

No. 23-1122

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

**BRIEF OF THE INTERNATIONAL CENTRE FOR
MISSING AND EXPLOITED CHILDREN
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960).....	7

United States v. Playboy Entm't Grp.,
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Tex. Civ. Prac. & Rem. Code Ann. § 129B.002... 12, 17

Other Authorities

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(Oct. 26, 2022), <https://tinyurl.com/3y83xjyj>..... 25

A.B. 3080, 2023–2024 Assemb., Reg. Sess.
(Cal. 2024) 27

Age Verification in the News,
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Alex Littlehales, *As new pornography verification law kicks in, Virginia ranks highest in recent searches for VPN access*,
13News Now (July 5, 2023),
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Aliza Vigderman, *2024 VPN Usage Statistics*, Security.org (Aug. 23, 2024),
<https://tinyurl.com/362ukham> 11

Ben Woods, *The (almost) invisible men and women behind the world's largest porn sites*,
The Next Web: Insider (Mar. 3, 2016),
<https://tinyurl.com/5fvjkuu7> 13

David Nield, <i>Protect Your Home Wi-Fi Network by Setting Up a VPN on Your Router</i> , WIRED (Apr. 25, 2024), https://tinyurl.com/55ydhvre	11
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<i>Idaho public library announces it will become adults-only library, cites Idaho Legislature’s library bill</i> , Idaho Press (Sept. 2, 2024), https://tinyurl.com/f2x58j5k	19
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Kyle Vanhemert, <i>Fascinating Graphs Show How Reddit Got Huge by Going Mainstream</i> , WIRED (Jan. 9, 2014), https://tinyurl.com/4rpdz8ve	19
Lee Mathews, <i>What Tor Is, And Why You Should Use It To Protect your Privacy</i> , Forbes (Jan. 27, 2017), https://tinyurl.com/2eewvhan	10

- Majid Yar, *Protecting children from Internet pornography? A critical assessment of statutory age verification and its enforcement in the UK*, 43 *Policing: An International Journal* 183 (2019) 14
- Meghan McIntyre, *Many pornography websites aren't complying with new Va. age verification law*, *Virginia Mercury* (Aug. 23, 2023), <https://tinyurl.com/3nc6n6mm> 14
- Nadeem Sarwar, *Pornhub Shutdown In Texas Sends Users Scrambling For VPN Access*, *SlashGear* (Mar. 15, 2024), <https://tinyurl.com/5ebbh87n> 10
- Neil Thurman & Fabian Obster, *The regulation of internet pornography: What a survey of under 18s tells us about the necessity for and potential efficacy of emerging legislative approaches*, 13 *Pol'y & Internet* 415 (2021) 16
- Pandora Blake, *Age verification for online porn: more harm than good?*, 6 *Porn Studies* 228 15
- Parental Controls*, FTC Consumer Advice (Sept. 2011), <https://tinyurl.com/2nsemz5c> 22
- Pietro Ferrara et al., *The Dark Side of the Web—A Risk for Children and Adolescents Challenged by Isolation during the Novel Coronavirus 2019 Pandemic*, 228 *J. Pediatrics* 324 (2021) 14, 15

<i>Press Release, ACLU, Free Speech Coalition and Partners Urge Supreme Court to Strike Down Unconstitutional Texas Law Burdening Adult Access to Sexual Content, ACLU (Apr. 12, 2024), https://tinyurl.com/3mn4aadk</i>	24
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Shweta, <i>What a VPN Hides (And What It Doesn't)</i> , Forbes (Oct. 19, 2023), https://tinyurl.com/bdhfw583	10
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<i>Usage of virtual private networks (VPN) worldwide as of 4th quarter 2023, by age and gender</i> , Statista (Apr. 25, 2024), https://tinyurl.com/5ankuf9y	11
<i>VPN overview for Apple device deployment</i> , Apple (Mar. 7, 2024), https://tinyurl.com/3r7suznk	11
Zachary McAuliffe, <i>Geo-Blocking Explained: What to Know and How You Can Get Around It</i> , CNET (Dec. 16, 2023), https://tinyurl.com/3tftn9sf	10

INTEREST OF *AMICUS CURIAE*¹

The International Centre for Missing & Exploited Children (ICMEC) is a nonpartisan, global nonprofit committed to advancing child protection and safeguarding vulnerable children around the world. The Centre has worked for more than 25 years to foster systemic change through thought leadership, research, capacity building for governmental agencies, engagement with the technology and financial-services industries and their regulators, and by working alongside partners in implementation efforts to keep children safe. ICMEC believes that the best way for it to serve children is to openly engage with policymakers, law enforcement, and industry leaders who have a genuine interest in practical solutions to achieve the common goal of building a safer world for all children.

For ICMEC, digital age verification done correctly is a critical component in efforts to protect children, enhance online safety, and maintain ethical and legal standards in the digital era. Age verification is necessary to ensure compliance with laws and regulations related to explicit content. Serving as a protective barrier, the correct age-verification measures, such as content filtering through device-level age-verification, can make it more challenging for children to access harmful content, prevent unintentional exposure, and enhance the protection of children. Such measures more accurately filter adult content, while allowing children to access non-adult content. Laws like Texas H.B. 1181, however, which rely on website-based age

¹ *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

verification, are an ineffective solution that will only result in downstream harm to children, by encouraging the use of virtual private networks and encouraging children to visit websites unreachable by U.S. laws. Such laws also chill children's speech and their parents' rights to make decisions on what their children see.

There is a better way to protect children from harmful content online: implementing age verification and filtering content directly on devices, rather than on websites. ICMEC understands that child protection is a global effort, and that the United States is a leader in that effort, so it is of paramount importance to strike the correct balance in achieving that goal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has consistently recognized that content-based restrictions on speech are subject to strict scrutiny. See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) [hereinafter *Ashcroft*]. This is for good reason: even well-intentioned laws abridging speech often have harmful downstream effects. Texas H.B. 1181 is a clear example. Obscene and salacious online content can be harmful to a child’s development and should not be accessible to minors in the absence of considered parental guidance. Although shielding minors from harmful content online is a compelling state interest, the means chosen by Texas in H.B. 1181 to achieve that interest are not narrowly tailored, burden far more speech than is necessary, and will cause more harm than good to the children Texas seeks to protect. H.B. 1181 will not protect children because it does not meaningfully address the extent to which internet users can circumvent website-based age verification, nor does it consider the practical barriers to enforcement across international borders. Perversely, the law invites dangerous consequences for children seeking adult content, including by directing them to less regulated, more dangerous websites. The First Amendment functions in part to deter government from making enormous policy mistakes like those embodied in H.B. 1181—a law that is not remotely calibrated to achieve its stated purpose.

The decision below conflicts irreconcilably with this Court’s decisions in *Ashcroft*, 542 U.S. at 656, *Reno v. ACLU*, 521 U.S. 844 (1997) [hereinafter *Reno*], and *Sable Communications of California v. FCC*, 492 U.S. 115 (1989). *Amicus* agrees with the Free Speech Coalition that this Court should correct the Fifth Circuit’s misstatement of controlling First Amendment law in subjecting H.B. 1181 to rational basis review.

If left to stand, the Fifth Circuit’s improper resolution of important First Amendment concerns will have deleterious consequences for children. In particular, the decision below relieves state legislatures of their burden under strict scrutiny to consider less restrictive—and, in this case, more effective—alternatives to website-level age verification. As Judge Higginbotham’s thorough dissent observes, the record below “is bereft of evidence responsive to the burdens of strict scrutiny.” Pet. App. 99a. It is precisely such evidence that lawmakers must consider to ensure that speech-burdening laws designed to protect children online are effective in achieving their aims.

H.B. 1181 does not achieve lawmakers’ aims for three reasons. *First*, it is ineffective. Under H.B. 1181, where more than a third of a website’s content comprises “sexual material harmful to minors,” the website must implement age verification. When implemented at the website or platform level, however, age-verification systems can be avoided easily by using widely available virtual private networks (“VPNs”) or private browsers, like The Onion Router (“Tor”) network. *Second*, meaningful enforcement of H.B. 1181 is impractical because the law cannot be enforced extraterritorially, where many websites hosting content harmful to minors are located. *Third*, in light of those practical realities, H.B. 1181 does and will continue to cause unintended harm. Both the Tor network and offshore websites expose minors to separate risks, such as malware, trafficking, and predation. In effect, H.B. 1181’s age-verification requirement could steer minors to more harmful corners of the internet where no such access limitation exists.

H.B. 1181 also suffers from vagueness and overbreadth problems, which impinge on minors’ own First Amendment rights. H.B. 1181 vaguely imposes age-verification requirements on websites if more

than one-third of their content comprises “sexual material harmful to minors”—but the law fails to define how the volume of a website’s content is to be measured. H.B. 1181 Tex. Civ. Prac. & Rem. Code Ann. § 129B. Combined with the statute’s expansive definition of “sexual material harmful to minors”—which includes “descriptions” of genitals, pubic hair, or nipples (*id.* § 129B.001(6)(B))—websites available for access in Texas might be forced to self-censor under threat of civil penalties if they risk crossing the one-third threshold under any measure. As a consequence, children are likely to be denied access to *all* content on a website fearing the one-third threshold—including content that is, by definition, not harmful to minors. H.B. 1181 instead could have required websites to redact or sequester harmful content, but it does not. There is no basis in this Court’s jurisprudence for such a sweeping restriction of children’s First Amendment right to access non-obscene speech.

Content filtering is an alternative framework to website-based age verification, which imposes a lesser burden on speech. This Court has previously endorsed content filtering, in part because it can be carried out by parents and guardians, an approach this Court has previously endorsed. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 824–825 (2000). Content filtering can also be implemented by device manufacturers through default settings that block harmful content on the basis of age verification at point-of-purchase or securely through the device. Unlike website-based age verification, content filtering does not require individuals to submit personal information to websites on a case-by-case basis, which can reveal sensitive or intimate preferences. Rather, verification is completed on the device, before the user attempts to access a particular website.

Content filtering, whether carried out by parents, implemented by default on devices, or some combination thereof, is also a more effective means of protecting children from harmful online content. Requiring the device to filter what content a child can see obviates the use of VPNs or private browsers to circumvent age verification. Content filtering also fits with the Court's longstanding preference for parental discretion and autonomy in child-rearing. Parents should be free to choose which websites or platforms are appropriate, and this discretion can best be granted through content filtering.

The proliferation of overbroad and underinclusive laws like H.B. 1181 threatens the future of child safety online. Texas's law is one of eight existing website-based age-verification laws. Pet. App. 8a n.11. At least eighteen other states have introduced or pre-filed website-based age-verification laws. Free Speech Coalition, *Age Verification Bill Tracker* (2024), <https://tinyurl.com/yb7kakyp>. The Fifth Circuit's misstatement of how H.B. 1181 must be measured against the First Amendment would relieve similar laws of the scrutiny necessary to vet their constitutionality and effectiveness, which will result in harm to the children these laws seek to serve. This Court should reject the Fifth Circuit's departure from settled First Amendment doctrine.

ARGUMENT

I. THE FIFTH CIRCUIT WRONGLY APPLIED RATIONAL BASIS REVIEW DESPITE CONTROLLING PRECEDENT REQUIRING STRICT SCRUTINY.

Content-based restrictions on protected speech are subject to strict scrutiny. See *Playboy*, 529 U.S. at 813. Such restrictions “must be narrowly tailored to promote a compelling Government interest,” and “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *Ibid.* Applying that framework, this Court has repeatedly held that, even where “a content-based restriction [is] designed to protect minors from viewing harmful materials,” it will not survive strict scrutiny if it also burdens adults’ access to protected speech, “[a]bsent a showing that [a] proposed less restrictive alternative would not be as effective.” *Ashcroft*, 542 U.S. at 670; see also *Reno*, 521 U.S. at 879; *Sable Commc’ns*, 492 U.S. at 131.

Despite this clear directive, the Fifth Circuit declined to apply strict scrutiny to H.B. 1181, a statute identical in all relevant respects to the Child Online Protection Act—a law that criminalized the knowing posting online of content “harmful to minors” (such as sexual content) and that was subjected to strict scrutiny and enjoined in *Ashcroft*. 542 U.S. at 661–662; see Pet. App. 12a–29a.

Strict scrutiny ensures that governments use their broad, stifling power in restricting speech to achieve “legitimate . . . aims,” minimizing the “legislative abridgement of fundamental personal rights and liberties,” *Shelton v. Tucker*, 364 U.S. 479, 488–489 (1960) (cleaned up), while requiring the government to show that its preferred approach is effective and will materially alleviate the targeted harms. *Playboy*,

529 U.S. at 816; *Edenfield v. Fane*, 507 U.S. 761, 770–771 (1993). By failing to apply strict scrutiny, the Fifth Circuit failed to ensure that the Texas legislature’s chosen course of action addressed its purported aims without causing additional harm. Perversely, the decision below opens children up to serious harms. It also ignores this Court’s mandate in *Reno*, *Ashcroft*, and *Playboy* that, under strict scrutiny, the government choose or consider plausible, less restrictive alternatives that would be more effective.

H.B. 1181 will not protect children because it does not meaningfully address the extent to which internet users can circumvent website-based age verification, nor does it consider the practical barriers to enforcement across international borders. Perversely, the law invites dangerous consequences for children seeking adult content, including by directing them to less regulated, more dangerous websites. In the process of creating these harms, H.B. 1181 also undermines minors’ First Amendment rights and this Court’s precedent respecting parental choice in determining what speech children consume. These harms to children and to First Amendment rights could have been avoided by mandating device-level age verification. But because the Fifth Circuit failed to apply this Court’s precedent requiring the application of strict scrutiny, H.B. 1181 continues to harm children and undermine the First Amendment.

II. H.B. 1181 FAILS STRICT SCRUTINY BECAUSE IT DOES NOT PROTECT CHILDREN, INVADES THEIR FIRST AMENDMENT RIGHTS, AND IGNORES LESS RESTRICTIVE, MORE EFFECTIVE ALTERNATIVES.

Shielding minors from pornographic content is a compelling state interest, but H.B. 1181 does not achieve that interest. To the contrary, in addition to

burdening the access of adults to protected speech, the statute does not protect children from pornographic content, impinges on *their* First Amendment rights, and, perversely, makes them *more* vulnerable to serious harm than they were before. H.B. 1181 is also unnecessary because there is a less restrictive and more effective alternative to the website-level age verification it requires: device-level age verification.

A. H.B. 1181 Does Not Protect Children.

H.B. 1181 fails to protect children from pornographic content because it is largely unenforceable for three reasons: (1) the law does nothing to address the various ways internet users can circumvent website-based age verification; (2) Texas will not be able to police the vast and ever-growing number of pornographic websites; and (3) the law will leave children free to access unregulated offshore websites.

1. Minors have easy access to tools that allow them to evade website-level controls.

H.B. 1181 does nothing to address the use of widely available, straightforward means of circumventing website-based age verification. The law seeks to limit minors' ability to access purportedly pornographic websites from within Texas. Websites infer a user's location by determining the geolocation of that user's Internet Protocol ("IP") address. See *Free Speech Coalition, Inc. v. Colmenero*, 2023 WL 5655712 (W.D. Tex. Aug. 4, 2023), ECF No. 5-2. But it is easy for users to make it appear as if they are somewhere they aren't. They can circumvent IP-based geolocation through the use of VPNs, the Tor network, or other technologies designed to mask IP addresses, all of which disguise a user's location.

VPN servers are freely and widely available on the internet. A VPN server hides users' original IP addresses by encrypting the "tunnel" between their device and the server when the users connect to the internet via the server. Shweta, *What a VPN Hides (And What It Doesn't)*, Forbes (Oct. 19, 2023), <https://tinyurl.com/bdhfw583>. When a user connects to a VPN, the VPN acts as the user's agent—making website requests on the user's behalf. *Ibid.* The website being accessed thinks that the VPN server, rather than the end user, is requesting access; it therefore uses the VPN server's location and not the user's location. *Ibid.* See also Zachary McAuliffe, *Geo-Blocking Explained: What to Know and How You Can Get Around It*, CNET (Dec. 16, 2023), <https://tinyurl.com/3tftn9sf>. A child in Texas can use a VPN to make it seem to an adult website that the child is in New York, Timbuktu, Antarctica, or anywhere else where users are not subject to digital age verification. The website, believing that the child is not in Texas, will not ask for digital proof of age.

The Tor network is a similar location-concealing tool. It uses even more layers, masking a user's location multiple times. Data on the Tor network is encrypted as it moves through a system of relays. Lee Mathews, *What Tor Is, And Why You Should Use It To Protect your Privacy*, Forbes (Jan. 27, 2017), <https://tinyurl.com/2eewvhan>. A website sees only the IP address, and hence geolocation, of the last Tor relay. *Ibid.*

Interest in these workarounds skyrocketed after the introduction of H.B. 1181 and similar bills. For example, in the days following PornHub's withdrawal from Texas, "traffic for VPN searches . . . shot up by over 1,500 percent." Nadeem Sarwar, *Pornhub Shutdown In Texas Sends Users Scrambling For VPN Ac-*

cess, SlashGear (Mar. 15, 2024), <https://tinyurl.com/5ebbh87n>. This increased Texan interest is not unique: the same thing happened last year after Virginia enacted a law similar to H.B. 1181, with Virginia internet users leading the “searches for ‘VPN’ or ‘virtual private network.’” Alex Littlehales, *As new pornography verification law kicks in, Virginia ranks highest in recent searches for VPN access*, 13News Now (July 5, 2023), <https://tinyurl.com/yjm5j4ty>.

These tools are not just for the tech savvy. They are readily accessible, nationally advertised, and easy to use. VPNs are available as default tools on iPhones, and can also be downloaded and installed within seconds on a browser or desktop operating system. See, e.g., *VPN overview for Apple device deployment*, Apple (Mar. 7, 2024), <https://tinyurl.com/3r7suznk>; David Nield, *Protect Your Home Wi-Fi Network by Setting Up a VPN on Your Router*, WIRED (Apr. 25, 2024), <https://tinyurl.com/55ydhvre>. Open-source tools to access the Tor network are free and easily downloadable. See The Tor Project, www.torproject.org (last visited Sept. 20, 2024). According to one survey, 29% of people use VPNs for personal use. Aliza Vigderman, *2024 VPN Usage Statistics*, Security.org (Aug. 23, 2024), <https://tinyurl.com/362ukham>. Another survey found that 20% of females and 32% of males between the ages of sixteen and twenty-four use VPNs. *Usage of virtual private networks (VPN) worldwide as of 4th quarter 2023, by age and gender*, Statista (Apr. 25, 2024), <https://tinyurl.com/5ankuf9y>.

Given the growing popularity of these location-masking tools and the ease with which they can be accessed, H.B. 1181 does little in practice to limit minors’ access to adult content.

2. Texas will not be able to police most pornographic websites.

H.B. 1181 regulates any website whose content is more than one-third “harmful” content. But because of the large amount of adult content on the internet, Texas will not be able to police age verification for websites that cross this one-third threshold.

As an initial matter, H.B. 1181 fails to explain how the state intends to measure the “one-third” threshold for content hosted on a website. H.B. 1181, Tex. Civ. Prac. & Rem. Code Ann. § 129B.002. It is unclear whether that threshold is measured by the size of the files, whether the one-third metric also encompasses user-generated content (such as direct messages between users), or whether enforcement agencies might use other unspecified metrics. The number of websites falling within this one-third threshold could vary significantly based on what metric is used to measure “one-third.” Nor is the law limited to major commercial adult websites: any blog, communications platform, or plaintext website is covered, which vastly expands the reach of the law.

To compound the problem, it is difficult to define obscenity or “hard core pornography.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Although H.B. 1181 attempts to define “sexual material harmful to minors” by using this Court’s guidance, the definition is still subjective and depends on “contemporary community standards” and the “prurient interest.” H.B. 1181, Tex. Civ. Prac. & Rem. Code Ann § 129B.001(6)(A). Yet H.B. 1181 does not specify whose community standards apply. It is unclear whether the Texas legislature defines those community standards, or whether each county, city, or town gets to apply its own community standards, such that websites satisfying the community standards of

one locality might nonetheless be subject to age-verification in another.

Even if the legislature could clearly identify websites that have “sexual material harmful to minors,” by some estimates 12% of all websites are pornographic and 266 new pornographic websites appear online every day. *The internet porn ‘epidemic’: By the numbers*, The Week (Jan. 8, 2015), <https://tinyurl.com/4d5y3zhr>. As such, the government will constantly be playing catch up—it will have to identify which of these many websites pass the one-third threshold, or else it will simply address only a small subset of websites that contain adult content.

Given the breadth of the internet, the difficulty of defining “harmful” content, and the complexity of measuring how much of a website is devoted to such content, Texas cannot efficiently or effectively identify and penalize non-complying websites. Texas will be left playing whack-a-mole: as one website is cited and penalized, another will appear in its place (and it may even be the same website under a new domain name). See Internet Society, *Internet Society—Perspectives on Internet Content Blocking: An Overview* 19 (Mar. 2017).

3. The law will leave children free to access unregulated offshore pornographic websites.

Texas will not be able to reach a large portion of websites that contain one-third “harmful” material because many websites hosting such material are not based in the United States and can simply thumb their noses at laws like H.B. 1181. Ben Woods, *The (almost) invisible men and women behind the world’s largest porn sites*, The Next Web: Insider (Mar. 3, 2016), <https://tinyurl.com/5fvjkuu7>. This pattern has already played out in other states that have enacted

similar age-verification statutes. Meghan McIntyre, *Many pornography websites aren't complying with new Va. age verification law*, Virginia Mercury (Aug. 23, 2023), <https://tinyurl.com/3nc6n6mm>. In fact, websites may be incentivized to move abroad or host their content abroad—in the process escaping not just H.B. 1181 but also U.S. regulations. The prevalence of overseas websites also creates a jurisdictional hurdle to enforcement, which H.B. 1181 does nothing to clear.

B. H.B. 1181 Will Have Unintended and Dangerous Consequences for Children.

Perversely, although H.B. 1181 may fail to reach most “harmful” websites, it will impact the most commonly used adult websites—and thereby ultimately harm children. By prohibiting minors from accessing regulated and well-known sexual-content websites, Texas’s law incentivizes minors to seek out *unregulated* websites that pose even greater risks to their wellbeing. See Majid Yar, *Protecting children from Internet pornography? A critical assessment of statutory age verification and its enforcement in the UK*, 43 Policing: An International Journal 183, 191–192 (2019) (explaining that age verification “may well simply encourage greater numbers of consumers to access instead pirated pornographic content via other, unregulated, channels”). Such unregulated sites often do not moderate their databases to remove non-consensual intimate imagery (“revenge porn”), child sexual abuse material, or material that is illegal to possess. See, e.g., Kari Paul, *Pornhub removes millions of videos after investigation finds child abuse content*, Guardian (Dec. 14, 2020), <https://tinyurl.com/3epfz6bz>. Unregulated sites could also expose minors to a wider range of harmful and illegal content, including sexual solicitation, online drug trafficking, and terrorist propaganda. See Pietro Ferrara et al., *The Dark Side of the*

Web—A Risk for Children and Adolescents Challenged by Isolation during the Novel Coronavirus 2019 Pandemic, 228 *J. Pediatrics* 324, 325 (2021).

H.B. 1181 would do nothing to stop minors from accessing these dark corners of the internet. In fact, the same technology that would enable minors to bypass age verification altogether would lead them to such dangerous content. By using the Tor network or other open-source, anonymity-preserving browsers, for example, minors would gain access to the dark web—a part of the internet “which predominantly host[s] unethical and criminal activities.” Ferrara at 324–325 (“Although not all content in the dark web is illegal, more than 60% of the sites on the dark web host illicit material.”). Children drawn to such sites in their efforts to circumvent age verification would face myriad risks, including “online grooming for various purposes, introduction to suicide, and child pornography.” *Id.* at 325; see also Pandora Blake, *Age verification for online porn: more harm than good?*, 6 *Porn Studies* 228, 229 (“Age verification will not only be ineffective, it will also put young people at greater risk (for instance, of encountering illegal child abuse images) if they use the dark web to get around age checks.”). Additionally, “[c]hildren and adolescents in particular may be unprepared and easily fall victim to hackers, give away personal information without intention, or slip into illegal activity.” Ferrara at 325.

Other governments have recognized these dangers. In assessing whether to implement its own age-verification requirements for websites with content harmful to children, the government of the United Kingdom noted that some children “may be pushed towards using Tor (dark web) and related systems to avoid age verification where they could be exposed to illegal and extreme material that they otherwise would never have come into contact with.” Yar at 192

(cleaned up). See Neil Thurman & Fabian Obster, *The regulation of internet pornography: What a survey of under 18s tells us about the necessity for and potential efficacy of emerging legislative approaches*, 13 *Pol’y & Internet* 415, 415 (2021).

While protecting children from age-inappropriate material is a legitimate government interest, the cure must not be worse than the disease. But that is precisely the outcome that H.B. 1181 invites. “In effect, the attempt at harm reduction may instead inadvertently become a source of harm proliferation.” Yar at 192. By excusing Texas from its burden of satisfying strict scrutiny, the Fifth Circuit blessed a law that seriously undermines its own aims of child protection.

C. Strict Scrutiny Ensures That Regulations Protect Minors’ First Amendment Rights to Receive Information.

Under H.B. 1181, where more than a third of a website’s content comprises “sexual material harmful to minors,” children are denied access to all content on the website—including content that is, by definition, not harmful to minors. H.B. 1181 instead could have required websites to redact or sequester harmful content, but it does not. There is no basis in this Court’s jurisprudence for such a sweeping restriction of children’s First Amendment right to access non-obscene speech. H.B. 1181 (1) violates the First Amendment rights of minors, and (2) undermines parents’ discretion regarding their children’s media consumption—both harms that could have been prevented by correctly subjecting the law to strict scrutiny.

1. H.B. 1181 violates minors’ First Amendment rights. The Constitution protects minors’ rights to receive information because “the right to receive ideas is a necessary predicate to the recipient’s meaningful

exercise of his own rights of speech, press, and political freedom.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion); see also *Ginsberg v. New York*, 390 U.S. 629, 637 (1968); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 692 n.14 (1977) (“minors are entitled to constitutional protection for freedom of speech”). Admittedly, minors’ First Amendment rights are not as expansive as those same rights for adults. *Ginsberg*, 390 U.S. at 636; see also *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 794 (2011) (noting that legislatures can “adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children”). But minors still have a constitutionally protected right to non-“adult” speech, and states may not simply ban minors’ exposure to a full category of speech when only a subset of that category can plausibly be deemed obscene for them. H.B. 1181’s overbreadth results in severe restrictions to those constitutionally protected rights.

H.B. 1181 vaguely and arbitrarily imposes age-verification requirements on websites if more than one-third of their content comprises “sexual material harmful to minors,” without once defining how the volume of a website’s content is measured. H.B. 1181, Tex. Civ. Prac. & Rem. Code Ann. § 129B.002. Children may not access websites that surpass this one-third threshold at all—even if the remainder of the website’s content is not “sexual material harmful to minors.” This “sexual material” could include mere “descriptions” of “a person’s pubic hair, anus, or genitals or the nipple of the female breast.” *Id.* § 129B.001(6)(b)(1). But “material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection.” *Jacobellis*, 378

U.S. at 191. As a result, even for minors, “[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.” *Roth v. United States*, 354 U.S. 476, 484, 487 (1957).

Although Texas attaches boilerplate language that the law applies only to content that, “taken as a whole, lacks serious literary, artistic, political, or scientific value for minors,” H.B. 1181, Tex. Civ. Prac. & Rem. Code Ann. § 129B.001(7), that language raises more questions than it answers. The law does not specify who will determine whether content lacks such value, or how Texas will measure how much of a website’s content has literary, artistic, political, or scientific value for minors, such that the website will be exempt from regulation. It is far from clear how Texas regulators would go about performing either task.

It’s clearer what websites will do under the shadow of government enforcement: self-censor and implement an overly restrictive age-verification system that filters out children—even if the content on a website does provide educational value—to avoid the risk that the government determines they lack redeeming value. It’s unclear whether sex-education materials, *Fifty Shades of Grey*, or *Game of Thrones* fall in the “harmful” or “unharmful” category, and the ultimate arbiter is the state. This problem is compounded for interactive websites where users can post comments or communicate directly with other users. Does a user-generated post containing “harmful” content count towards the one-third threshold? Does user-to-user communication count towards the threshold? Even moderately risk-conscious websites are likely to implement an age-verification system reflexively, for fear of getting in trouble with Texas regulators.

H.B. 1181 is not narrowly tailored because it regulates more than just the “sexual material harmful to minors,” and instead also affects non-obscene content, in three ways. First, minors may no longer be able to view content that does have literary, artistic, political, or scientific value. Minors could be foreclosed from non-obscene material, including sex-education materials, or art that the government may find objectionable or disagreeable. For example, Idaho’s House Bill 710 defines “harmful” materials to minors in a manner similar to H.B. 1181, and requires libraries to separate “harmful” materials and prevent minors from accessing those materials, with a financial penalty on those libraries that fail to do so. H.B. 710, Idaho Code 18-1514. Because of the difficulty of complying with the law, some libraries have closed their doors to children. *Idaho public library announces it will become adults-only library, cites Idaho Legislature’s library bill*, Idaho Press (Sept. 2, 2024), <https://tinyurl.com/f2x58j5k>.

Second, websites that contain *some* harmful material but also contain material suitable for children could become off-limits for minors. For example, Reddit, a large social media platform, has safe-for-work content like informational posts and memes, but also has not-safe-for-work content. Kyle Vanhemert, *Fascinating Graphs Show How Reddit Got Huge by Going Mainstream*, WIRED (Jan. 9, 2014), <https://tinyurl.com/4rpdz8ve> (noting the diversity of not-safe-for-work posts and more substantive, safe-for-work posts on Reddit).

Third, if the “one-third” threshold includes user-generated content, a website that was once accessible by minors may, over time, become subject to H.B. 1181. *Ibid.* (noting the gradual change in the amount of explicit material on Reddit, over time). Taken to-

gether, H.B. 1181 threatens to greatly limit the universe of non-harmful content that minors can see online.

2. Strict scrutiny ensures that the state respects “parental authority” and provides “parents the information needed to engage active supervision” of their children. *Playboy*, 529 U.S. at 826. “Constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.” *Ginsberg*, 390 U.S. at 639–640.

While this Court is aware of the effect that “indecent” content has on children, where identifying “indecent” material is subjective, and such material can often be wrongly categorized as indecent when it does contain “artistic or educational value,” the Court has expressed a preference for laws that “provide[] tolerance for parental choice” and “facilitate[] parental control of material coming into their homes.” *Reno*, 521 U.S. at 879; see also *Ashcroft*, 542 U.S. at 670 (emphasizing device-level age verification because it would “give parents [the] ability [to monitor what their children see]”); *Brown*, 564 U.S. at 804 (emphasizing that the law must not prescribe what “parents *ought* to want,” but instead must assume that parents can choose what speech their children consume). And where there is “parental consent,” the government has little “interest in substituting itself for informed and empowered parents.” *Playboy*, 529 U.S. at 811, 814, 825.

Given the difficulty and subjectivity of the exercise, parents should be determining whether material is “sexual material harmful to children” or instead provides children with literary, artistic, scientific, ed-

educational, or political value. A law that provides parents with tools to adjust what their children consume based on their own parental discretion and their rights, as parents, to “direct the rearing of their children,” is more likely to survive strict scrutiny and preserve parental rights. *Ginsberg*, 390 U.S. at 639–640. Such tools also allow parents to make judgments that the state is ill-equipped to make, such as what material is harmful to their children, whether their children should be able to view appropriate content on websites that *also* contain “harmful” content, and when and whether a website contains too much “harmful” content to be suitable for their children as a whole.

III. Device-Level Age Verification Would Be More Effective and Safeguard Protected Speech.

Content filtering is a well-established, effective alternative to H.B. 1181 that avoids needless restrictions on adults’ and minors’ access to speech and also respects parental rights to determine what information their children receive. Where strict scrutiny applies (as it should here to the content-based H.B. 1181, see *supra* Section I), content filtering is the “modern version of ‘blocking and filtering software’” that this Court has endorsed as constitutionally compliant. *Colmenero*, 689 F. Supp. 3d at 401 (citing *Ashcroft*, 542 U.S. at 666–673). Indeed, content filtering is this Court’s preferred method of protecting children from adult content. See *Playboy*, 529 U.S. at 815 (noting that systems that “block unwanted channels on a household-by-household basis” would likely survive strict scrutiny). Content filtering does exactly that: it blocks adult content or other content chosen by parents or administrators, on a device-by-device basis. This Court also has acknowledged the effectiveness of content filtering, observing that “a filter can prevent

minors from seeing *all* pornography, not just pornography posted to the Web from America. [Website-based age verification] does not prevent minors from having access to foreign harmful material.” *Ashcroft*, 542 U.S. at 666–667.

A. At Least Two Forms of Content Filtering Would Be More Effective than Website- Based Age Verification.

Two methods of implementing content filtering are technologically feasible, preferred by the industry and child advocates alike, and likely would survive strict scrutiny: (1) parental controls available in software, and (2) device-level age verification.

Parental Controls: Parental controls are settings that administrative-level users, like parents, can use to set limits on what users can view, access, and use. See *Parental Controls*, FTC Consumer Advice (Sept. 2011), <https://tinyurl.com/2nsemz5c>. These tools also can be used by administrators to monitor what sites are accessed and block outgoing content (such as explicit images). *Ibid.* For example, parents could filter any searches for adult content made by their children’s computer- or internet-access accounts.

In addition to the noted effectiveness of content filtering, parental-control systems “support parental authority” and “provide parents the information needed to engage in active supervision”—goals this Court has endorsed. *Playboy*, 529 U.S. at 815, 826. Parental controls empower parents with default protections, allowing them to establish robust oversight because protections can be bypassed only by the parent. In the district court’s words, device-level age verification (such as through content filtering) “allows parents to determine the level of access that their children should have, and it encourages those parents to have

discussions with their children regarding safe online browsing.” *Colmenero*, 689 F. Supp. 3d at 403.

Importantly, content filtering gives parents discretion to decide what their children should be able to view, and thus respects parental authority. *Reno*, 521 U.S. at 879; *Playboy*, 529 U.S. at 815; *Ginsberg*, 390 U.S. at 639–640. Accordingly, this Court has held that “filtering software” (a type of device-level age verification) was a reasonable alternative to more sweeping age-verification measures in part because device-level age verification would “give parents [the] ability [to monitor what their children see] without subjecting protected speech to severe penalties.” *Ashcroft*, 542 U.S. at 670. Giving parents agency to decide what content is inappropriate for their children is better than relying on the overbroad, ambiguous definitions of “harmful” content codified in H.B. 1181. See, e.g., *Brown*, 564 U.S. at 804 (noting the importance of parents in deciding what media their children consume).

Operating Systems that Filter Content Based on Age: The government also could require that device manufacturers institute default settings on devices sold to children to prevent access to explicit content. Under this mechanism, when users first activate their devices, they must provide verifiable proof of age. For example, users could be required to provide their age to sign up for an Apple ID, which governs the permissions of an iPhone. If the user is an adult, content filtering can be turned off, and the user can browse the web freely. If the users are children, however, their devices will filter out content based on preset indicia of explicit or dangerous material. The advantage of this form of content filtering is that it works across all websites and applications on the device and can prevent even the recording or transmittal of harmful content on a child’s device. An ancillary benefit is that

personal information is stored *locally*: platforms are not given dates of birth or ID numbers.

B. Content Filtering Provides Significant Advantages That Protect Children.

Content filtering has at least five advantages in protecting children while retaining adults' ability to freely access content protected by the First Amendment.

First, content filtering at the device level is the preferred approach for civil-liberties groups and for the adult entertainment industry. For example, privacy-rights groups like the ACLU recognize that “the installation of filtering software on minors’ devices” is a better alternative to website-based age verification. See *Press Release, ACLU, Free Speech Coalition and Partners Urge Supreme Court to Strike Down Unconstitutional Texas Law Burdening Adult Access to Sexual Content*, ACLU (Apr. 12, 2024), <https://tinyurl.com/3mn4aadk>. Similarly, leaders in the adult-film industry endorse age-verification methods that “identify users at the source: by their device, or account on the device, and allow access to age-restricted materials and websites based on that identification.” See *Age Verification in the News*, PornHub Blog (Mar. 14, 2024), <https://tinyurl.com/y4pcuju8>. This is because content filtering provides a standardized approach to age verification across multiple platforms and services, especially when content restrictions are consistent across sites. Content filtering creates a unified, efficient system that cannot be replicated by mandating age verification at the platform level alone, as H.B. 1811 does.

Second, content filtering is more effective at shielding children from explicit content than website-based age verification because it is harder to circum-

vent. Content filtering can be integrated into the operating system via device-level age verification, ensuring that content is filtered across various websites and online services. Filters work across all websites and applications on the device and can further prevent recording or transmitting harmful content on a child’s device. In the ordinary course, users cannot circumvent these restrictions through the use of fake IDs or other deceptive practices. Website-based age verification, by contrast, can be evaded by using VPNs, the Tor network, or websites hosted abroad. Content filtering can filter also by specific *content*, rather than making off-limits whole *websites* that contain not just adult content but also innocuous, age-appropriate content that a child may reasonably wish to access.

Third, content filtering minimizes the sharing of personal information with websites, which prevents websites from identifying who their users are and from sharing and monetizing that information. This personal information includes the identities of children who may attempt to access such websites using their IDs. Nor can third parties access that information because it is located only on the device. Thus, malicious actors, like hackers and identity thieves, will have no user information to target. Identity theft—especially of children’s identities—is a serious problem affecting millions of children every year and causing serious financial and emotional harm. *1.7 Million U.S. Children Fell Victim to Data Breaches, According to Javelin’s 2022 Child Identity Fraud Study*, Javelin (Oct. 26, 2022), <https://tinyurl.com/3y83xjyj>.

Fourth, website-based verification necessarily requires would-be users’ personal information (including that of minors) to be shared with third parties. H.B. 1181 provides no guidance on what adult web-

sites need to do to adequately perform age verification. But to check the validity of an ID—for example, to prevent minors from using fake IDs—each website will have to cross-check a user’s ID information with a government or third-party database.² That creates the possibility that the government can track children’s online behavior. Further, while H.B. 1181 requires that adult websites may not “retain any identifying information” of a user, it imposes no such restriction on internet service providers or the third-party database being used as a cross-reference; nor does it define what “retention” or the duration of retention is. H.B. 1181. And as the district court already noted, the law’s requirements to delete data do not apply “for the data *in transmission*”—so “any intermediary between the commercial websites and the third-party verifiers will not be required to delete the identifying data.” *Colmenero*, 689 F. Supp. 3d at 400 (emphasis added).

Fifth, website-based identification systems create the risk of dangerous actors accessing the personal information of would-be users, including minors. There is no guarantee that third-party trackers, such as advertising modules—which frequently track a user’s preferences and personal information—will not gain access to identification information that is entered on a website. Worse, H.B. 1181 does not provide encryption or other security standards for websites that are implementing age-verification requirements, thereby increasing the chances that those attempting to access these websites—children and adults alike—could

² Alternatively, if such websites do not implement robust ID verification systems, users, including minors, will have the incentive to acquire fake IDs, which can be a gateway to other illicit behavior. Failure to ensure that such websites are implementing effective ID-verification systems would add to H.B. 1181’s lack of effectiveness at achieving its aims of protecting children.

have their personal information end up in the hands of hackers, identity thieves, or other wrongdoers. Content filtering removes these significant privacy barriers, ensuring that identification information remains secure and local, and is not used to violate the privacy of minors sharing their personal information with websites.

C. Other Jurisdictions Already Have Crafted Legislation That Is More Narrowly Tailored and More Effective.

Other states—with the same interest in protecting minors from harmful content—are considering or have already enacted laws to protect minors effectively without impermissibly infringing on the First Amendment.

For example, Utah recently passed into law the “Children’s Device Protection Act.” S.B. 104, 2024 Gen. Sess. (Utah 2024). That legislation similarly advances the goal of protecting minors from content harmful to them through more effective and narrowly tailored methods. S.B. 104 requires that all tablet and smartphone devices sold in Utah include a filter that blocks content harmful to children. The filter can be removed upon activation if the user of the device is not a minor, and the parents and guardians of minors have the ability to deactivate the filter on a device through a password. This type of content filtering provides maximum protection for minors alongside maximum agency for parents.

Similarly, California recently debated enacting legislation like H.B. 1181. That legislation—the “Parent’s Accountability and Child Protection Act” (A.B. 3080)—has the same important goal as H.B. 1181; namely, protecting minors against exposure to content that is harmful to them. But the California approach has an important distinction from H.B. 1181:

A.B. 3080 requires age-verification either through parental control software, or through device-level age-verification. A.B. 3080, 2023–2024 Assemb., Reg. Sess. (Cal. 2024). Although A.B. 3080 has not been enacted, it is nevertheless an example of how Texas could have drafted its legislation to be more narrowly tailored and more effective.

By misstating First Amendment law, the Fifth Circuit failed to require Texas to demonstrate that the methods chosen in H.B. 1181 are the least restrictive means of achieving the goal of protecting minors from explicit or obscene internet content. They are not. Content filtering is a plausible, more effective, more secure, and less burdensome alternative than website-level age verification.

CONCLUSION

This Court should reverse the Fifth Circuit’s decision.

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