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 AMICI CURIAE FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONERS

Jennifer Safstrom
Counsel of Record
STANTON FOUNDATION FIRST AMENDMENT CLINIC
VANDERBILT LAW SCHOOL
131 21st Ave South
Nashville, TN 37203-1181
(615) 322-4964
jennifer.safstrom@vanderbilt.edu

September 23, 2024 *Counsel for Amici Curiae*

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INTEREST OF AMICI CURIAE

Amici are scholars who write and teach about the First Amendment and thus have an interest in the sound development of doctrine in this area. *Amici* agree that the First Amendment prohibits Texas from using the guise of protecting minors to limit adults' constitutional right to anonymously view sexually explicit material. All *amici* are joining this brief in their personal capacities.[1]

CLAY CALVERT is a Nonresident Senior Fellow at the American Enterprise Institute in Washington, D.C., and Professor Emeritus at the University of Florida in Gainesville where he held a joint appointment in the Levin College of Law and the College of Journalism and Communications. He has published more than 150 law journal articles on First Amendment, free speech, and media law-related topics.

ERWIN CHEMERINSKY is the Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkley School of Law. He is a leading First Amendment scholar, having published nineteen books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction, and over 200 law review articles.

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[1] Pursuant to this Court's Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ALAN CHEN is the Thompson G. Marsh Law Alumni Professor at the University of Denver Sturm College of Law, where he teaches and writes about free speech doctrine and theory and other American constitutional law topics. He is the co-author of three books, two of which concern the freedom of speech, *Truth and Transparency: Undercover Investigations in the Twenty-First Century* (Cambridge University Press 2023) and *Free Speech Beyond Words: The Surprising Reach of the First Amendment* (NYU Press 2017), and has published numerous scholarly articles about the First Amendment in many of the leading national law journals.

BRETT G. JOHNSON IS an associate professor at the University of Iowa's School of Journalism and Mass Communication. His research focuses on the areas of mass communication law, First Amendment theory, and online media.

LYRISSA LIDSKY is the Raymond & Miriam Ehrlich Chair in U.S. Constitutional Law at the University of Florida Levin College of Law. Her scholarship includes a leading Media Law casebook, a First Amendment casebook, a reference book on press freedom, and dozens of law review articles.

CLARE R. NORINS is a Clinical Associate Professor at the University of Georgia School of Law and director of the Law School's First Amendment Clinic. Her scholarship has been published in the University of Pennsylvania Journal of Constitutional Law, George Mason University Civil Rights Law Journal, and is forthcoming in the Washington and Lee Law Review Online.

AMANDA REID is a media law professor at the University of North Carolina's Journalism School. She holds courtesy appointments at the University of North Carolina's law school and the University of North Carolina's School of Information and Library Science. She is also the faculty Co-Director of the University of North Carolina's Center for Media Law and Policy and an affiliate researcher with University of North Carolina's Center for Information, Technology, and Public Life. Her scholarly articles have appeared in peer reviewed journals, flagship law reviews, and specialty journals from top law schools.

NADINE STROSSEN is the John Marshall Harlan II Professor of Law Emerita at New York Law School, past President of the American Civil Liberties Union (1991–2008), a Senior Fellow with the Foundation for Individual Rights and Expression ("FIRE"), and a leading expert and frequent speaker and media commentator on constitutional law and civil liberties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The fundamental protections of the First Amendment, which include the right to anonymous speech, are inherently at odds with age verification laws imposed on sexually explicit websites. Such laws require users to reveal personal information, compromising their ability to engage in expressive activity and association without fear of identification or retribution. Texas's age verification requirements for accessing websites with sexually explicit material, as

set forth in H.B. 1181, "the Act," unconstitutionally infringe on First Amendment protections, particularly the right to anonymous speech. Anonymity is a core element of American public discourse, enabling individuals to express sensitive, controversial, and unpopular opinions without fear of retaliation or exposure. This right, which extends to online speech, is crucial in maintaining an open marketplace of ideas. The age verification requirements in H.B. 1181 undermine this constitutional protection by forcing individuals to reveal personal information, chilling free expression and disproportionately impacting marginalized groups who are less likely to possess identification or are more vulnerable to errors in identity verification systems. Furthermore, the law's underinclusive nature and the existence of less restrictive means, such as parental controls or content filters, demonstrate that it fails to satisfy the strict scrutiny required for content-based restrictions. Therefore, H.B. 1181 violates the First Amendment and should be declared unconstitutional.

ARGUMENT

I. H.B. 1181 Must Be Subject to Strict Scrutiny Because the Law Impermissibly Interferes with Anonymous Speech and Association Rights Protected by the First Amendment

The First Amendment's protection of anonymity is a cornerstone of free speech rights in the United States, as it ensures that individuals can engage in

discourse on sensitive and potentially controversial subjects without fear of identification or retaliation. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958); *Talley v. California*, 362 U.S. 60 (1960); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). Regulations that infringe on the right to anonymity must serve a compelling state interest and be narrowly tailored to achieve that interest. *See, e.g.*, *NAACP*, 357 U.S. at 449; *Talley*, 362 U.S. at 60; *Brown*, 459 U.S. at 87. By imposing age verification requirements on websites with sexually explicit content, H.B. 1181 violates these First Amendment principles by compelling users to disclose personal information, thus chilling their ability to engage in protected anonymous speech and expression online. *See* Tex. Code Ann. Civ Prac. & Rem. § 129B.002-003 (West 2023). This regulation not only fails to meet the stringent standards set forth for limitations on anonymity but also poses a significant threat to the freedom of expression that the First Amendment protects. *See id.*

A. This Court Should Protect Anonymous Speech, Which Is Deeply Rooted in This Nation's History

Anonymous speech has been a cornerstone of American discourse for centuries, serving as a powerful tool for individuals to express ideas without fear of retaliation or social repercussion. The tradition of anonymity in political and public discourse can be traced back to the revolutionary period and has continued to evolve alongside technological advancements, most notably the rise of the internet. The use of pseudonyms was instrumental in shaping American thought and policy. Notable examples include the letters written in 1769 by "Junius," whose identity remains a

mystery, which discussed independence prior to the Revolutionary War. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n.6 (1995). In fact, the *Letters of Junius* were "widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause." *Powell v. McCormack*, 395 U.S. 486, 531 n.60 (1969). Thomas Paine's *Common Sense*, a pivotal work advocating for American independence, was published anonymously. *McIntyre*, 514 U.S. at 368 (Thomas, J., concurring). These "colonial patriots" had to "conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts." *Talley*, 362 U.S. at 65.

Perhaps most famously, The Federalist Papers were penned by Alexander Hamilton, James Madison, and John Jay under the pseudonym "Publius." *McIntyre*, 514 U.S. at 343 n.6. Anti-Federalist texts, including John Dickinson's influential *Letters from a Federal Farmer*, were also authored anonymously. *Id.* (noting that "'Cato,' believed to be New York Governor George Clinton [and] 'Centinel,' probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan" were also anonymously authored). Clearly, the Founding Fathers and other influential politicians valued anonymity at the time of our nation's establishment. *See id.* The ideals and values of anonymity continued to flourish in the United States past the founding era. As noted by this Court in *McIntyre*, "[t]his tradition [of anonymity] is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." *Id.* at 343. In fact, as Justice Thomas highlighted in his concurrence, "[i]t is only an innovation of modern

times that has permitted the regulation of anonymous speech." *Id.* at 366 (Thomas, J., concurring).

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection extends to the communication, its source, and its recipients. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976); *see also ACLU v. Gonzales*, 478 F. Supp. 2d 775, 812 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008) (finding that the "C[hild] O[nline] P[rotection] A[ct]'s affirmative defenses will deter *listeners*, many of whom will be unwilling to reveal personal and financial information in order to access content and, thus, will chill speech") (emphasis added). The emergence of the internet has both expanded and complicated the landscape of anonymous speech. The internet allows speakers to reach audiences "larger and more diverse than any the Framers could have imagined," amplifying voices that might otherwise go unheard. *Doe v. Cahill*, 884 A.2d 451, 455–56 (Del. 2005) (citing Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 896 (2000)). Online anonymity provides significant benefits for public and political discourse by enabling individuals to participate without revealing their identities, which helps ensure that ideas are judged on their own merits rather than being influenced by the speaker's personal attributes such as race, class, or age. *Id.* This can lead to less hierarchical and discriminatory discussions, fostering a more inclusive environment for sharing diverse perspectives. *Id.*

The importance of anonymous speech, and its place in history, in the United States cannot be overstated. It embodies core First Amendment values

by promoting a marketplace of ideas where arguments stand on their own and the speakers, shielded by anonymity, are protected from undue harm. *See McIntyre*, 514 U.S. at 359–70 (Thomas, J., concurring); *Cahill*, 884 A.2d at 455–56. Historical and legal precedents affirm that the right to speak anonymously is not only a deeply-rooted tradition, but also a vital component of democratic discourse, especially in our increasingly connected world. *See McIntyre*, 514 U.S. at 359–70 (Thomas, J., concurring); *Cahill*, 884 A.2d at 455–56.

B. H.B. 1181 Undermines an Individual's Ability to Express Themselves Anonymously, Infringing on the First Amendment

The First Amendment guarantees a right to anonymity in speech, expression, and association. *See* U.S. Const. amend. I; *McIntyre*, 514 U.S. at 334. Specifically, this Court has held that unless a regulation limiting an individual's right to anonymity serves a compelling state interest and is narrowly tailored to achieve that goal, an individual has a First Amendment right to both anonymity and anonymous association. *NAACP*, 357 U.S. at 449; *Talley*, 362 U.S. at 60; *Brown*, 459 U.S. at 87. Federal and state courts have adopted a similar stance in protecting speech—such as requiring an internet user's identity to remain confidential unless a challenger can overcome numerous hurdles. *See Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *Cahill*, 884 A.2d at 451. By requiring age verification on websites containing sexually explicit content, H.B. 1181 abridges the First Amendment right to anonymity because the regulation compromises an individual's ability to engage in

speech without fear of identification or retribution. *See* § 129B.002-003.

a. H.B. 1181 Violates the First Amendment Right to Anonymous Association, Chilling Expression and Deterring Adults from Accessing Constitutionally-Protected Speech

The First Amendment protects the rights to free speech, expression, and association, including the right to associate anonymously. *See generally* U.S. Const. amend. I; *NAACP*, 357 U.S. at 449; *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963). This Court, in "remarking upon the close nexus between the freedoms of speech and assembly," has noted that the right to group association enables effective advocacy of both public and private points of view, especially controversial ones. *NAACP*, 357 U.S. at 460. More pointedly, the right to associate anonymously allows individuals to engage in activities, share ideas, or join groups without fear of retaliation or unwanted public exposure, which is particularly important for those expressing unpopular, controversial, or sensitive viewpoints. *See id.* at 462–63.

This Court recognized the right to anonymity in association in *NAACP v. Alabama*, where it held that the state of Alabama could not compel the Alabama charter of the National Association for Advancement of Colored People ("NAACP") to disclose its membership lists. *Id.* at 460; *see also Bates v. Little Rock*, 361 U.S. 516 (1960) (holding that Arkansas' membership disclosure requirement imposed an unconstitutional burden on the NAACP's right to freedom of association under the First Amendment). The Court's analysis

focused on the retaliatory effects that disclosing the membership list could cause, noting that the NAACP "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP*, 357 U.S. at 462. The Court also noted that membership disclosure "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.* at 463. Furthermore, the Court clarified that the protection of anonymity in association, as guaranteed by the First Amendment, applies regardless of whether the beliefs or causes advanced by the group are political, economic, religious, or cultural in nature. *Id.* at 460.

Five years later, in *Gibson v. Florida Legislative Investigation Committee*, this Court reaffirmed the First Amendment right to associate anonymously. 372 U.S. at 539. The Court held that a state legislative committee did not have the authority to compel the NAACP's president to provide the association's membership records to determine whether specific individuals, alleged to be Communists, were members of the association. *Id.* The Court stated that the First Amendment right to freedom of association is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id.* at 544 (quoting *Bates*, 361 U.S. at 523). Specifically, the Court noted that "where the challenged privacy is that of persons espousing beliefs already unpopular with their neigh-

bors[,] [] the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association [are] consequently [] more immediate and substantial." *Id.* at 557. The protection of anonymity in association, particularly for those advocating for controversial or unpopular causes, is a crucial safeguard for preserving the free exercise of First Amendment rights. *See id.* at 539.

By not prohibiting the transmission of personal information, obtained through age verification, H.B. 1181 violates the First Amendment right to associate anonymously. *See NAACP*, 357 U.S. at 460; *Gibson*, 372 U.S. at 539; § 129B.002(b). Although the entity performing age verification "may not retain any identifying information of the individual," transmission of such information is not prohibited. § 129B.002(b). Furthermore, the Act does not establish monitoring or reporting requirements for entities performing age verification. *Id*. While Texas may argue that the regulation does not compel disclosure of an individual's information,[2] the Act does not prohibit the external transmission of these adults' information and the "risk of inadvertent disclosures, leaks, or hacks" is pervasive. Brief of Petitioner-Appellant at 26, *Free Speech Coalition v. Paxton*, No. 23-1122 (U.S. Sept. 16, 2024). In fact, this regulation is exactly the sort of "subtle governmental interference" that can stifle the right to association just as effectively as direct

[2] "A civil penalty imposed under this section for a violation of Section 129B.002 or 129B.003 may be in an amount equal to not more than the total, if applicable, of: . . . $10,000 per instance when the entity retains identifying information." § 129B.006(b).

suppression, as this Court noted in *Gibson*. 372 U.S. at 544.

This Court emphasized that membership disclosure could cause individuals to withdraw from or avoid joining groups due to fear of exposure. *NAACP*, 356 U.S. at 462–63. Just as fear of disclosure of one's membership in the NAACP served as a deterrent effect to membership altogether, H.B. 1181's age verification requirement serves as a deterrent for individuals wishing to access websites containing more than one-third sexually explicit material. *See id*. at 460; § 129B.002. In fact, one pornographic website noted that in Louisiana—after a similar regulation to H.B. 1181 was passed—the website's traffic dropped eighty percent. @Pornhub, X (June 30, 2023, 8:38 AM), https://twitter.com/Pornhub/status/1674774396773318658. Of course, "[t]hese people did not stop looking for porn. They just migrated to other corners of the internet that don't ask users to verify age, that don't follow the law, that don't take user safety seriously, and that often don't even moderate content." *Id.* By failing to explicitly prohibit the transmission of an individual's data, H.B. 1181 instills a fear of disclosing personal associations, which in turn creates a chilling effect that discourages adults from accessing these websites. *Id*; § 129B.002(b). Thus, H.B. 1181 violates the First Amendment right to anonymity. *See NAACP*, 357 U.S. at 460; § 129B.002.

b. The First Amendment Safeguards Anonymity So People May Engage in Disfavored Speech and Expression Without Fear of Retribution

The right to anonymity, as protected under the First Amendment, plays a crucial role in political discourse, shielding individuals from retaliation and fostering free expression, particularly in sensitive matters of political dissent and advocacy. *See, e.g.*, *Talley*, 362 U.S. at 65; *McIntyre*, 514 U.S. at 334; *Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 195 (1999). This Court has repeatedly upheld this protection, recognizing that compelled disclosures in political speech or campaign finance can create a chilling effect on free speech. *See, e.g.*, *Talley*, 362 U.S. at 65; *McIntyre*, 514 U.S. at 334. Sexually explicit material—like political discourse—often involves sensitive, deeply personal, and potentially disfavored opinions that are precisely the type of expression the First Amendment is designed to protect. *See McIntyre*, 514 U.S. at 334. By mandating age verification for accessing certain online content, H.B. 1181 compromises this right to anonymity, subjecting individuals to potential retaliation and deterring lawful participation in protected speech, thereby violating the core values of the First Amendment. *See id.*; § 129B.001-003.

i. The First Amendment Protects Sensitive and Uncomfortable Content, Like Sexually Explicit Material, Just as It Shields Minority Political Opinions

Because anonymity is a vital tool for safeguarding the free exchange of ideas, this Court has interpreted

the First Amendment's protection of freedom of speech to include the right to anonymity in political discourse. *Talley*, 362 U.S. at 65. Specifically, anonymity can be a necessary tool for individuals to express dissent, criticize government policies, or advocate for change without fear of retaliation. *Id.* In *Talley v. California*, this Court struck down a Los Angeles ordinance that prohibited the distribution of anonymous handbills, finding that "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. The Court noted that "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified" because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 65.

In *McIntyre v. Ohio Elections Commission*, this Court reinforced the right to anonymous political discourse under the First Amendment by striking down an Ohio statute that prohibited the distribution of anonymous campaign literature. 514 U.S. at 357. The majority found that requiring identification of the author of political pamphlets is "particularly intrusive" because it reveals "unmistakabl[y] the content of [the author's] thoughts on a controversial issue." *Id.* at 355. Specifically, the Court noted that the choice to remain anonymous when expressing political views serves as crucial protection against the "tyranny of the majority," emphasizing that anonymity allows individuals to voice unpopular opinions without fear of economic or official retaliation, social ostracism, or other personal consequences. *Id.*

at 357 (citing John Stuart Mill, *On Liberty and Considerations on Representative Government* 3–4 (R. McCallum ed. 1947)). Furthermore, the Court acknowledged that while there are dangers associated with the misuse of anonymous speech, "our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.* at 357 (citing *Abrams v. United States*, 250 U.S. 616, 630–31 (1919)).

H.B. 1181 prohibits anonymity in the context of controversial and sensitive discourse, posing a risk of chilling free expression by compelling individuals to disclose identifying information as a precondition for access. § 129B.002(a); *Talley*, 362 U.S. at 60; *McIntyre*, 514 U.S. at 334. The Act undermines the established protection for anonymous expression, which is particularly vital in contexts where individuals wish to engage with controversial or sensitive content without fear of retaliation or social stigma. *See* § 129B.002(a); *Talley*, 362 U.S. at 60; *McIntyre*, 514 U.S. at 334.

Specifically, the mandatory submission of identifying information for age verification will deter individuals from accessing the regulated websites. *See* § 129B.002(a); *Talley*, 362 U.S. at 60; *McIntyre*, 514 U.S. at 334. As referenced above, there is direct evidence that age verification requirements on websites depicting sexually explicit material serve as a deterrent., @Pornhub, X (June 30, 2023, 8:38 AM), https://twitter.com/Pornhub/status/1674774396773318658 (stating that, when a similar regulation was passed in Louisiana, traffic to Pornhub dropped eighty percent). Marginalized groups are more likely to face an even greater chilling effect given historical patterns of disenfranchisement. Jasmine Mithani, *Why Some States Are Requiring ID to Watch Porn Online*, 19th

(Feb. 14, 2024), https://veritenews.org/2024/02/14/why-some-states-are-requiring-id-to-watch-porn-online/. By restricting access to content related to these communities under the guise of protecting minors, H.B. 1181 perpetuates a legacy of using obscenity laws to silence marginalized voices. *See* § 129B.001–006; *see also* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379 (2008). This Court has consistently underscored the role of anonymity in fostering open discourse and protecting speakers from the "tyranny of the majority." *McIntyre*, 514 U.S. at 334. The requirement for age verification directly conflicts with this protection by making access to websites containing sexually explicit material contingent upon the disclosure of personal information, effectively chilling the exercise of free speech. *See id.* at 334; § 129B.002.

ii. The First Amendment Ensures the Right to Anonymity in Areas That Involve Controversial Speech, Such as Political Contributions, Where Revealing One's Identity Can Lead to Harassment or Retaliation

This Court has also emphasized the importance of anonymous speech in the context of campaign finance disclosure, where identification can expose individuals to harassment or retaliation and thereby chill speech. In *Brown v. Socialist Workers '74 Campaign Committee*, this Court ruled the First Amendment prohibits states from compelling minor political parties to disclose the names of contributors and recipients of disbursements when there is a reasonable probability those persons will be subject to threats, harassment, or reprisals. 459 U.S. at 87. The majority stated that

evidence offered to exempt minor parties from compelled disclosures, "need show *only a reasonable probability* that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 93 (citing *Buckley v. Valeo*, 424 U.S. 1, 71 (1976)) (emphasis added). The Court also noted how, if the law remained in place, the public interest would be harmed through the reduction of "the free circulation of ideas both within and without the political arena." *Id.* at 98. The Court thus held that the First Amendment prohibits a state from compelling disclosures by a minor party that will reasonably subject those persons to threats or reprisals. *Id.* at 102. The Court's ruling highlights how campaign disclosure laws can violate the First Amendment by creating a chilling effect, deterring individuals from associating with minor political parties due to the fear of harassment and reprisals. *See id.*

In dissenting from a denial of certiorari in *Delaware Strong Families v. Denn*, Justice Thomas amplified First Amendment concerns of campaign disclosure laws, expressing the need to shield the anonymity of donors who might otherwise be targeted for their contributions. 136 S. Ct. 2376, 2376–77 (2016) (Thomas, J., dissenting from denial of certiorari). Justice Thomas highlighted the conflict between election transparency policies and expressive rights, noting how "First Amendment rights are all too often sacrificed for the sake of transparency." *Id.* at 2373. Justice Thomas stated, "'[i]t is undoubtedly true' that mandatory disclosure of donor names 'will deter some individuals who otherwise might contribute' and 'may even expose contributors to harassment or retalia-

tion.'" *Id.* at 2377 (citing *Buckley*, 424 U.S. at 68). He reasoned that because campaign finance disclosure requirements deter individuals from donating and can expose these individuals to harassment, the First Amendment leaves little room for disclosing otherwise anonymous donor rolls. *Id.* at 2377. Again, this emphasizes that anonymity is particularly crucial in sensitive areas where disclosure could lead to a chilling effect, discouraging individuals from participating in the political process out of fear of retribution or harassment. *See id.* at 2376–77.

H.B 1181 violates the First Amendment because forcing users to verify their age creates a chilling effect, discouraging users from accessing constitutionally protected content out of fear of exposure or potential retaliation. *See Brown*, 459 U.S. at 87; § 129B.003. Both sexually explicit material and political contributions involve controversial speech that is essential to free expression. *See Brown*, 459 U.S. at 102. The protection of anonymity in such speech is critical to preventing censorship and ensuring that individuals are not deterred from engaging with or disseminating such content due to fear of reprisal or societal disapproval. *See id*. This Court in *Brown* held that laws interfering with the right to anonymity violate the First Amendment when there is a reasonable probability of subjecting individuals to threats or reprisals. *Id*. H.B. 1181's age verification requirement similarly risks deterring individuals from engaging in protected, controversial speech due to the fear of exposure or potential misuse of their data, creating a chilling effect that runs afoul of the First Amendment's protections. *See id.*; § 129B.003.

Justice Thomas' argument in *Delaware Strong Families v. Denn*—that a state's purported interest in disclosure laws does not justify exposing the identities of anonymous donors—applies directly to H.B. 1181. *See* 136 S. Ct. at 2377; § 129B.003. Just as disclosure of donor identities undermines the right to anonymity, age verification laws that require individuals to reveal personal information before accessing sexually explicit websites similarly infringe on this right. *See Del. Strong Fams.*, 136 S. Ct. at 2377; § 129B.003. Texas's stated goal of preventing children's exposure to mature content, like Delaware's purported interest in ensuring election transparency, cannot justify the erosion of privacy and anonymity. *See Del. Strong Fams.*, 136 S. Ct. at 2377; § 129B.002. The First Amendment protects sensitive and potentially uncomfortable speech, and requiring personal disclosures in the name of protecting children undermines this fundamental freedom. *See Del. Strong Fams.*, 136 S. Ct. at 2377.

c. Courts Across the Country Are Fortifying the Right to Anonymity Online and This Court Should Do the Same

The First Amendment right to anonymous speech is particularly vital on the internet, where individuals often rely on anonymity to freely express opinions without fear of retaliation.[3] *See Dendrite Int'l, Inc.*, 775 A.2d at 767; *Cahill*, 884 A.2d at 457. In *Dendrite*, the New Jersey Superior Court recognized the right to

[3] Although both are state court cases, *Dendrite Int'l, Inc*. has been cited in fifty federal court opinions as well as 209 law review articles. Similarly, *Cahill* has been cited in fifty-two federal court opinions and 207 law review articles.

speak anonymously online. 775 A.2d at 765. The court denied the plaintiff's request to compel disclosure of an internet user's identity because the claimant failed to meet the court's high hurdles to bypass these protections. *See id*. The court emphasized:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment.

Id. at 767 (quoting *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)). The court was specifically worried that bad actors would attempt to ascertain an internet user's identity "in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Id.* at 771.

Similarly, in *Doe v. Cahill*, the Supreme Court of Delaware emphasized "that speech over the internet is entitled to First Amendment protection. This protection extends to anonymous internet speech." *Cahill*, 884 A.2d at 456. The court found the internet to be "a unique democratizing medium" that "dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate." *Id.* at 455. Specifically, the court noted that because of anonymity on the internet, "'the audience must evaluate [a] speaker's ideas based on her words alone.' 'This unique feature of [the internet] promises to make public debate in cyberspace less hierarchical

and discriminatory' than in the real world because it disguises status indicators such as race, class, and age." *Id.* at 456 (citing Lidsky, *supra*, at 896). The court further impressed the importance of pseudonymous internet speech, finding that the right to anonymity online is essential to prevent a chilling effect that might deter individuals from exercising their freedom to speak anonymously on digital platforms. *See id.* at 559. Thus, this case reiterated the critical importance of protecting anonymous internet speech under the First Amendment. *See id.*

Courts throughout the country are upholding the right to remain anonymous online, and this Court should do likewise. *See Dendrite Int'l, Inc.*, 775 A.2d at 767; *Cahill*, 884 A.2d at 457. Online viewers of sexually explicit content are protected by the First Amendment's right to anonymity, and H.B. 1181's age verification requirement violates this right by requiring users to submit personal identification. *See Dendrite Int'l, Inc.*, 775 A.2d at 767; *Cahill*, 884 A.2d at 457; § 129B.003. In *Dendrite*, the court reinforced the right to anonymous speech online, emphasizing the importance of First Amendment protections for website users. 775 A.2d at 767. The court required a significant burden of proof before disclosing an anonymous user's identity, and any law that seeks to compel individuals to disclose their identities—such as H.B. 1181—should be held to a similarly high standard. *See id.*; § 129B.003. By stripping away the anonymity that enables open discourse and exploration online, H.B. 1181 imposes an unconstitutional barrier on free speech. *See Dendrite Int'l, Inc.*, 775 A.2d 762; § 129B.003. This Court should recognize the vital

importance of online anonymity by striking down H.B. 1181 as an infringement on First Amendment rights.

As the Supreme Court of Delaware noted in *Cahill*, the internet has the potential to make public debate more equitable. 879 A.2d at 456. Texas's law erodes this possibility because both verification methods offered—"(A) government-issued identification; or (B) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual"—disproportionately impact and restrict access to these websites for marginalized groups. § 129B.003(b)(2). A significant portion of U.S. residents, particularly those from marginalized groups, do not possess government-issued identification, and facial recognition systems are notoriously less accurate for individuals who are not white, cisgender men. Jason Kelley & Adam Schwartz, *Age Verification Mandates Would Undermine Anonymity Online*, EFF (Mar. 10, 2023), https://www.eff.org/deeplinks/2023/03/age-verification-mandates-would-undermine-anonymity-online; Bennett Cyphers, Adam Schwartz & Nathan Sheard, *Face Recognition Isn't Just Face Identification and Verification: It's Also Photo Clustering, Race Analysis, Real-time Tracking, and More*, EFF (Oct. 7, 2021), https://www.eff.org/deeplinks/2021/10/face-recognition-isnt-just-face-identification-and-verification.

The Delaware Supreme Court also noted that revealing an internet user's identity would create a chilling effect, thereby discouraging individuals from exercising their First Amendment rights. *Cahill*, 879 A.2d at 457. This concern directly applies to H.B. 1181's age verification requirement, as individuals who fear the loss of anonymity when accessing sexually

explicit websites may avoid using these sites altogether, even when engaging in lawful activities. *Id.*; § 129B.003. Just as online commenters may self-censor if they believe their identities could be exposed in future lawsuits, users of sexually explicit websites may refrain from visiting such sites if they fear their personal information could be disclosed. *See Cahill*, 879 A.2d at 457. *Cahill* and *Dendrite* emphasize the vital role of protecting online anonymity to prevent chilling speech or undermining the core principles of the First Amendment. *See id.*; 775 A.2d at 765. This Court should adopt the same position and fortify the right to anonymity online by striking down H.B. 1181's age verification requirements. Failure to do so would "reduce the adult population" of Texas to viewing "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 384 (1957).

II. TEXAS'S LAW FAILS TO SATISFY STRICT SCRUTINY BECAUSE IT IS NOT NARROWLY TAILORED TO ACHIEVE ITS GOALS

Regulations must be carefully tailored to avoid unnecessarily infringing on First Amendment rights. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). This close-fit requirement applies even when governmental entities may have legitimate interests, such as in regulating minors' access to certain aspects of internet use and preventing access to harmful content by minors. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126–27 (1989) ("In our judgment, this case . . . presents us with 'legislation not reasonably restricted to the evil with which it is said to deal.'" (internal citation omitted)). Thus, while H.B. 1181—in imposing an age-verification requirement on websites containing more than one-third sexually explicit

material—ostensibly protects minors from accessing inappropriate content, Texas's law is underinclusive and overly restrictive. *See Reno v. ACLU*, 521 U.S. 844, 875–79 (1997); § 129B.002. As the District Court noted in preliminary hearings, Texas has a valid, compelling interest in safeguarding minors, but H.B. 1181 is not narrowly tailored to pursue that interest given the existence of more effective and less restrictive alternatives. *Free Speech Coal., Inc. v. Colmenero*, 689 F. Supp. 3d 373, 392 (W.D. Tex. 2023), *aff'd in part, vacated in part sub nom. Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024). As the trial court correctly found, the law is "severely underinclusive" because it exempts search engines and social media sites, which host extensive sexual content. *Id.* Additionally, there are less restrictive, more effective alternatives to safeguard children from sexually explicit content, such as advanced content-filtering software. *Id.*

A. H.B. 1181 Is Not Narrowly Tailored Because There Are Less Restrictive Means to Achieve the State's Purported Interest

To survive strict scrutiny, a law must be narrowly tailored to serve the government's compelling interest. *Ent. Merchs. Ass'n*, 564 U.S. at 799. If less restrictive, more efficient alternatives to achieve the state's compelling interest exist, the law fails strict scrutiny. *Id.* H.B. 1181 is overly restrictive as less burdensome alternatives exist to achieve the state's interest in protecting minors from sexually explicit content. *See Reno*, 521 U.S. at 879; *Ashcroft v. ACLU*, 542 U.S. 656, 663 (2004); § 129B.002. These less restrictive methods include implementing adult controls on children's

devices or requiring internet service providers to block specific content until adults opt-out of the block.

In *Reno v. ACLU*, this Court struck down provisions of the Communications Decency Act of 1996 ("CDA") that aimed to protect minors from harmful online content by prohibiting the transmission of "indecent" and "patently offensive" communications on the internet. *Reno*, 521 U.S. at 844. The Court noted that the CDA, as a content-based restriction on speech, must serve a compelling governmental interest and be narrowly tailored to achieve that interest using the least restrictive means available: "The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes." *Id.* at 846. Thus, while the government's interest in protecting minors from harmful content was acknowledged as compelling, this Court found that the CDA was not narrowly tailored given the availability of less restrictive means that could achieve the same goal. *Id.* at 875. Specifically, the Court pointed to tools that allowed parents to restrict access to certain material, such as device-level filters, noting that these alternatives could be equally effective in preventing minors from accessing sexually explicit material. *Id.* at 879. The Court favored parental control software and device filters, emphasizing parents' authority to decide what content is suitable for their own children. *Id.*

In *Ashcroft v. ACLU*, this Court reviewed the constitutionality of the Child Online Protection Act ("COPA"), a federal law intended to prevent minors from accessing harmful material on the internet by imposing criminal penalties on website operators who made such content accessible to children. 542 U.S. at

661–62. The Court found that Congress had not fulfilled its burden to demonstrate that COPA's requirements were more effective than less restrictive alternative methods for preventing minors from accessing harmful material. *Id.* at 663. As in *Reno*, the Court acknowledged that protecting minors from exposure to harmful online content is a compelling interest, but it found that COPA was not the least restrictive means available to achieve this end. *Id.* at 663–66 (favoring content-filtering and blocking software); *Reno*, 521 U.S. at 879 (discussing how content filters balance children's protection with adults' access rights).

Texas's H.B. 1181 bears a strong resemblance to the federal statutes in *Reno* and *Ashcroft* that this Court found to be impermissible, overly-restrictive means of preventing minors from viewing sexually explicit material. *See Reno*, 521 U.S. at 875; *Ashcroft*, 542 U.S. at 663; § 129B.002. While the objective of protecting minors is compelling, H.B. 1181 fails strict scrutiny because there are less restrictive means of achieving Texas's goals. *See Reno*, 521 U.S. at 875; *Ashcroft*, 542 U.S. at 663; § 129B.002. Appellants proposed two alternatives: "(1) requiring internet service providers, or ISPs, to block specified content until adults opt-out of the block; and (2) 'content filtering' by implementing adult controls on children's devices." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 at 303 (Higginbotham, J., dissenting).

This Court has historically recognized that parental controls provide a less restrictive means for protecting minors. *See Reno*, 521 U.S. at 875. "Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit

card information." *Ashcroft*, 542 U.S. at 657. Above all, "promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished." *Id*. If the Court recognized "a reasonably effective method by which parents can prevent their children from accessing sexually explicit" content in 1997, it must do so again today, as these alternatives have only become more accessible and effective over time. *See Reno*, 521 U.S. at 877. These methods are especially well-suited because they empower parents to decide what is appropriate for their children, aligning with the principle that parents, rather than the government, should make key decisions about raising their children. *Ashcroft*, 542 U.S. at 663. H.B. 1181 mirrors the flaws found in the CDA and COPA by imposing unnecessary, overburdensome restrictions on adult access to lawful speech. *See Reno*, 521 U.S. at 875; *Ashcroft*, 542 U.S. at 663. Thus, H.B. 1181 fails to satisfy strict scrutiny because it imposes broad restrictions when more precise and less burdensome alternatives are available.

B. H.B. 1181 Is Seriously Underinclusive Because It Selectively Applies Its Restrictions and Ignores Key Avenues Through Which Minors Can Still Access Sexually Explicit Material

Laws restricting speech to protect minors must be narrowly tailored to serve a compelling government interest, and underinclusive regulations fail to meet this strict scrutiny standard. *See generally Ent. Merchs. Ass'n*, 564 U.S at 786; *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989). In particular, when a law targets

certain types of content while leaving other, similarly unpopular media unregulated, it raises concerns about whether the state is genuinely pursuing its stated interest or simply censoring disfavored speech. *See Ent. Merchs. Ass'n*, 564 U.S at 802.

In *Entertainment Merchants Association*, this Court held California's law prohibiting the sale or rental of violent video games to minors violated the First Amendment because it was not narrowly tailored to serve a compelling government interest, particularly due to its underinclusive nature. *Id.* at 786. California enacted a law prohibiting the sale of violent video games to minors, asserting that its interest in shielding children from violent entertainment was aimed at preventing potential harm to their well-being. *Id.* at 789. The law required "18" labels on violent video games and imposed fines on retailers for selling such games to minors. *Id*. The video game industry challenged the law, asserting it violated free speech rights under the First Amendment. *Id*. The Court found the law was "wildly underinclusive" in addressing the state's purported interest of protecting children from violent content. *Id.* at 802. The regulation targeted video games, while California chose not to restrict other forms of violent media, such as "Saturday morning cartoons," books, or movies. *Id.* at 801. This selective approach raised "serious doubts" about whether the state was genuinely pursuing its interest in protecting children, or rather "disfavoring particular speaker[s] or [the] viewpoint[s]" of video game sellers. *Id.* at 802. Furthermore, the law allowed children to access these allegedly dangerous materials as long as an adult consented, without any meaningful verification of their relationship to the minor. *Id*. This

inconsistency further weakened California's argument that it was addressing a "serious social problem." *Id.* at 803. Given this infirmity, the law's restrictions did not adequately provide parental control, rendering the state's asserted interest insufficient to justify the law's limitations on free speech. *Id.* at 806. As a method of protecting children, the law was underinclusive for focusing only on video games while allowing other violent media to go unregulated. *Id.*

Texas's H.B. 1181 is eerily similar to the California law this Court struck down in *Entertainment Merchants Association.* 564 U.S. at 789; § 129B.002. While Texas claims it is protecting children from exposure to sexually explicit material, several key exemptions and loopholes undermine this justification. Petition for Writ of Certiorari at 10, *Free Speech Coalition v. Paxton*, No. 23-1122 (Apr. 12, 2024), 2024 WL 1657101 at *10 (highlighting that "search engines allow access to 'sexually explicit or pornographic' content through 'visual search,' and 'social media sites, such as Reddit, can maintain entire communities and forums (i.e., subreddits), dedicated to posting online pornography with no regulation under H.B. 1181'"). First, like California's failure to restrict all forms of violent media from minors, H.B. 1181 fails to include search engines and social media platforms, despite the fact that these platforms have entire communities and forums dedicated to posting sexually explicit content. *See Ent. Merchs. Ass'n*, 564 U.S. at 801; § 129B.002. It is far more likely that children will encounter sexually explicit material on popular social media sites like Instagram or Facebook than they would pornographic websites, both of which display the same explicit content without any age verification

mechanisms. Common Sense Media, a leading nonprofit providing media advice and recommendations for families, released a report showing that fifty-eight percent of teens aged thirteen to seventeen have accidentally encountered adult content, with approximately one-in-five of those incidents occurring on social media. *Teens and Pornography*, Common Sense Media (Jan. 10, 2023), https://www.commonsensemedia.org/research/teens-and-pornography. Since H.B. 1181 only applies to websites where more than one-third of the content is classified as harmful to minors, it will fail to protect those teens from exposure on social media platforms. *Id.*; § 129B.002. Therefore, just as the California law was underinclusive for failing to regulate all forms of violent media that minors could access, H.B. 1181 is similarly underinclusive because it exempts search engines and social media platforms, where children are far more likely to encounter explicit content. *See Ent. Merchs. Ass'n*, 564 U.S. at 802; § 129B.002. The reality is children are substantially more active on social media platforms than on dedicated adult websites, yet social media platforms are not subject to the same age verification requirements. *See Ent. Merchs. Ass'n*, 564 U.S. at 802; § 129B.003. This makes the law underinclusive by ignoring the most likely avenues through which minors might access explicit material, failing to fully address the state's purported interest in protecting children. *See Ent. Merchs. Ass'n*, 564 U.S. at 789; § 129B.002. Moreover, this selective application of the law raises questions about whether the state is truly protecting children or simply disfavoring adult websites, much like California's selective targeting of video games. *Ent. Merchs. Ass'n*, 564 U.S. at 802; § 129B.002.

Additionally, H.B. 1181 does not account for technological workarounds, such as the use of virtual private networks ("VPNs"), which allow children to bypass age verification by digitally altering their location, placing them outside the law's reach. According to a recent Massachusetts Institute of Technology study of middle school aged children (ages eleven to fourteen), forty-one percent of them use a VPN to access the internet. Nicholas Santer, Adriana Manago, Allison Starks & Stephanie M. Reich, *Early Adolescents' Perspectives on Digital Privacy, in Algorithmic Rights and Protections for Children* 142 (2023). Therefore, just as the California law in *Entertainment Merchants Association* failed by allowing children to access allegedly dangerous materials without any meaningful verification of the adult's relationship, H.B. 1181 is similarly flawed because it does not prevent minors from using VPNs to bypass age verification. In both cases, the lack of proper verification mechanisms allows children to easily circumvent the laws' protections. *See Ent. Merchs. Ass'n*, 564 U.S. at 802; § 129B.002. This technological loophole further undermines Texas's attempt at addressing the "serious social problem" of restricting minors' access to explicit material. *See Ent. Merchs. Ass'n*, 564 U.S. at 804; § 129B.002. While proponents of the law might argue that this demonstrates the need for regulations like H.B. 1181, such laws ultimately fail to effectively protect minors and instead impose unconstitutional restrictions on adults' access to legally protected material. *See Ent. Merchs. Ass'n*, 564 U.S. at 804; § 129B.002. By attempting to impose overly broad and intrusive regulations on all users the law fails to achieve its intended purpose without infringing on the fundamental rights of individuals. *See Ent. Merchs. Ass'n*, 564 U.S. at 804; § 129B.002.

CONCLUSION

For the reasons discussed, this Court should extend the right to anonymity online and disallow age verification laws that compel users to disclose personal information. Requiring identity disclosure on sexually explicit websites undermines the ability to engage in expression and association freely without fear of identification or retaliation. Because H.B. 1181 violates these well-established First Amendment protections, it should be struck down.

Respectfully submitted,

Jennifer Safstrom
Counsel of Record
STANTON FOUNDATION FIRST AMENDMENT CLINIC
VANDERBILT LAW SCHOOL
131 21st Ave South
Nashville, TN 37203-1181
(615) 322-4964
jennifer.safstrom@vanderbilt.edu

*Counsel for Amici Curiae**

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* Reagan K. Mitchell, Sarah J. Zeiger, and Ryan Riedmueller of the Vanderbilt First Amendment Clinic substantially assisted with the preparation of this brief.