No. ______

IN THE

Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,

Petitioners,

v.

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

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly held that States may rationally restrict minors' access to sexual materials, but such restrictions must withstand strict scrutiny if they burden adults' access to constitutionally protected speech. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 663 (2004). In the decision below, the Fifth Circuit applied rational-basis review—rather than strict scrutiny—to vacate a preliminary injunction of a provision of a Texas law that significantly burdens adults' access to protected speech, because the law's stated purpose is to protect minors. The question presented is:

Whether the court of appeals erred as a matter of law in applying rational-basis review to a law burdening adults' access to protected speech, instead of strict scrutiny as this Court and other circuits have consistently done.

PARTIES TO THE PROCEEDINGS

Petitioners Free Speech Coalition, Inc., MG Premium Ltd, MG Freesites Ltd, WebGroup Czech Republic, a.s., NKL Associates, s.r.o., Sonesta Technologies, s.r.o., Sonesta Media, s.r.o., Yellow Production, s.r.o., Paper Street Media, LLC, Neptune Media, LLC, Jane Doe, MediaME SRL, and Midus Holdings, Inc., were plaintiffs-appellees in the court of appeals.

Respondent Ken Paxton, in his official capacity as Attorney General of Texas, was defendant-appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Free Speech Coalition, Inc. has no parent corporation.

MG Premium Ltd and MG Freesites Ltd are wholly-owned subsidiaries of MG CY Holdings Ltd, which is a subsidiary, through affiliates,[*] of 1000498476 Ontario Inc.

WebGroup Czech Republic, a.s. has no parent corporation.

NKL Associates s.r.o. has no parent corporation.

Sonesta Technologies, s.r.o. and Sonesta Media, s.r.o. are wholly-owned subsidiaries of United Communication Hldg II, a.s.

Yellow Production, s.r.o. has no parent corporation.

Paper Street Media, LLC and Neptune Media, LLC are wholly-owned subsidiaries of Paper Street Holdings, Inc.

MediaME SRL has no parent corporation.

Midus Holdings, Inc. has no parent corporation.

No publicly held corporation owns 10 percent or more of any of the above-listed entities' stock.

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[*] Licensing IP International S.a.r.l.; MindGeek S.a.r.l.; ECP One Limited; ECP Three Limited; ECP Four Limited; ECP Alpha Holding Ltd; ECP Alpha LP; SIE Holdings Limited; ECP Capital Partners Ltd; and FMSM Holdings, Inc. (OBCA).

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

Free Speech Coalition, Inc., et al. v. Colmenero, No. 1:23-CV-917-DAE (Aug. 31, 2023) (granting preliminary injunction).

United States Court of Appeals (5th Cir.):

Free Speech Coalition, Incorporated, et al. v. Paxton, No. 23-50627 (Mar. 7, 2024) (affirming in part and vacating in part).

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PETITION FOR A WRIT OF CERTIORARI

Americans hold a wide range of views about sexual content online. Some view it as offensive or indecent; for others, it is artistic, informative, or even essential to important parts of life. Consistent with the fundamental First Amendment principle that "esthetic and moral judgments about art and literature … are for the individual to make, not for the Government to decree," this Court has long treated non-obscene sexual content as constitutionally protected. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000). And while the Court has recognized that legislatures may limit *minors'* access to sexual material reasonably determined to be harmful to them, the Court has held repeatedly that a burden on *adults'* access to that content "can stand only if it satisfies strict scrutiny." *Id.* at 813; *see Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989).

The decision below openly defies that precedent and "begs for resolution by the high court." App. 163a (Higginbotham, J., dissenting). The law at issue, Texas H.B. 1181 ("the Act"), requires any website that publishes content one-third or more of which is "harmful to minors"—a broad category that includes virtually any salacious content—to verify the age of every user before permitting access. App. 171a. While purportedly seeking to limit minors' access to online sexual content, the Act imposes significant burdens on adults' access to constitutionally protected expression. Of central relevance here, it requires every user, including adults, to submit personally identifying information to access sensitive, intimate content over a medium—the Internet—that poses unique security

and privacy concerns. The district court rightly applied strict scrutiny to the age-verification provision and entered a preliminary injunction after finding it likely would not meet that standard. App. 107a-136a. But a divided Fifth Circuit panel vacated that injunction, reasoning that the age-verification provision's burdens on adults' First Amendment rights are subject to only *rational-basis review*. App. 8a-27a.

As elaborated in Judge Higginbotham's forceful dissent, the panel's position is untenable and erroneous as a matter of law. App. 45a-87a. Indeed, the panel acknowledged that this Court applied strict scrutiny to a materially indistinguishable law in *Ashcroft v. ACLU*, before declining to follow *Ashcroft* based on what it considered "omissions" in this Court's analysis. App. 17a. *Ashcroft* was well reasoned and consistent with prior decisions. Nor can a lower court, in any event, disregard this Court's precedent based on perceived legal weaknesses. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The Fifth Circuit's decision also splits from the law of multiple circuits. The panel majority admitted that its position departed from the Third Circuit's in *ACLU v. Mukasey*, 534 F.3d 181 (2008). App. 18a n.26. And as Judge Higginbotham demonstrated, the Second, Fourth, and Tenth Circuits have all applied strict scrutiny to laws indistinguishable from the one to which the Fifth Circuit applied rational-basis review here. App. 163a & n.2. Such acknowledged conflicts with the decisions of this Court and other circuits afford paradigmatic bases for this Court's intervention.

This Court's intervention is also warranted because the decision below is exceptionally important

and exceptionally wrong. By applying rational-basis review rather than strict scrutiny to a facially content-based restriction on adults' speech, the Fifth Circuit contravened a central teaching of First Amendment jurisprudence while disregarding the district court's factual findings about the profound chill the Act's age-verification requirement inflicts on adults. *See* App. 125a. The Fifth Circuit also avoided addressing the law's severe underinclusivity, including its exemption of search engines and social-media sites that contain "the online pornography that is most readily available to minors." App. 113a. And the Fifth Circuit outlined an arguable roadmap for upholding an outright ban on adults' access to sexual expression deemed inappropriate for minors, even though this Court long ago refused to countenance laws that "reduce the adult population … to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

In short, this case presents a far-reaching question about government efforts to burden disfavored expression of the kind this Court has repeatedly deemed worthy of review—in its leading sexual-content cases and many others. *See, e.g.*, *Netchoice, LLC v. Paxton*, 144 S. Ct. 477 (2023); *NIFLA v. Becerra*, 585 U.S. 755 (2018); *McCullen v. Coakley*, 573 U.S. 464 (2014); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011); *Snyder v. Phelps*, 562 U.S. 443 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); *Texas v. Johnson*, 491 U.S. 397 (1989). This Court should grant certiorari to restore the constitutional safeguards applicable to the protected speech targeted by Texas's law.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-87a) is reported at 95 F.4th 263. The opinion of the district court granting a preliminary injunction (App. 90a-161a) is not yet published in the Federal Supplement but is available at 2023 WL 5655712.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law … abridging the freedom of speech." Texas H.B. 1181 is reproduced in an appendix to this petition. App. 169a-75a.

STATEMENT

Texas enacted H.B. 1181 ("the Act") in June 2023. App. 93a. In August 2023, the district court preliminarily enjoined the Act's age verification and "health warnings" requirements before they took effect. App. 90a. After granting an administrative stay (which lasted roughly two months), followed by a stay pending appeal (which lasted nearly four months), the Fifth Circuit affirmed the preliminary injunction of the health warnings but vacated the preliminary injunction of the age-verification provisions over Judge Higginbotham's dissent. App. 2a-3a, 45a.

A. Legal And Factual Background

1. As relevant here, this Court's First Amendment jurisprudence distinguishes between two categories of speech involving sex: (i) obscenity, which is unprotected by the First Amendment, and (ii) non-obscene sexual content, which is fully protected by the First Amendment as to adults, but can be rationally restricted as to minors.

This Court has held for decades that obscenity is "not protected by the freedoms of speech and press." *Roth v. United States*, 354 U.S. 476, 481 (1957). This Court has narrowly defined that unprotected category as speech that "appeals to the prurient interest," "depicts or describes in a patently offensive way, sexual conduct," and "lacks serious literary, artistic, political, or scientific value" according to community standards. *Miller v. California*, 413 U.S. 15, 24 (1973).

Critically, however, "sex and obscenity are not synonymous." *Roth*, 354 U.S. at 487. For adults, "[t]he portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.* (footnote omitted). To the contrary, "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Id.* The First Amendment thus fully protects adults' access to non-obscene sexual expression, even if a majority of the population "may find [such material] shabby, offensive, or even ugly." *Playboy*, 529 U.S. at 826; *see, e.g.*, *Reno*, 521 U.S. at 874-85.

That same protection does not extend to minors. The Court has recognized that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (citation omitted). In the context of sexual expression, the Court has held that a state may "adjust[] the definition of obscenity" outlined in *Miller* to prevent dissemination of sexual material that it deems "harmful to minors," so long as it has a rational basis for doing so. *Id.* at 638, 641; *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 & n.10 (1975).

Of central relevance here, the Court has repeatedly clarified that, where a law adopted to advance the "compelling interest in protecting" minors from sexually explicit content also burdens *adults'* access to constitutionally protected speech, the law can "withstand constitutional scrutiny" only if it is "'narrowly drawn … to serve those interests without unnecessarily interfering with First Amendment freedoms.'" *Sable*, 492 U.S. at 126 (citation omitted). That is, the law's burden on adults' access to constitutionally protected speech must satisfy "strict scrutiny." *Playboy*, 529 U.S. at 814. The Court has twice reiterated that rule in the specific context of Internet restrictions. *Ashcroft*, 542 U.S. at 665-66; *Reno*, 521 U.S. at 874.

2. Texas has long criminalized conduct involving obscenity. *See* Tex. Penal Code §§ 43.21-43.23. That prohibition is neither part of the Act nor under challenge. App. 6a n.7. The Act imposes new obligations on any commercial operator of an Internet website "more than one-third of which is sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code § 129B.002(a). The Act defines "sexual material

harmful to minors" as material that satisfies *Miller*'s standard for obscenity from the perspective of the average person considering the material's effect on minors. *Id.* § 129B.001(6); App. 4a.[1] While inherently vague, that definition as a practical matter "covers virtually all salacious material"—for example, sex-education videos, R-rated movies, and soft-core pornography. App. 109a; *see* App. 115a.

Websites covered by the Act must comply with two requirements. First, they must "verify that an individual attempting to access the [covered] material is 18 years of age or older." Tex. Civ. Prac. & Rem. Code § 129B.002(a). The Act permits verification by "digital identification," "government-issued identification," or "a commercially reasonable method that relies on public or private transactional data." *Id.* § 129B.003. The entity performing age verification "may not retain any identifying information of the individual," *Id.* § 129B.002(b), but transmission of that information is not prohibited, and the Act establishes

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[1] Specifically, the Act provides that "'[s]exual material harmful to minors' includes any material that (A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest; (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of: (i) a person's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." Tex. Civ. Prac. & Rem. Code § 129B.001(6).

no monitoring or reporting requirements for entities performing age verification.

Second, covered websites must provide prescribed "sexual materials health warnings." *Id.* § 129B.004 (capitalization altered). Specifically, websites must display "on the landing page of the … website on which sexual material harmful to minors is published or distributed" and on "all advertisements for that … website" in "14-point font or larger" statements that, for example, "[p]ornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function." *Id.* § 129B.004(1) (prescribing additional required statements). The required statements begin by claiming they are a "TEXAS HEALTH AND HUMAN SERVICES WARNING," even though the Texas Health and Human Services Commission has not made any such findings or announcements. App. 95a.

The Act expressly exempts search engines from its requirements, even if the search engines provide access to the same content as covered websites. Tex. Civ. Prac. & Rem. Code § 129B.005(b). Most social media sites are also "de facto exempted" from the Act's requirements "because they likely do not distribute at least one-third sexual material" as defined by the Act. App. 113a.

The Act authorizes enforcement by the Texas Attorney General, with penalties for violations ranging from injunctive relief to civil penalties up to $10,000 per day, plus additional enhancements of up to $250,000 as defined by the statute. Tex. Civ. Prac. & Rem. Code § 129B.006.

3. The online age verification required by the Act is markedly different than age verification in person. In requiring adults to provide information over the Internet to "affirmatively identify themselves," such as through their "government ID," the Act creates a "substantial chilling effect" by exposing adults to the "risk of inadvertent disclosures, leaks, or hacks." App. 125a-126a. "The deterrence is particularly acute because access to sexual material can reveal intimate desires and preferences." App. 125a. "[B]ecause users may be more willing to pay to keep that information private," such information is "more likely to be targeted" by identity thieves and extortionists. App. 127a. Moreover, because the Act does not prohibit the external transmission of adults' information, including to the government, the fear of "state monitoring" of "what kind of websites they visit" compounds adults' reasonable concerns. App. 125a-126a.

B. Procedural History

1. District court proceedings

Petitioners sought a preliminary injunction barring enforcement of the Act before it was scheduled to take effect on September 1, 2023. On August 31, 2023, after thorough briefing and a hearing, the district court issued a preliminary injunction accompanied by a detailed decision explaining its factual findings and legal reasoning. App. 90a-161a.

a. The district court first explained that the Act's age-verification requirement is subject to strict scrutiny because it imposes a content-based burden on adults' access to protected expression, relying on this Court's decisions in *Reno* and *Ashcroft*. App. 107a-111a. The court acknowledged the state's compelling

interest in protecting minors from inappropriate sexual content, but held that the age-verification requirement would likely not satisfy strict scrutiny because it was both underinclusive and overly restrictive in pursuing that interest and because more effective, less restrictive alternatives are available. App. 111a-135a.

Specifically, the district court found the age-verification requirement "severely underinclusive," because it exempts search engines and social-media sites, even though they contain extensive sexual content. App. 112a-114a. In particular, search engines allow access to "sexually explicit or pornographic" content through "visual search," and "social media sites, such as Reddit, can maintain entire communities and forums (i.e., subreddits), dedicated to posting online pornography with no regulation under H.B. 1181." App. 112-113a. "Likewise, Instagram and Facebook pages can show material which is sexually explicit for minors without compelled age verification." App. 113a. As a result, the court found, the law "fails to reduce the online pornography that is most readily available to minors." *Id.*

The district court also found the age-verification requirement overly restrictive because it "sweeps far beyond obscene material and includes all content offensive to minors, while failing to exempt material that has cultural, scientific, or educational value to adults only." App. 122a. The court explained that the Act's coverage is "largely identical" to that of the federal statute this Court and the Third Circuit held would not satisfy strict scrutiny in *Ashcroft* and *Mukasey*, respectively. App. 118a. The court rejected

Texas's claim that changes in technology compel a different result, finding that Texas's assertion "simply does not match the evidence." App. 127a.

The district court further found that—even according to Texas's own evidence—less-restrictive and more-effective alternatives were available to prevent minors from accessing inappropriate material, including modern, much-improved versions of the content-filtering software that this Court relied on in applying strict scrutiny in *Ashcroft*. App. 128a-135a. The district court added that use of such software "is especially tailored" because parents can choose the level of access they deem appropriate for their children, which "comports with the notion that parents, not the government, should make key decisions on how to raise their children." App. 132a. The court observed that there was no indication the Legislature had "even considered the law's tailoring or made any effort whatsoever to choose the least-restrictive measure." App. 135a.

b. The district court also found that the Act's health warnings and related disclosure requirements were likely unconstitutional. App. 136a-150a. Applying this Court's decision in *NIFLA v. Becerra*, the district court explained that the requirements constitute government-compelled speech necessitating strict scrutiny, which they likely cannot survive given that they would be seen primarily by *adults*—not minors who were the object of the Act. App. 114a. The court added that the requirements could not survive even as commercial-speech mandates because they are not "purely factual and uncontroversial." App. 145a (quoting *Zauderer v. Off. of Disciplinary. Couns. Of Sup. Ct.*, 471 U.S. 626, 651 (1985)).

c. Having found that petitioners were likely to succeed on the merits, the district court found that a preliminary injunction was warranted based on the irreparable harm that enforcement of the Act would inflict through its "chilling effect" and speech compulsion. App. 156a. The court added that there "are viable and constitutional means to achieve Texas's goal" of protecting minors, "and nothing in th[e court's] order prevents the state from pursuing those means." App. 160a.[2]

2. Fifth Circuit proceedings

a. Texas appealed and sought a stay pending appeal. App. 165a-166a. The district court denied a stay, but on September 19, 2023, a Fifth Circuit motions panel entered an unexplained administrative stay, which remained in place for roughly two months. App. 167a-168a. Following expedited briefing and argument, the merits panel by a 2-1 vote issued an order granting a stay pending appeal, also without any reasoning, which remained in place for nearly the next four months. App. 166a & n.1 (noting Judge Higginbotham's dissent). In February 2024, Texas began enforcing the Act in state court. *See* C.A. Dkt. #131.

b. On March 7, 2024, the Fifth Circuit issued its decision. App. 1a-87a. Although the court had stayed the preliminary injunction for six months, it unanimously upheld the injunction as to the Act's "health warnings" and other disclosure requirements. App. 27a-38a. By a 2-1 vote, the panel concluded that petitioners were not likely to succeed on their challenge to

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[2] In addition, the district court found that application of the Act to some petitioners was preempted by 47 U.S.C. § 230. App. 150a-154a. That holding is not at issue here.

the Act's age-verification provisions. App. 8a-27a. The divided panel thus vacated the preliminary injunction of the age-verification provision, App. 44a, over Judge Higginbotham's dissent. App. 45a-87a.

In assessing the age-verification provision, the majority acknowledged that it was "very similar" to the provision of the Child Online Protection Act (COPA) that this Court and the Third Circuit analyzed in *Ashcroft* and *Mukasey*, respectively. App. 16a. The majority explained that both statutes allow online distribution of material obscene to minors only if a website engages in age verification. *Id.* The majority further acknowledged that both this Court and the Third Circuit applied strict scrutiny to COPA because it burdened adults' access to constitutionally protected expression. *Id.* at 16a-17a.

The majority concluded, however, that strict scrutiny should not apply here. App. 17a. According to the majority, the proper standard was the rational-basis review applied by this Court in *Ginsberg v. New York*, because the Act is a "regulation[] of the distribution *to minors* of materials obscene *for minors*." App. 8a (emphasis in original). The majority acknowledged that this Court in *Ashcroft* did not follow that approach, but the majority deemed *Ashcroft*'s absence of "discussion of rational-basis review under *Ginsberg*" a "startling omission[]" that could "only" be explained by the failure of the petitioner in that case (the United States, represented by Solicitor General Theodore B. Olson) to argue for application of rational-basis review rather than strict scrutiny. App. 17a. The majority added that, because the proper level of scrutiny "is not a jurisdictional argument," this Court in *Ashcroft* "did not have to correct" the

United States' acceptance of the wrong standard and that this Court's application of strict scrutiny "does not control." App. 18a-19a.[3]

The majority also thrust aside this Court's many other decisions applying strict scrutiny to laws that burden adults' access to constitutionally protected content in the course of limiting minors' access to sexual material. App. 20a-26a (discussing *Reno*, *Playboy*, and *Sable*). In the majority's view, none of those decisions "surmount the rock that is *Ginsberg*." App. 20a. And, applying rational-basis review under *Ginsberg*, the majority concluded that the Act's age-verification provision "easily surmounts [petitioners'] constitutional challenge." App. 26a.

Judge Higginbotham dissented from the majority's age-verification analysis. Following this Court's seminal precedents, including *Sable*, *Reno*, *Playboy*, and *Ashcroft*, he explained that the Act "must face strict scrutiny review because it limits adults' access to protected speech using a content-based distinction." App. 48a-49a. And he explained that the majority had overread *Ginsberg*, which holds "that minors have more limited First Amendment rights than adults" but "has no purchase" in addressing "a challenge to an adult's ability to access constitutionally protected materials" online. App. 56a-57a. Reviewing the district court's findings for clear error, he would have affirmed the preliminary injunction in full. App. 68a-78a.

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[3] The majority did not attempt to similarly distinguish the Third Circuit's application of strict scrutiny to COPA in *Mukasey*, thereby acknowledging a square circuit conflict on the standard applicable to such a law. App. 18a n.26.

c. Following the panel decision, petitioners moved to stay issuance of the mandate pending their filing of this petition and to vacate any remaining stay pending appeal if the panel granted that motion. *See* App. 162a. Texas did not oppose a stay of the mandate, but maintained that the stay pending appeal would be restored and should remain in place if the court of appeals granted that request. App. 164a.

The panel denied petitioners' motion over Judge Higginbotham's dissent. App. 162a. Judge Higginbotham noted that the case "begs for resolution by" this Court because the majority opinion "conflicts with Supreme Court precedent and decisions of [other] circuits." App. 163a & n.2 (collecting cases).

REASONS FOR GRANTING THE PETITION

As Judge Higginbotham correctly observed, this is a paradigmatic case for this Court's intervention. The divided Fifth Circuit panel jarringly departed from this Court's precedent on an important question of constitutional law. In addition, the decision below admittedly split with the Third Circuit and, as Judge Higginbotham detailed, it conflicts with decisions from other circuits as well.

The legal question on which lower courts now divide—whether to apply strict scrutiny or rational-basis review—was dispositive in this case. It will likewise be dispositive in many cases involving adults' access to material deemed harmful to minors, given the vast distance between those standards of scrutiny. The question is cleanly presented to this Court for resolution, and the leading precedents in this area arose in the same preliminary-injunction posture as this case, reflecting the chill of First Amendment rights

that such laws inflict. The importance of the issue is clear both from those prior grants of review and from the flurry of similar laws recently enacted by other states, which illustrate the need to clarify the First Amendment's application to adults' access to protected expression on the modern Internet. The petition for certiorari should be granted.

I. THE DECISION BELOW DEPARTS FROM THIS COURT'S PRECEDENT

The principal basis for this Court's intervention is straightforward. By attempting to reconceive this Court's binding precedent based on purported "omissions" in this Court's reasoning, App. 17a, the divided Fifth Circuit panel committed the cardinal error of an inferior federal court: it failed to "follow" the decision of this Court "which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237 (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)); *cf.* App. 160a (noting that "the core of [Texas's] argument is the suggestion that H.B. 1181 is constitutional *if the Supreme Court changes its precedent*") (emphasis added).

A. This Court's Precedent Requires Strict Scrutiny of H.B. 1181's Content-Based Restriction

As outlined above, the Court's doctrine in this area is well established. States can regulate obscenity without any First Amendment restriction, and states can reasonably limit minors' access to sexual content that is obscene or otherwise harmful as to them. But if a state's regulation of *minors'* access to sexual con-

tent burdens *adults'* access to constitutionally protected expression, then the regulation must satisfy strict scrutiny. *See* pp. 7, 16, *supra*.

1. In *Ginsberg*, the Court considered a state law that prohibited the sale to minors of magazines deemed "'harmful to'" them but concededly "not obscene for adults." 390 U.S. at 633-34 (citation omitted). When a vendor was convicted for selling "'girlie' picture magazines" to a minor, he appealed on the ground that "the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor." *Id.* at 643, 636; *see* Br. for Appellant, *Ginsberg*, *supra* (No. 47, O.T. 1967), 1967 WL 113634, at *7 ("The appellant's position is that the restriction on the distribution of literature based on age classification is censorship, pure and simple."). In other words, he invoked the "constitutionally protected freedoms" of "minors." *Ginsberg*, 390 U.S. at 638.

The Court understood—and ultimately rejected—the argument on those terms. The Court noted that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," *id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)), and held that a state's regulation of content that the state determines is obscene or harmful for minors is permissible if it has a "rational relation to the objective of safeguarding such minors from harm," *id.* at 643.

The law at issue in *Ginsberg* did not impose any burden on adults' access to constitutionally protected content. Indeed, *Ginsberg* expressly distinguished the

challenged law from the one the Court invalidated in *Butler v. Michigan*, 352 U.S. 380 (1957), which prohibited the sale to minors *and* adults of publications deemed inappropriate for minors. *Id.* at 634-35. *Ginsberg* thus does not address the standard applicable to a law that regulates minors *and* adults; it stands for the significant but limited proposition that a state may rationally "regulate minors in ways it could not regulate adults." App. 55a (Higginbotham, J., dissenting).

2. Later decisions confirm that reading of *Ginsberg*. In *Erznoznik v. City of Jacksonville*, the Court reviewed a law that—unlike the statute in *Ginsberg*—burdened the rights of adults as a consequence of restricting minors' access to sexually inappropriate material. 422 U.S. at 212. Specifically, the ordinance in *Erznoznik* prohibited drive-in movie theaters from screening films with non-obscene nudity, in part as a "means of protecting minors from this type of visual influence." *Id.* The Court reiterated its holding in *Ginsberg* that a government may "adopt more stringent controls on communicative materials available to youths than on those available to adults." *Id.* But the Court did not uphold the Jacksonville ordinance on that basis. To the contrary, the Court struck down the ordinance in part because it invaded the First Amendment rights of adults. *Id.* at 207, 212-14.

Over the ensuing decades, this Court has repeatedly declined to apply *Ginsberg* to laws that restricted the rights of adults to access protected speech. For example, the Court in *Sable Communications v. FCC* considered a federal ban on "indecent as well as obscene interstate commercial telephonic messages"

that was enacted in part to protect minors from exposure to such content. 492 U.S. at 117. The Court readily upheld the ban on obscene messages, but unanimously invalidated the ban on "indecent but not obscene" messages. *Id.* at 126.

In doing so, the *Sable* Court acknowledged that "there is a compelling interest in protecting" minors from sexually explicit content, including material "that is not obscene by adult standards." *Id.* at 126 (citing *Ginsberg*, 390 U.S. at 639-40). But the Court explained that a law enacted to "serve this legitimate interest" can "withstand constitutional scrutiny" only if it is "'narrowly drawn … to serve those interests without unnecessarily interfering with First Amendment freedoms.'" *Id.* (citation omitted). The Court held that the law could not satisfy such strict scrutiny, including because the government could accomplish its objective through less-restrictive means. *Id.* at 128.

The Court applied a similar approach in *United States v. Playboy Entertainment Group*, which involved a federal law that required cable-television operators to block channels "primarily dedicated to sexually-oriented programming," except during the late-night hours when minors would likely be asleep. 529 U.S. at 812. Citing *Ginsberg* and other precedents, the Court explained that the government need not "be indifferent to unwanted, indecent speech that comes into the home without parental consent." *Id.* at 814. But because the speech at issue is "protected" for adults, "the question [of]… what standard the Government must meet in order to restrict it" has a "clear" answer: "The standard is strict scrutiny." *Id.* The Court added that the level of scrutiny did not change

because the statute only partially limited adults' access; for purposes of the First Amendment, "[t]he distinction between laws burdening and laws banning speech is but a matter of degree." *Id.* at 812. Because there was a less-restrictive alternative—namely blocking "unwanted channels on a household-by-household basis"—the Court invalidated the law. *Id.* at 815.

3. Of particular relevance here, the Court has twice applied those same principles to laws that burden adults' access to protected expression while restricting minors' access to sexual content online.

First, in *Reno*, this Court reviewed a preliminary injunction of a provision of the Communications Decency Act of 1996 that was "enacted to protect minors from 'indecent' and 'patently' offensive' communications on the Internet." 521 U.S. at 849. As relevant here, the provision prohibited online publishers from knowingly transmitting "indecent messages to any recipient under 18 years of age," *id.* at 859, while providing a defense for publishers that employed age-verification measures to ensure that recipients were not minors, *id.* at 860-61.

Consistent with prior cases, the *Reno* Court recognized the continued force of *Ginsberg* but declined to apply rational-basis review or uphold the law under *Ginsberg*. *Id.* at 864-66. Rather, the Court explained that the provision was subject to "the most stringent form" of review—strict scrutiny—because, "[i]n order to deny minors access to potentially harmful speech," the law "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* at 868, 874.

The absence of narrow tailoring "undermine[d] the likelihood" that the law could survive strict scrutiny, leading the Court to the affirm the preliminary injunction. *Id.* at 871, 885.

In *Ashcroft*, the Court reviewed a preliminary injunction of another law—COPA—enacted "to protect minors from exposure to sexually explicit materials on the Internet." 542 U.S. at 659.[4] As noted above, COPA (like the Act at issue in this case) applied to content that was obscene for minors under an adapted version of the *Miller* standard. *Id.* at 661-62. And, like the Act at issue here, COPA effectively allowed dissemination of such material online only by website operators that implemented age-verification measures. *Id.* at 662; *see* App. 16a.

The *Ashcroft* Court applied strict scrutiny to COPA, reiterating *Reno*'s holding that, when a law aimed at protecting minors "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another," the government must show that the challenged regulation "is the least restrictive means among available, effective alternatives." 542 U.S. at 655-66 (citation omitted). The Court affirmed the preliminary injunction of COPA on the ground that content-filtering software likely offered a less-restrictive, superior alternative for preventing minors from accessing sexual content on the Internet. *Id.* at 666-68. The Court observed that filters do not require adults "to identify themselves or provide their credit card information,"

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[4] The Court reviewed a distinct question about COPA at an earlier stage of the case. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

and "do[] not condemn as [illegal] any category of speech," thus reducing the chilling effect associated with age verification. *Id.* at 667.

B. The Court Of Appeals Defied This Court's Precedent By Applying Rational-Basis Review

Given that consistent precedent, particularly the Court's decisions addressing closely analogous laws in *Reno* and *Ashcroft*, the framework for analysis of H.B. 1181 should have been clear. Because the Act's age-verification requirement aims to prevent minors' access to sexual content online, but subjects adults to significant and chilling burdens in the process, the requirement is subject to strict scrutiny. The district court readily recognized as much and applied strict scrutiny based on *Reno* and *Ashcroft*, among other precedents. App. 107a-111a. The Fifth Circuit panel majority, however, swerved sharply off that well-charted path and directly contradicted this Court's precedent.

1. Relying on an unprecedentedly broad reading of *Ginsberg*, the panel held that "regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review." App. 8a. The flaw in that assessment is apparent from the discussion above. The laws at issue in *Sable*, *Reno*, *Playboy*, and *Ashcroft* were each "regulations of the distribution to minors" of materials that had been legislatively deemed "obscene for minors." *Id.* (emphasis removed); *see* pp. 10-16, *supra*. In each of those cases, however, the Court applied strict scrutiny, not rational-basis review, because the laws burdened adults' access to protected speech. *See Sable*, 492 U.S. at 126;

Reno, 521 U.S. at 868; *Playboy*, 521 U.S. at 813-14; *Ashcroft*, 542 U.S. at 666.

The Fifth Circuit attempted to sidestep each of those precedents through an increasingly strained series of purported distinctions. But none is persuasive in its own right, and together they build to the implausible notion that this Court has repeatedly described the governing standard in a way that does not mean what it says, while *Ginsberg* has a far-reaching meaning that has gone essentially unnoticed in this Court (and every relevant lower court, *see* Part II, *infra*) for more than 60 years.

a. To begin with the most striking example, the Fifth Circuit acknowledged that this Court in *Ashcroft* reviewed a statute (COPA) that was "very similar" to the Act; indeed, the panel noted that the Act "mimics the language" of COPA, with only insubstantial differences. App. 4a, 16a. The panel further acknowledged that this Court applied strict scrutiny in *Ashcroft*. App. 16a. But the majority asserted that the Court's failure to discuss "rational-basis review under *Ginsberg*" was a "startling omission[]," and that the "only … way" to understand *Ashcroft* as consistent with *Ginsberg* was to infer that the Court in *Ashcroft* had mistakenly applied strict scrutiny because the United States as the petitioner defending COPA had failed to argue for the application of rational-basis review—a supposed non-jurisdictional error that the Court was not required to "correct … *sua sponte*." App. 17a-18a.

That explanation is (to understate the point) unpersuasive, particularly given that strict scrutiny was the standard applied in the relevant prior precedents (*Reno*, *Playboy*, and *Sable*); strict scrutiny was applied

by both the district court and the Third Circuit in the preceding stages of the *Ashcroft* litigation, *see* 542 U.S. at 665; Justice Scalia's dissent in *Ashcroft* expressly criticized the Court's application of strict scrutiny, *id.* at 676; and applying rational basis rather than strict scrutiny would almost certainly have changed the result in an important First Amendment case about the constitutionality of a federal statute. At a minimum, one would expect the Court to have explained that it was applying strict scrutiny only because the parties did not contest it, but the Court said no such thing. *Cf.* App. 67-68a (Higginbotham, J., dissenting) ("[T]he majority's implication that the Supreme Court knowingly applied the wrong level of scrutiny merely because the issue was not 'jurisdictional' needs no response.").

The Fifth Circuit's attempted distinctions of earlier precedents are no more satisfying. The panel majority recognized that *Reno* applied strict scrutiny to a restriction on adults' access to constitutionally protected expression online, where the restriction arose from an effort to limit minors' access to sexually inappropriate material—a holding the panel majority acknowledged contained "seemingly contradictory language" when compared to the majority's conclusion that rational-basis review applied. App. 13a, 15a. The panel nevertheless attempted to distinguish *Reno* on various fact- and record-specific grounds, most significantly that the law at issue in *Reno* purportedly applied to more content than covered by H.B. 1181 or the law in *Ginsberg*, thereby taking it out of *Ginsberg*'s permissive standard for protecting minors from inappropriate sexual content. *See, e.g.*, App. 14a & n.19 (closely parsing the scope of "excretory"-related

content covered by the various laws). In focusing on those narrow issues, however, the panel majority missed *Reno*'s overarching point: When a content-based law aimed at protecting minors exerts a "chilling effect" on speech that is protected for adults, "[t]hat burden on adult speech is unacceptable" unless the law can survive strict scrutiny. 521 U.S. at 871-72, 874.[5]

As for *Playboy* and *Sable*, both of which addressed laws restricting adults' access to protected speech, the panel majority sought to distinguish those decisions principally on the grounds that they purportedly involved broader restrictions. App. 16a n.23, 20a-21a. But the Court in *Playboy* explained that "content-based burdens must satisfy the same rigorous scrutiny as its content-based bans," as the panel recognized. App. 16a n.23; *see Playboy*, 529 U.S. at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree."). The panel again resorted to claiming that this Court did not mean what it said, suggesting that the reasoning in *Playboy* "is not as broad as it seems." App. 16a n.23. In fact, the Court has repeatedly reiterated that speech burdens as well as speech bans trigger strict scrutiny, *see, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S.

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[5] The panel majority finally offered that *Reno* dates from the "rudimentary" era of the Internet in the 1990s, App. 15a, without explaining why that would be a less apt comparison for the online restriction at issue here than the 1960s-Long-Island-lunch-counter setting of *Ginsberg*.

552, 565-66 (2011), and the panel provided no compelling reason for diverging here.[6]

b. The Fifth Circuit's stated basis for straining to distinguish so many precedents was that "*Ginsberg* is good law" and "must have some minimum content." App. 19a-20a. But no such straining is necessary to give meaning to *Ginsberg*. As explained above and in Judge Higginbotham's dissent, *Ginsberg* stands for the important but limited proposition that states can restrict the rights of minors to access sexual content in ways that states cannot for adults. *See* pp. 16, 20-21, *supra*; App. 55a, 68a (Higginbotham, J., dissenting). That is how this Court has long described the *Ginsberg* rule, most recently in *Brown v. Entertainment Merchants*, where the Court declined to extend *Ginsberg*'s limitation on the First Amendment rights of minors outside the context of sexual material. 564 U.S. at 794; *see, e.g., Erznoznik*, 422 U.S. at 214 n.11 (citing *Ginsberg* for the premise that "[t]he First Amendment rights of minors are not 'co-extensive with those of adults.'").[7]

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[6] The panel majority also stated that "*Playboy* preceded … *Reno*." App. 21a. In fact, *Reno* was decided first.

[7] The panel majority relied on *Erznoznik* to support its broad reading of *Ginsberg*, but *Erznoznik* struck down the city ordinance at issue on First Amendment grounds. *See* pp. 20-21, *supra*. The panel majority suggested that the Court would have upheld the ordinance if it had been tailored to "prohibiting youths from viewing the films," App. 9a, but the city in *Erznoznik* did invoke an interest in shielding minors from the films, and the Court nevertheless invalidated the ordinance even on that alternative ground. *See* p. 20, *supra*. The critical point in *Erznoznik*, as here, is that the challenged regulation restricted *adults'* access to speech on the basis of content.

Accordingly, if the challenge in this case were based on the proposition that minors have rights to view sexual content covered by H.B. 1181, *Ginsberg* might be relevant. Recognizing *Ginsberg*'s continued vitality in such a circumstance gives that precedent the force it is due, no more and no less. The majority veered astray by overreading *Ginsberg*, for fear it would otherwise be a dead letter, as calling for application of rational-basis review to content-based restrictions on *adults'* access to speech—in conflict with this Court's many subsequent on-point precedents.

Relatedly, the panel majority seemed to adopt the premise that extending *Ginsberg* to laws restricting adults' access to speech was necessary to ensure that states would have means of protecting children from harmful sexual content. App. 22a. Contrary to the panel's suggestion, however, strict scrutiny is not "a death knell in and of itself." *Id.* The Court has upheld laws under strict First Amendment scrutiny. S*ee, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010); *cf. Citizens United v. FEC*, 558 U.S. 310, 366-67, 371-72 (2010) (upholding disclaimer and disclosure provisions of campaign-finance law because they survived "exacting scrutiny"). The Court in *Ashcroft* expressly stated that a narrowly tailored "regulation of the Internet designed to prevent minors from gaining access to harmful materials" would pass muster. 542 U.S. at 672. And the district court in this case likewise acknowledged that there "are viable and constitutional means to achieve Texas's goal" of protecting minors from sexual content online without unduly limiting adults' rights. App. 160a. The "death knell"

for the law at issue, App. 22a, was thus not the application of strict scrutiny in and of itself, but rather Texas's failure to make any "effort whatsoever to choose the least-restrictive measure." App. 135a.

2. The panel majority contradicted this Court's precedents in another respect. Speech restrictions targeting "speakers and their messages for disfavored treatment" are also subject to strict scrutiny. *Sorrell*, 564 U.S. at 565; *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 394 (1992) (describing such speaker-based discrimination as "presumptively invalid"); *cf. Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny to laws targeting particular religious practices).

The Act embodies such speaker-based discrimination on its face. It leaves unregulated the extensive volume of sexual content on social-media websites and search engines, Tex. Civ. Prac. & Rem. Code § 129B.005, while aiming its burdensome restrictions on the online pornography industry alone, *see* App. 114a (district court finding that the Act exempts the "material most likely to serve as a gateway to pornography use"); *see also* C.A. Dkt. # 76 at 1 (Texas's appellate brief describing the Act's target as "commercial purveyors of online pornography"). The court below nevertheless concluded that the Act does not discriminate based on speaker or viewpoint, because Texas's decision to regulate only one part of the sexual content online was "a reasonable policy choice." App. 25a.

That reasoning fails on several grounds. First, nothing in the record supports the panel majority's view that the Act exempts social media websites and

search engines "to avoid the legal concerns that accompany . . . regulat[ing] the 'entire universe of cyberspace.'" *Id.* (citing *Reno*, 521 U.S. at 868). In fact, Texas has embraced regulating social media platforms. *See, e.g.*, *Netchoice, LLC v. Paxton*, 49 F.4th 439, 444, 494 (5th Cir. 2022) (upholding Texas social media law). And the district court in granting the preliminary injunction determined that Texas enacted H.B. 1181 to take *special* aim at the adult industry, including as reflected in the *sui generis*, compelled "health warnings" that every participating judge has agreed are unconstitutional. App. 112-114a.

The Fifth Circuit also misread *R.A.V. v. City of St. Paul*, reasoning that the "[s]electivity" referenced there applied to "different sorts of *messages*, not different *mediums*." App. 25a (citation omitted). But *R.A.V.* never cabined its holding in that way, nor did it suggest that different rules would govern a speaker-based restriction on another medium. *See* 505 U.S. at 394; *see also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979) (invalidating state law that restricted speech in newspapers but not on radio). Indeed, this Court has held that an "ink and paper tax" that "singles out the press" cannot stand for that very reason. *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983); *see also Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (same).

In any event, the search engines and social-media platforms that the Act exempts are part of the same medium—the Internet—as the websites the Act targets. The panel's failure to apply the strict scrutiny that *R.A.V.* and related decisions require for such

speaker-based discrimination is another departure from precedent warranting this Court's review.[8]

II. THE DECISION BELOW CREATES A CIRCUIT CONFLICT

The conflict between the decision below and this Court's precedent is not the only conflict supporting review. As Judge Higginbotham recognized, the panel decision "conflicts with … decisions of [the court's] sister circuits"—indeed, with every circuit that has addressed the relevant question. App. 163a & n.2.

The panel majority itself acknowledged one of those conflicts. While the panel (unconvincingly) characterized this Court's application of strict scrutiny to COPA in *Ashcroft* as something less than a binding holding, it did not attempt any such distinction of the Third Circuit's holding on remand that "strict scrutiny applied." App. 18a n.26 (quoting

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[8] The Act's vagueness and overbreadth are further flaws under this Court's precedents. Like the law in *Reno*, the Act's chill is compounded by multiple "ambiguities concerning the scope of its coverage." 521 U.S. at 870. "[T]he law offers no guidance as to how to calculate the 'one-third'—whether it be the number of files, total length, or size." App. 116a. Nor is it clear how to apply the Act's definition of "sexual material harmful to minors," since the application will vary greatly between 5-year-olds and 17-year-olds. App. 115a. The Act's one-third threshold, moreover, appears to be wholly arbitrary and overbroad. If websites were movie theaters, they would have to "catalog all movies that they show, and if at least one-third of those movies are R-rated . . . screen everyone at the main entrance for their 18+ identification, regardless of what movie they wanted to see." App. 111a.

Mukasey, 534 F.3d at 190) (internal quotation mark omitted).[9]

The Third Circuit has good company. In *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), the Second Circuit considered a Vermont law prohibiting the distribution of "sexually explicit material that are harmful to minors" over the Internet. *Id.* at 99 (citation omitted). In a unanimous opinion by Judge Walker, the court observed that "[t]he Constitution permits a state to impose restrictions on a minor's access to material considered harmful to minors[.]" *Id.* at 101 (citing *Ginsberg*, 390 U.S. at 636-37). The court continued, however, that "such restrictions aimed at minors *may not* limit non-obscene expression among adults." *Id.* (emphasis added). Like H.B. 1181, the purpose of the Vermont law was, in part, "the general interest in preventing minors from viewing pornographic material on the Internet." *Id.* at 102. But unlike the Fifth Circuit here, the Second Circuit correctly applied strict scrutiny and held that the law "violate[d] the First Amendment." *Id.*

Similarly, the Fourth Circuit in *PSInet v. Chapman*, 362 F.3d 227 (2004), reviewed a Virginia law that "criminalize[d] the dissemination of material harmful to minors over the Internet." *Id.* at 229. Affirming the lower court's holding that the law "in seeking to restrict the access of minors to indecent material on the Internet … impose[d] an unconstitutional burden on protected adult speech," the Fourth

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[9] The Third Circuit, moreover, applied strict scrutiny to the COPA earlier in the *Ashcroft* litigation as well. *See ACLU v. Ashcroft*, 322 F.3d 240, 251 (2003).

Circuit applied strict scrutiny and held the law unconstitutional. *Id.* at 233, 239.

Likewise, the Tenth Circuit in *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), affirmed a preliminary injunction of a New Mexico law that "criminalize[d] the dissemination by computer material that is harmful to minors." *Id.* at 1151. Drawing on this Court's decision in *Reno*, the Tenth Circuit applied strict scrutiny and held that the law was not "the least restrictive means of serving" the government interest. *Id.* at 1155-58, 1164 (citation omitted).

In sum, the decision below departs from the decisions of every other circuit that has considered the level of scrutiny applicable to laws that burden adults' right to access protected expression online while attempting to limit minors' exposure to sexual material inappropriate for them. That circuit conflict is a paradigmatic basis for this Court's review.

III. THE ERROR IN THE DECISION BELOW IS EXCEPTIONALLY IMPORTANT AND WARRANTS THIS COURT'S REVIEW

In addition to creating conflicts with decisions of this Court and other courts of appeals, the Fifth Circuit's decision warrants review because it is both exceptionally important and exceptionally wrong.

1. As in *Reno* and *Ashcroft*, the legal question here arises from the grant of a preliminary injunction. The question before the Court in reviewing such an injunction is whether the district court abused its discretion in concluding that the challengers are likely to succeed on the merits and satisfy the relevant equitable considerations. *Ashcroft*, 542 U.S. at 664-65. "If the underlying constitutional question is close," a court

"should uphold the injunction and remand for trial on the merits." *Id.* The Fifth Circuit's decision ultimately rests on the conclusion that the district court *abused its discretion* in finding that petitioners presented at least a "close" constitutional question by relying on precedent *from this Court* that the panel acknowledged had applied strict scrutiny and invalidated a *materially indistinguishable* law. *Id.*; *see* App. 16a. Even setting aside the Fifth Circuit's other errors, that aspect of the decision defies explanation.

The strict-scrutiny analysis in this case, moreover, was sound. The district court issued an unusually detailed preliminary-injunction decision making extensive factual findings about the Act's likely constitutional infirmities. Of particular note, the court thoroughly documented the intense "deterrence" and "substantial chilling effect" that the age-verification requirement would inflict on petitioners' customers, who would be far less likely to access sensitive (but constitutionally protected) sexual content when required to submit personally identifying information that could be leaked, stolen, or otherwise used for purposes of embarrassment or extortion. App. 126a; *see, e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (crediting generally similar evidence of chill). The district court also thoroughly analyzed the Act's "severely underinclusive" scope, with exceptions that "fail[] to reduce the online pornography that is most readily available to minors," and explained that the government's own evidence demonstrated that less-restrictive measures were available—indeed, updated versions of the same less-restrictive measures that this Court described in *Reno* and *Ashcroft*. App. 123a; *see* App. 128a-135a. Given

that record, if the Fifth Circuit had applied anything other than mere rational-basis review, it would have had to uphold the preliminary injunction.

In short, the Fifth Circuit's anomalous, destabilizing decision "begs for resolution" by this Court. App. 163a (Higginbotham, J., dissenting).

2. Resolving the legal issues in this case is also exceptionally important. As an initial matter, the Court has an institutional interest in reviewing the decision below to preserve the integrity of its precedents against circumvention by lower courts based on what they perceive to be errors or "omissions" in this Court's reasoning. App. 17a; *see Agostini*, 521 U.S. at 237; *cf.* App. 108a-109a (recognizing that "a district court is not at liberty to disregard existing Supreme Court precedent in favor of a dissenting opinion"). If this Court's holdings in *Ashcroft* and related cases are to be set aside, that decision should come from this Court, not the Fifth Circuit.

Resolving the circuit conflict created by the decision below is also especially important because "[s]even other states—Arkansas, Louisiana, Mississippi, Montana, North Carolina, Utah, and Virginia—have recently passed" laws "similar" to H.B. 1181, and several of those laws arise in states that are on the other side of the circuit conflict. App. 8a n.11. In addition, more than a dozen other states are reportedly considering such laws.[10] And as noted, the Fifth Circuit's application of mere rational-basis review to such

[10] *Verification Bill Tracker*, *freespeechcoalition.com*, https://action.freespeech.coalition/age-verification-bills.

laws arguably invites even more restrictive laws, potentially including broad bans on sexual content online, which might well be defended as rational measures to protect minors from such material.

Finally, granting review would be consistent with this Court's venerable tradition of enforcing the First Amendment's protection of speech and expressive content that many "find shabby, offensive, or even ugly." *Playboy*, 529 U.S. at 826. Texas's briefing below, recounting the nature of some of the content on one petitioner's site in graphic detail, was clearly designed to shock and disgust. But "disgust is not a valid basis for restricting expression." *Brown*, 564 U.S. at 798. The First Amendment's protections "belong to all, including to speakers whose motives others may find misinformed or offensive." *303 Creative LLC v. Elenis*, 600 U.S. 570, 595 (2023). This Court has vindicated that principle in sexual-content cases like *Ashcroft*, *Reno*, *Playboy*, *Sable*, and *Butler*—as well as other canonical cases like *Brown*, *Snyder*, and *Stevens*. This Court should grant review to uphold that cherished principle again here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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