No. 23-1122

IN THE

Supreme Court of the United States

FREE SPEECH COALITION, INC., *et al.*,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

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

BRIEF OF AMERICAN BOOKSELLERS FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., AUTHORS GUILD, INC., COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ FOUNDATION, AND INDEPENDENT BOOK PUBLISHERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KENNETH A. BAMBERGER
Counsel of Record
UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
Law Building 446 (North Addition)
Berkeley, California 94720
(510) 643-6218
kbamberger@berkeley.edu

Counsel for Amici Curiae

332994

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF AMICI[1]

American Booksellers for Free Expression, Authors Guild, Inc., Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, and Independent Book Publishers Association respectfully submit this brief as *amici curiae* in support of Petitioners.

Amici's members (also referred to herein as "Amici") write, create, publish, produce, distribute, sell, advertise in, lend, and manufacture books, magazines, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.

Amici include:

• **American Booksellers for Free Expression ("ABFE").** ABFE is the free speech initiative of the American Booksellers Association ("ABA"). ABA was founded in 1900 and is a national not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA represents 2,178 bookstore companies operating in 2,593 locations. ABA's members are key participants in their communities' local economy and culture. ABFE's mission is to promote and protect free expression, particularly expression within

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the- preparation or submission of this brief. No person other than *amici curiae* their members, their counsel, or Media Coalition Inc. (a 51-year-old trade association of which some of the *amici* are members) made a monetary contribution to its preparation or submission.

books and in literary culture, through legal advocacy, education, and collaboration with other groups with an interest in free speech.

• **Association of American Publishers, Inc. ("AAP")**. AAP is a not-for-profit organization that represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP's membership includes approximately 130 individual members, who range from major commercial book and journal publishers to small, nonprofit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP's members publish a substantial portion of the general, educational, and religious books produced in the United States in print and digital formats, including critically acclaimed, award-winning literature for adults, young adults, and children. AAP represents an industry that not only depends upon the free exercise of rights guaranteed by the First Amendment, but also exists in service to our Constitutional democracy, including the unequivocal freedoms to publish, read, and inform oneself.

• **Authors Guild, Inc. ("Guild")**. The Guild was founded in 1912 and is a national non-profit association of more than 14,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists, and other writers of non-fiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods

through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field. The ability to write on topics of their choosing and to have their work available through bookstores and libraries is vital to their ability to make a living in their chosen profession.

• **Comic Book Legal Defense Fund ("CBLDF").** CBLDF is a nonprofit organization dedicated to protecting the legal rights of the comic arts community. With a membership that includes creators, publishers, retailers, educators, librarians, and fans, the CBLDF has defended dozens of First Amendment cases in courts across the United States and let important educational initiatives promoting comics literacy and free expression.

• **The Freedom to Read Foundation ("FTRF").** FTRF was established to foster libraries as institutions that fulfill the promise of the First Amendment; support the rights of libraries to include in their collections, and make available to the public, any work they may legally acquire; establish legal precedent for the freedom to read of all citizens; protect the public against efforts to suppress or censor speech; and support the right of libraries to collect, and individuals to access, information that reflects the diverse voices of a community so that every individual can see themselves reflected in the library's materials and resources.

• **The Independent Book Publishers Association ("IBPA").** IBPA is the largest publishing trade association in the United States, with over 3,500 members. IBPA

connects its members to the publishing industry and provides a forum for publishers to voice their concerns. IBPA's mission is to lead and serve the independent publishing community through advocacy, education, and tools for success.

IMPORTANCE OF THE ISSUE TO AMICI

The question before the Court is whether rational basis review, rather than strict scrutiny, is appropriate to review content-based burdens imposed on adults' and older minors' access to protected speech when the stated purpose of the restriction is to protect minors from sexual material. While the Texas statute at issue here purportedly addresses what are often colloquially referred to as "adult porn websites[2]," the mode of analysis presented by the Fifth Circuit, if sustained, would have far-reaching implications for bookstores, libraries, publishers, authors and mainstream websites such as Amici. Nor would the application of the rational basis test be limited to adult porn sites or to the Internet; it would affect other laws that restrict materials based on their content.

HB 1181 makes it illegal for websites to make available 'harmful to minors material' to minors. 'Harmful to

2. The statute itself is not so limited. Material that is "harmful to minors" covers much mainstream material that is not harmful to adults and older minors. Amici believe it is particularly important to present the perspective of mainstream creators, producers, distributors, and retailers when a First Amendment issue affecting Amici's constitutional rights arises, as here, that ostensibly involves speech that is outside of the mainstream but actually has a broader impact.

minors' material covers both material which has no serious value and is inappropriate for younger readers (such as ages 8 to 10) and that which has no serious value and is inappropriate for a 17-year old. This "harmful to minors" material encompasses contemporary fiction, literary classics, young adult fiction, and health books, and given the breadth of the variable age categories, is significant in number, including many prize-winning and important works that of course are constitutionally protected as to older minors and adults. While the law only applies to websites on which one-third of the material qualifies, for many bookstores and libraries, determination as to whether they are subject to the law would involve reading, in their entirety (since the test requires that material be taken as a whole), thousands or hundreds of thousands of books, including those available only through their websites, an impossible task.

Past attempts to ban access to mainstream materials illustrate the effect that the Fifth Circuit's decision here will have on Amici and others with regard to other content-based laws. Through the years, states have attempted to ban access to and the availability of harmful to minors materials to minors in physical bookstores and libraries– passing, in effect, "anti-browsing" or "minors access" laws.[3] Over the past 40 years, courts have consistently held such statutes to be unconstitutional restrictions. *See, e.g. Am. Booksellers Ass'n v. Superior Ct*, 129 Cal. App. 3d 197 (Cal. Dist Ct App. 1982); *Shipley, Inc. v. Long*, 454 F. Supp.

3. Laws that regulate sales or rentals by a bookstore or library to an individual minor of material harmful to that child under the *Miller/Ginsburg* test are not constitutionally problematic. *See Miller v. California,* 413 U.S. 15, 24 (1973)*; Ginsberg v. New York*, 390 U.S. 629, 635 (1968).

2d 819 (E.D. Ark 2004); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985); *Leech v. Am. Booksellers Ass'n*, 582 S.W.2d. 738 (Tenn. 1979). Alternatively, recognizing that, as written, these laws would be unconstitutional, courts have permitted them to be enforced only after they have been limited in a manner that minimizes the burdens on adult and older minors' speech. *See, e.g., Am. Booksellers Ass'n v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989), on remand from the U.S. Supreme Court after the statute was limited by the Virginia Supreme Court in response to certified questions from the U.S. Supreme Court, *Commonwealth v. Am. Booksellers Ass'n, Inc.*, 372 S.E.2d 618 (Va. 1988); *Am. Booksellers Ass'n v. Webb*, 919 F.2d 1493 (11th Cir. 1990); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

Courts have recognized that complying with these laws is untenable for booksellers and librarians. Libraries could bar anyone under the age of 18 from entering, but that would compromise the mission of public libraries, and likely impose an unnecessary and unjustified burden on older minors' ability to access free library books appropriate to his or her age and reading level. Prohibiting all minors from entering is similarly untenable for bookstores and their owners, as doing so would constrict their mission, dramatically affect their sales of children's and young adult books, restrict older minors from access to books which are developmentally appropriate for and constitutionally protected as to them, and imply the store only sold "adult" or "pornographic" books, which would be immensely detrimental to business.

Alternatively, a library or bookstore could theoretically attempt to limit its collection or inventory to only items

not likely to contain sexual material which could be considered harmful to minors. As an initial matter, such an action would require comprehensive review of a library's collection or a bookstore's inventory. Reviewing materials to determine if they might be considered harmful to young minors is an expensive and time-consuming process, given the substantial number of potentially "harmful" materials at issue. Even if it were feasible to limit books that are "harmful to minors," removing those books from shelves would curtail the availability of many popular books, including bestsellers, constitutionally protected as to adults and older minors. Taking that drastic step would prevent public libraries from providing patrons with materials of interest and is also not commercially feasible for booksellers. This alternative would also make it logistically difficult to order new books because librarians and booksellers rarely have the opportunity to review books in full before ordering them, generally relying on third party sources when ordering new books.

It is also practically and economically burdensome for bookstores and libraries to "keep minors away from any material considered obscene as to the youngest minors – in other words, any material with any amount of sexual content." *Fayetteville Pub. Libr. v. Crawford Cnty.*, Arkansas, 684 F. Supp. 3d 879, 904 (W.D. Ark. 2023). They could place all "harmful" materials behind blinder racks, segregating them under a supervised checkout or circulation counter, or removing them to a physically secure room for adults. "This would likely impose an unnecessary and unjustified burden on any older minor's ability to access free library books appropriate to his or her age and reading level. It is also likely that adults browsing the shelves of bookstores and libraries with

their minor children would be prohibited from accessing most reading material appropriate for an adult—because the children cannot be near the same material for fear of accessing it." *Id.* at 904-905. And, as described in detail below, the steps booksellers and libraries would have to take in the internet context, where they may be making hundreds of thousands of books available, are even more restrictive.

Finally, and most importantly, each of these burdensome and inadequate options violate the First Amendment rights of booksellers, librarians, readers, and borrowers.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Fifth Circuit because of its failure to apply strict scrutiny to Texas' content-based restrictions. The application of the far less demanding rational basis test rather than strict scrutiny to uphold HB 1181 not only directly affects bookstores, libraries, and mainstream websites such as Amici, but the application of rational basis to content-based laws would have implications that reach far beyond HB 1181 and Texas.

This Court's longstanding precedent is clear: content-based restrictions on First Amendment-protected materials are subject to strict scrutiny. In particular, a law that "'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another [as Texas Law HB 1181 would] is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purposes

that the statute was enacted to serve.'" *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

The Fifth Circuit in this case radically deviated from the case law of this Court, at least four other Circuits and at least one state's highest court, which have consistently held that when a content-based restriction on adults arises collaterally in connection with restrictions on access by minors to sexually frank material, constitutionality would be determined based on a strict scrutiny test.[4]

ARGUMENT

I. Texas Law HB 1181 Substantially Restricts Protected Speech and Is Subject to Strict Scrutiny

Like other laws that have attempted to limit the speech of minors with a sweeping regulation, HB 1181 impermissibly burdens the protected speech of older minors and adults and is thus subject to strict scrutiny.

HB 1181 requires that a website operator who "knowingly and intentionally publishes or distributes

4. In this Court, *see, e.g., Ashcroft,* 542 U.S. at 666; *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 813-814 (2000); *Reno,* 521 U.S. at 882; *Sable Commc'ns of Cal. Inc. v. FCC,* 492 U.S. 115, 126 (1989). In federal Circuit Courts, *see, e.g., ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008); *PSINet Inc. v. Chapman,* 362 F.3d 227 (4th Cir. 2004) *rehearing den.* 372 F.3d 671 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003); *ACLU v. Johnson*, 194 F. 3d 1149, 1156 (10th Cir. 1999). In state court, *see Tattered Cover, Inc.*, 696 P. 2d at 786. *See also Cyberspace, Commc'ns, Inc. v. Engler,* 55 F. Supp. 2d 737, 749 (E.D. Mich. 1999), *order aff'd and remanded*, 238 F.3d 420 (6th Cir. 2000) (unpublished).

material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors, shall use reasonable age verification methods . . . to verify that an individual attempting to access the material is 18 years of age or older." § 129B.002(a).[5] The Texas law applies to "commercial entit[ies]" that "operate[] an Internet website." Tex. Civ. Prac. & Rem. Code §§ 129B.002(a), 006(b)(1). It also expressly exempts search engines and the media. § 129B.005(b). The definition of "sexual material harmful to minors" substantially tracks the definition laid out in *Miller,* 413 U.S. at 24.[6]

Because it targets specific protected speech and identifies particular speakers, HB 1181 is clearly a content-based regulation. "Content-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, (1991) (Kennedy, J., concurring in judgment)); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972), "and the government bears the burden to rebut that presumption." *United States v. Stevens,* 559 U.S. 460, 468 (2010) (internal quotations and

5. One who merely makes material available is included within the definition of publisher.

6. It is not entirely clear how the one-third threshold would be computed in the case of Amici bookstores, for example, who may make available on their websites thousands of books for purchase and delivery, or for downloading, that they do not stock in their stores, some of which may contain "sexual material harmful to minors." As discussed herein, vetting those books for that kind of material would be a nearly impossible task for an independent bookstore.

citation omitted). Accordingly, HB 1181, and laws like it, must (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve that interest and (3) be the least restrictive means of advancing that interest to survive the correct mode of constitutional scrutiny. *Sable Commc'ns of Cal. Inc.*, 492 U.S. at 126 (acknowledging the federal government's compelling interest in protecting the "physical and psychological well-being of minors" but nevertheless requiring the statute be "narrowly drawn").

In *Reno v. ACLU*, this Court recognized that "sexual expression which is indecent but not obscene is protected by the First Amendment" and the government cannot pursue its interest in protecting minors through "an unnecessarily broad suppression of speech addressed to adults." 521 U.S. at 874-875. HB 1181 does just that. By regulating all content that is without value *to minors*, HB 1181 goes well beyond regulating obscene content. It thus places substantial burdens on adults' and older minors' access to broad swaths of expression that is constitutionally protected. As the district court in this case stated, "[b]ecause most sexual content is offensive to young minors, the law covers virtually all salacious material. This includes sexual, but non-pornographic, content posted or created by Plaintiffs." *Free Speech Coal., Inc. v. Colmenero*, 689 F. Supp. 3d 373, 391 (W.D. Tex. 2023), *aff'd in part, vacated in part sub nom. Free Speech Coal., Inc.*, 95 F.4th 263 (5th Cir. 2024). The district court in this case accordingly found the defects in the statute too numerous to survive strict scrutiny: HB 1181 is both severely underinclusive because of its exemptions, and overly restrictive, among other things. *Id.* at 393, 398. Moreover, it forces adults to identify themselves through a commercial age verification system to access protected

content, burdening adults who wish to remain anonymous when exercising their First Amendment rights, or who have concerns about the privacy and security of the age verification system, as well as those who do not have government identification.

HB 1181 limits speech that is not obscene as to adults and older minors based both on its content and the identity of the speaker. It disfavors certain speakers (namely, adult websites), while exempting, for example, search engines. Once the one-third trigger is met, the law burdens all speech on a website by forcing adults to surrender their personal information to access any content on the site.

For the aforementioned reasons, HB 1181 should be analyzed under the strict scrutiny standard.

II. HB 1181 Affects Mainstream Websites, Bookstores, Libraries, and More

Although HB 1181 was touted as a law targeting "pornographic" websites[7] and obscenity,[8] it directly

7. *See, e.g., Attorney General Ken Paxton Sues Two More Pornography Companies for Violating Texas Age Verification Law*, Texas Attorney General (March 21, 2024) https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-two-more-pornography-companies-violating-texas-age-verification-law ("In Texas, companies cannot get away with showing porn to children.").

8. *See, e.g.*, *Attorney General Ken Paxton Wins After Pornography Companies Sued Texas Over Age Verification Requirements*, Texas Attorney General (March 8, 2024) https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-wins-after-pornography-companies-sued-texas-over-

restricts many other sites that may host constitutionally protected content that could be harmful to young minors but not to older minors and adults. Amici publishers,' authors' and booksellers' literary, artistic, political, and scientific works, some of which may be deemed harmful to minors, may also be affected. Since the law targets websites that "distribute" or "publish" content that is "harmful to minors" (which includes simply making them available), a website operated by a bookstore selling books with sexual themes that are protected as to adults and older minors would be required to implement age verification mechanisms if that material comprised one-third of the site or were potentially available on the site. The same would be true for content made available by authors and publishers on their websites. This "harmful to minors" material encompasses contemporary fiction, literary classics, young adult fiction, and health books. For example, books that are frequently challenged for sexual content include "Beloved" by Toni Morrison, "Forever" by Judy Blume, "Let's Talk About It: The Teen's Guide to Sex, Relationships, and Being Human" by Erika Moen, "Looking For Alaska" by John Green, "The Handmaid's Tale" by Margaret Atwood, and "It's Perfectly Normal" by Robie Harris.[9]

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age-verification ("HB 1181 requires purveyors of obscene materials online to institute reasonable age-verification measures to safeguard children from pornography.").

9. For further frequently challenged books, *see*

- *Top 10 Most Challenged Books 2023*, Am. Libr. Ass'n, available at https://www.ala.org/bbooks/frequentlychallengedbooks/top10 (last visited September 13, 2024);
- *Top 100 Most Frequently Challenged Books: 2010-2019*, Am. Libr. Ass'n (Sept. 9, 2020), available athttps://www.ala.org/

Compounding the problem is that even determining whether one-third of the content would meet this criteria, and thus whether the age-verification mechanism is needed, would be nearly impossible for an independent bookstore. Many use third- party distributors to fulfill consumer orders through their website of books offered on their website that they do not physically stock in their stores. One popular distributor is Ingram Content Group, which advertises that its catalogue includes at least 13 million books in 350 languages.[10] Employees of independent bookstores would have the impossible task of vetting all the books that could be made available on its website through such distributors, thereby requiring them to shut down those avenues of book sales.

Importantly, HB 1181 does not distinguish between older and younger minors, so a 17-year-old would be treated the same way as an 8-year-old for the purposes of determining what is harmful to them. This overbroad statute would catch all of these books in its net if the sexual content in them was deemed harmful to the youngest of minors. The federal district court in Shipley, Inc. v. Long, 454 F. Supp 2d 819 (E.D. Ark 2004), for example, recognized this regarding a 2003 Arkansas law

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advocacy/bbooks/frequentlychallengedbooks/decade2019 (last visited September 6, 2024);

- *Top 13 Most Challenged Books for 2022*, Am. Libr. Ass'n (choose "Top 13 Most Challenged Books for 2022" from the dropdown), available at https://www.ala.org/bbooks/frequentlychallengedbooks/top10/archive (last visited September 6, 2024).

10. *See* The Ingram Catalog, available at https://www.ingramcontent.com/retailers/products

prohibiting the display of materials that were harmful to minors: "material which is only harmful to the youngest of the minors may not be displayed by Plaintiffs even though such material would not be harmful to adults or older minors. The statute therefore effectively stifles the access of adults and older minors to communications and material they are entitled to receive and view." *Id.* at 829-830. The federal district court in the 2023 *Fayetteville* case dealing with a similar provision regarding making available materials that are "harmful to minors" echoed that issue:

> [T]he only way librarians and booksellers could comply with the law would be to keep minors away from any material considered obscene as to the youngest minors—in other words, any material with any amount of sexual content. This would likely impose an unnecessary and unjustified burden on any older minor's ability to access free library books appropriate to his or her age and reading level.

684 F. Supp. 3d at 904. [11]

11. A narrowing interpretation that limits "harmful to minors" to what is harmful to an older minor may save these kinds of statutes. "Some courts grappling with these same issues saved their respective variable obscenity statutes from invalidity by construing 'harmful to minors' narrowly…" *Fayetteville Pub. Libr.* 684 F. Supp. 3d at 903-904 (citing *Davis-Kidd*, 866 S.W.2d at 528) (limiting interpretation of state statute to mean material 'harmful to minors' was only what was considered obscene to a 17-year-old minor)); *Webb*, 919 F.2d at 1508–09 (finding that Georgia courts would interpret their own variable obscenity statute with reference to what is 'harmful' to a reasonable 17-year-old minor, thus saving the statute from overbreadth).

In the instant case, the district court below noted the same problem with HB 1181: "A website dedicated to sex education for high school seniors, for example, may have to implement age verification measures because that material is 'patently offensive' to young minors and lacks educational value for young minors." *Free Speech Coal.*, 689 F. Supp.3d at 394.

III. Subjecting Content-Based Laws to Rational Basis Review Would Open the Floodgates for Laws That Burden the Constitutionally Protected Speech of Amici and Others

Beyond just the immediate impact of HB 1181 on Amici, the application of a rational basis review to content-based laws would have extensive repercussions around the nation on Amici and others. If legislatures must only demonstrate that laws they enact are rationally related to the government's legitimate interest in protecting minors, they will be free to adopt restrictions that heavily burden the protected speech of adults and older minors. Employing a rational basis test instead of the correct strict scrutiny test would have changed the outcome in a decades-long line of cases challenging the constitutionality of content-based laws, and laws on the books of several states would look different than they do today.

For example, in a case previously brought by Amici, the Fourth Circuit, applying strict scrutiny, struck down a Virginia state law that prohibited display on the Internet, in a manner accessible to minors, of "any description or representation, in whatever form," that is harmful to minors. *PSINet Inc.* 362 F.3d at 231 (quoting Virginia Code section 18.2-390(6)). This law too included in its broad sweep a substantial amount of constitutionally protected non-

obscene material, such as speech relating to health, arts, sex education, and other information that may be deemed to have value for adults, although not minors. Yet, under the Fifth Circuit's decision upending the established standard for reviewing such laws, the government would have had a strong argument that the law rationally achieved its stated purpose of protecting minors.

Looking forward, attempts to restrict books and other materials in the name of protecting minors – materials that are constitutionally protected for older minors and adults – abound. In libraries, for example, the number of titles targeted for censorship increased by 65% from 2022 to 2023, according to data from the American Library Association ("ALA"); the ALA identified efforts to censor 4,240 unique book titles in schools and libraries in 2023 alone.[12]

In 2021 in Texas, Governor Abbott asked the Texas Education Agency to investigate the presence of "pornography" books in public schools to protect children,[13] and Texas state Representative Matt Krause sent a list of about 850 books about race and sexuality to school superintendents, asking if they carried them.[14]

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12. *See American Library Association reports record number of unique book titles challenged in 2023*, March 14, 2024, available at https://www.ala.org/news/2024/03/american-library-association-reports-record-number-unique-book-titles (last visited September 6, 2024).

13. See letter from Gov. Greg Abbott to Dr. Dan Troxell, Nov. 1, 2021, available at https://gov.texas.gov/uploads/files/press/TroxellDan.pdf; letter from Gov. Greg Abbott to the Hon. Mike Morath, Nov. 10. 2021, available at https://gov.texas.gov/uploads/files/press/O-MorathMike202111090719.pdf

14. Bill Chappell, *A Texas lawmaker is targeting 850 books that he says could make students feel uneasy,* NPR, Oct. 28, 2021,

Book challenges in the name of protecting minors are so prevalent in Florida – such as 1600 recent book banning attempts in Escambia County alone, including dictionaries[15] — that Florida Governor Ron DeSantis scaled back policies that made it easier to challenge books in schools. He signed HB 1285 in April 2024, which limits the number of book objections that can be made by a person who doesn't have a child accessing school materials.[16] Even a book about book bans was among the books challenged in the Indian River Florida school district, and the board voted in favor of removing it in 2024.[17] More than 140 books had been removed from school shelves in that same district as of March 2024.[18]

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available at https://www.npr.org/2021/10/28/1050013664/texas-lawmaker-matt-krause-launches-inquiry-into-850-books; Michael Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can be Read*, The New York Times, Dec. 10, 2021, updated June 22, 2023 available at https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html

15. Nadra Nittle, *Even dictionaries aren't safe from censorship in this Florida school district*, The 19th, Jan. 12, 2024, available at https://19thnews.org/2024/01/florida-escambia-county-book-bans-censorship-dictionaries/

16. Press Release, "Governor DeSantis Champions Legislation to Further Enhance Florida Education," April 15, 2024, available at https://www.flgov.com/2024/04/15/governor-desantis-champions-legislation-to-further-enhance-florida-education/

17. Douglas Soule, *'Challenges our authority': School board in Florida bans book about book bans*, Tallahassee Democrat, USA Today Network, June 11, 2024, available at https://www.tallahassee.com/story/news/politics/2024/06/11/florida-school-board-bans-book-about-book-bans/73970418007/

18. *Id.*, citing a public records request available at https://docs.google.com/spreadsheets/d/1UHpep_GuvI1EMK_gLshOBDseYjwnRykM/edit?gid=1416041407#gid=1416041407

In Utah, as of July 1, 2024, a measure allows a book that is removed by three school districts (or two school districts and five charter schools) to be removed statewide by the Education Department.[19] The bill's preamble states that it "requires the prioritization of protecting children from illicit pornography over other considerations in evaluating instructional material," ostensibly including *Miller/Ginsberg* considerations.

In Idaho, HB 710, which went into effect July 1, 2024, requires libraries to relocate a book to an "adults only" area if a student, parent or legal guardian deem it harmful, or face a lawsuit and a fine.[20] Demonstrating the effect of a law like this one on libraries and readers, at least one public library in Idaho is so small that it cannot adequately separate its adult materials, and is now requiring that a minor obtain permission from a parent or guardian to enter the library alone.[21]

At a moment in which the political appetite for book banning is at an upswing, scaling back the searching review of such content-based restrictions poses an especially concrete threat to access to constitutionally protected materials.

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19. 2024 Utah House Bill No. 29, available at https://le.utah.gov/~2024/bills/static/HB0029.html

20. 2024 Idaho House Bill 710, available at https://legislature.idaho.gov/sessioninfo/2024/legislation/h0710/

21. Elizabeth A. Harris, More States Are Passing Book Banning Laws. Here's What They Say, The New York Times, July 29, 2024, available at https://www.nytimes.com/2024/07/29/books/book-banning-south-carolina-tennesse-idaho-utah.html

IV. The Application of Rational Basis Rather Than Strict Scrutiny to Review Content-Based Laws That Burden the Protected Speech of Adults and Older Minors Conflicts With This Court's Precedent

Under this Court's precedents, the proper test for evaluating the constitutionality of content-based laws that burden the protected speech of adults and older minors[22] under the auspices of protecting minors is strict scrutiny, not rational basis. *See, e.g., Ashcroft,* 542 U.S. at 666; *Playboy* 529 U.S. at 813-814; *Reno*, 521 U.S. at 882; *Sable Commc'ns of Cal. Inc.,* 492 U.S. at 126. "Each of these cases recognized the government's compelling interest in protecting children from obscene materials but nevertheless evaluated the laws at issue under strict scrutiny because the law infringed constitutionally protected speech or imposed distinctions based on content." *Free Speech Coal., Inc. v . Paxton*, 95 F.4th 263, 289 (5th Cir. 2024) (Higginbotham, J., dissenting in part and concurring in part). By applying a rational basis test to Texas' law restricting broad swaths of protected speech on the Internet, the majority of the Fifth Circuit panel has upended this Court's previous rulings upholding

22. Whether material is "harmful to minors" is based on the age and maturity of the minor – what has serious value for a 17 year-old (such as a young adult novel or a work on sexual health) may not have serious value for an 8 or 9 year-old. *Shipley, Inc. v. Long*, 359 Ark. 208, 215 (Ark. 2004). Thus, a blanket ban on access or display covering material harmful to any minor under 18 would substantially burden and restrict the First Amendment rights of older minors unless state law limits material harmful to minors in the restriction to mean only materials harmful to a discrete older group, such as a legitimate minority of older adolescents. *Compare id. with Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168, 176 (Va. 1988).

preliminary injunctions against such restrictions when they fail to employ the least restrictive means.

V. *Ginsberg*, on Which the Fifth Circuit Relied, Does Not Address Laws That Burden Adults' Access to Protected Speech

Ginsberg v. State of New York, on which the Fifth Circuit relied when applying rational basis review, involved a challenge asserting an individual's right to purchase certain materials. 390 U.S. 629 (1968). It did not involve a law that also infringed the constitutionally protected speech of adults and older minors the way the age verification provision in HB 1181 does, and *Ginsberg* is clearly distinguishable from this case, and from the many other cases applying strict scrutiny to similar laws. *See id.* The Fifth Circuit has wrongfully relied on *Ginsberg* to dismiss decades of subsequent precedent. *See Free Speech Coal., Inc.*, 95 F.4th 263.

In contrast to laws imposing age verification requirements, or even the display restrictions in bookstores and libraries struck down or upheld with narrowing provisions by multiple courts after being sued by Amici, *Ginsberg* dealt with a section of New York's penal code that restricted minors' access to materials deemed harmful to them. *See Ginsberg*, 390 U.S. at 631-33. Specifically, the law prohibited one-on-one sales, such as the event at issue in that case – the sale of a "girlie" magazine to a minor by a luncheonette in Bellmore, New York. HB 1181, on the other hand, affects all potential users of the website. "Therefore, *Ginsberg's* justification for rational basis review—that minors have more limited First Amendment rights than adults—has no purchase

here, as we are dealing with a challenge to an adult's ability to access constitutionally protected materials on the ubiquitous internet, not over-the-counter magazine sales in a drug store." *Free Speech Coal.*, 95 F.4th at 293 (Higginbotham, J., dissenting in part and concurring in part); *See also Webb*, 919 F.2d at 1501 ("*Ginsberg* did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them.").

Insisting that HB 1181 is not like the many laws burdening the protected speech of adults that courts have struck down or modified under a strict scrutiny standard, the Fifth Circuit twists itself in knots to discard the long line of precedents that control this case.

In justifying its heavy reliance on *Ginsberg*, the Fifth Circuit wrongly concluded that *Ashcroft v. ACLU* does not apply. *Free Speech Coal.*, 95 F.4th at 273-275. In *Ashcroft*, which even the Fifth Circuit admitted involved a "very similar" law to HB 1181, *id.*, this Court rejected the age verification provisions of the Children's Online Protection Act ("COPA") because those provisions deterred adults' access to sexually explicit, but constitutionally protected, material, far beyond the interest of protecting minors. In so doing, the *Ashcroft* court reiterated the applicability of strict scrutiny to content-based laws: "'[w]hen plaintiffs challenge a content-based speech restriction, the Government has the burden to prove that the proposed alternatives will not be as effective as the challenged statute.'" *Free Speech Coal.*, 95 F.4th at 274 (quoting *Ashcroft*, 542 U.S. at 657). Moreover, as the Fifth Circuit described below, this Court in *Ashcroft*, finding "that COPA probably failed the narrow tailoring component

of strict scrutiny, sent the case back down for trial." *Id.* at 273.

Yet while the Fifth Circuit accepts that *Ashcroft* reviewed the "very similar" statute at issue under strict scrutiny, it nonetheless concluded (1) that the *Ashcroft* Court did not hold that strict scrutiny was the "appropriate tier of scrutiny" and (2) that the application of strict scrutiny is inconsistent with *Ginsberg*. *Id.* at 274. Neither of these explanations passes muster. In fact, when the *Ashcroft* case was remanded for trial, the age verification provisions in COPA did not survive. Rather, the Third Circuit upheld the District Court's determination that the age verification mechanism "would involve high costs and also would deter users from visiting implicated Web sites," and concluded that "[i]t is clear that these burdens would chill protected speech and thus that the affirmative defenses fail a strict scrutiny analysis." *Mukasey*, 534 F.3d at 197 (emphasis added).

The Fifth Circuit similarly dismisses this Court's 2000 decision in *United States v. Playboy Entertainment Group,* stating that "Playboy cannot surmount the rock that is Ginsberg"— a case decided 32 years before Playboy. *Free Speech Coal.,* 95 F.4th at 275. In *Playboy*, this Court held that forcing adult TV channels to block access or scramble content during certain hours to protect kids from access was unconstitutional. 529 U.S. 803. The Fifth Circuit compared the relative burdens on speech in that case with those imposed by HB 1181 and distinguished HB 1181's age verification requirement from *Playboy*'s video scrambling, noting that once an adult satisfies an age verification standard, that adult can enter a site, but that, pursuant to the law at issue in *Playboy*, videos

would remain scrambled for everyone during certain hours of the day. *Free Speech Coal.,* 95 F.4th at 275. Yet that is a distinction without legal consequence regarding the applicable standard because both laws substantially burden the ability of adults and older minors to access protected speech. Both – like the long line of cases addressing laws that burden content – should be evaluated under strict scrutiny.

CONCLUSION

The decision of the Fifth Circuit should be reversed on the basis that the restrictions of HB 1181 must be subject to strict scrutiny.

Respectfully submitted,

Kenneth A. Bamberger
Counsel of Record
University of California, Berkeley
School of Law
Law Building 446 (North Addition)
Berkeley, California 94720
(510) 643-6218
kbamberger@berkeley.edu

Counsel for Amici Curiae