a way to screen out minors from
20 specific content. And it didn't say, if more
21 than one-third of a store is inappropriate for
22 minors, minors have to be kept out of the store.
23 This law differs in all of those respects.

24 The question about let's wipe away for
25 the moment, Justice Kagan, the precedents that

1 this Court has laid down for decades about
2 sexually indecent speech that's inappropriate
3 for minors via electronic media and via the
4 Internet. Let's wipe it away for a moment. I
5 strongly urge this Court to stick with strict
6 scrutiny as the applicable standard of review
7 when we're talking about content-based burdens
8 on speakers.

9 This Court has an area of law that is
10 clear, that is well understood, that is
11 reliable, that will withstand mounting and
12 varied attacks because we all know when strict
13 scrutiny applies. It applies here. And I would
14 urge the Court to stick with it even if we
15 forget about the on-point precedents for the
16 moment. There are -- there are principles that
17 I think are important, reliable principles that
18 will serve us well going forward, yes, in this
19 context, but also in others.

20 And so that brings me, Justice Kagan,
21 to your question about what about 20 other laws
22 that, by some views, may look a lot like
23 Texas's? I can tell Your Honors this is the
24 worst of them. This is the worst of the laws.
25 It has the health warnings where Texas is

1 telling these targeted speakers and their users
2 that pornography is, among other things,
3 contributing to prostitution, child
4 exploitation, child pornography. You have a
5 hostile regulator who's saying to adults, you
6 should not be here.

7 You have no consideration whatsoever
8 of content filtering as the number one
9 alternative that this Court had called out. You
10 have age verification that just, respectfully,
11 does not answer the description that Texas's
12 amici are offering and that Mr. Nielson is
13 collapsing to today, which is age verification
14 different from what the plain terms of the law
15 would permit. And you have none of the
16 protections that you would expect from a
17 responsible regulator who's concerned about
18 adults' interests here.

19 You don't have enforceable rights for
20 them. You do not have privacy protection. You
21 do not have confidentiality of information. You
22 do not have the government saying we cannot pry
23 open this information and use it against you.

24 All of that, Your Honors, you should
25 await a state or the federal government doing

1 its work, showing its homework, having something
2 other than the ill-tailored law that you have
3 here and a blank legislative record that tells
4 you nothing about why Texas would have arrived
5 at a law that looks like this unless it was out
6 to chill adults and chill speakers when it comes
7 to expression that is clearly protected as to
8 adults.

9 And I want to offer the Ashcroft law
10 if I may as a point of comparison. We think
11 that this is the a fortiori case, Your Honors.
12 There, the Court was looking at federal
13 legislation on a well-developed, comprehensive
14 legislative record where you could see what
15 Congress was doing and why it was doing it. And
16 it was a serious, genuine effort to regulate,
17 Justice Kavanaugh, as we were discussing, to
18 protect kids from all of the content that was
19 deemed inappropriate for minors regardless of
20 its source.

21 Texas's law is not fit for that
22 purpose for reasons that have gone conceded, I
23 think, effectively by Texas and by its amici,
24 and you can find in a well-substantiated set of
25 findings from the district court about how

1 under-inclusive this law is.

2 Your Honors have room and -- and --
3 and I understand sympathy for a state that is
4 trying to do its job to regulate in this area
5 conscientiously. And I want to assure you,
6 Justice Barrett, when we talk about scrutiny
7 that is strict in theory and fatal in fact -- I
8 was lucky enough to learn constitutional law
9 from Gerry Gunther -- that resonates. None of
10 us is suggesting that in this context strict
11 scrutiny is fatal. It is not. It should not
12 be. We've conceded that there is a compelling
13 interest here.

14 The question will always be, has the
15 government tried to arrive at a less restrict --
16 it -- it -- it -- has it tried to do this in a
17 way that is not unduly burdening adults and is
18 truly protecting kids? Once this law answers to
19 strict scrutiny as it -- as it has long been
20 understood, I do think, respectfully, this
21 becomes an easy case.

22 The last point. From -- from
23 Mr. Fletcher, and I agree with so much of what
24 he says, he talked about tradition as a
25 guidepost here. And I would just note the

1 tradition that we have on the Internet, on the
2 Internet. Yes, Justice Kagan, we've come a long
3 way from -- from when we were first talking
4 about the Internet and had to explain what it
5 was. But Reno and Ashcroft have been absolutely
6 fundamental to how the Internet has developed as
7 a free medium of -- of expression, as our modern
8 public square. And -- and the tradition on the
9 Internet is to say that it will be free and that
10 it is incumbent upon parents to screen out
11 content that is inappropriate for their kids.
12 That's where the law should stay.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 12:19 p.m., the case
17 was submitted.)

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