

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 Petition for a 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**

JILLIAN LONDON

DANIEL R. ADLER

ROARK LUSKIN

ZACHARY MONTGOMERY

GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Ave.

Los Angeles, CA 90017

KYLIE CALABRESE

GIBSON, DUNN & CRUTCHER LLP

811 Main St., Ste. 3000

Houston, TX 77002

AMER S. AHMED

Counsel of Record

IASON TOGIAS

APRATIM VIDYARTHI

GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.

New York, NY 10166

(212) 351-2427

AAhmed@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE FIFTH CIRCUIT’S MISSTATEMENT OF CONTROLLING FIRST AMENDMENT LAW.	7
II. THIS ISSUE IS EXCEPTIONALLY IMPORTANT BECAUSE THE PROLIFERATION OF INEFFECTIVE WEBSITE-BASED AGE-VERIFICATION MANDATES WILL CAUSE HARM TO CHILDREN.	9
A. Minors Have Easy Access to Tools That Allow Them to Evade Website-Level Controls.....	10
B. H.B. 1181 Will Be Hampered by Cross- Border Enforcement Problems.....	13
C. H.B. 1181 Will Have Unintended and Dangerous Consequences for Children.....	14
III. CONTENT FILTERING IS AN ALTERNATIVE THAT BURDENS SPEECH LESS AND PROTECTS CHILDREN MORE.	17
A. At Least Two Forms of Content Filtering Would be More Effective than Website- Based Age Verification.	17
B. Content Filtering Provides Significant Advantages That Protect Children.....	19
CONCLUSION	22

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Americans for Prosperity Foundation v. Bonta</i> , 141 S. Ct. 2373 (2021).....	8
<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004).....	3, 7, 8, 17, 18
<i>Brown v. Entertainment Merchants Association</i> , 564 U.S. 786 (2011).....	19
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993).....	8
<i>Free Speech Coalition, Inc. v. Colmenero</i> , 2023 WL 5655712 (W.D. Tex. Aug. 4, 2023).....	10, 17, 18, 22
<i>Ginsberg v. New York</i> , 360 U.S. 629 (1968).....	18
<i>Jacobellis v. Ohio</i> , 378 U.S. 184 (1964).....	13
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	3, 7, 18
<i>Sable Communications of California v. FCC</i> , 492 U.S. 115 (1989).....	3
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960).....	7
<i>United States v. Playboy Entertainment Grp.</i> , 529 U.S. 803 (2000).....	5, 8, 17, 18

Statutes

Tex. Civ. Prac. & Rem. Code Ann. § 129B	8, 9
--	------

Other Authorities

<i>1.7 Million U.S. Children Fell Victim to Data Breaches, According to Javelin’s 2022 Child Identity Fraud Study</i> , Javelin (Oct. 26, 2022), https://tinyurl.com/3y83xjyj	21
<i>Age Verification in the News</i> , PornHub Blog (Mar. 14, 2024), https://tinyurl.com/y4pcuju8	20
Alex Littlehales, <i>As new pornography verification law kicks in, Virginia ranks highest in recent searches for VPN access</i> , 13News Now (July 5, 2023), https://tinyurl.com/yjm5j4ty	12
Ben Woods, <i>The (almost) invisible men and women behind the world’s largest porn sites</i> , The Next Web: Insider (Mar. 3, 2016), https://tinyurl.com/5fvjkuu7	14
Chauncey Crail, <i>VPN Statistics And Trends In 2024</i> , Forbes (Feb. 29, 2024), https://tinyurl.com/yhuat44y	12
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	12

Free Speech Coalition, <i>Age Verification Bill Tracker</i> (2024), https://tinyurl.com/yb7kakyp	5
<i>The internet porn ‘epidemic’: By the numbers</i> , The Week (Jan. 8, 2015), https://tinyurl.com/4d5y3zhr	13
Internet Society, <i>Internet Society— Perspectives on Internet Content Blocking: An Overview</i> (Mar. 2017)	14
Kari Paul, <i>Pornhub removes millions of videos after investigation finds child abuse content</i> , The Guardian (Dec. 14, 2020), https://tinyurl.com/3epfz6bz	15
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	11
Majid Yar, <i>Protecting children from Internet pornography? A critical assessment of statutory age verification and its enforcement in the UK</i> , 43 Policing: An International Journal 183 (2019)	15, 16
Meghan McIntyre, <i>Many pornography websites aren’t complying with new Va. age verification law</i> , Virginia Mercury (Aug. 23, 2023), https://tinyurl.com/3nc6n6mm	14
Nadeem Sarwar, <i>Pornhub Shutdown In Texas Sends Users Scrambling For VPN Access</i> , SlashGear (Mar. 15, 2024), https://tinyurl.com/5ebbh87n	12

Neil Thurman & Fabian Obster, <i>The regulation of internet pornography: What a survey of under 18s tells us about the necessity for and potential efficacy of emerging legislative approaches,</i> 13 Policy & Internet 415 (2021)	16
Pandora Blake, <i>Age verification for online porn: more harm than good?,</i> 6 Porn Studies 228	16
<i>Parental Controls, FTC Consumer Advice</i> (Sept. 2011), https://tinyurl.com/2nsemz5c	18
Pietro Ferrara et al., <i>The Dark Side of the Web-A Risk for Children and Adolescents Challenged by Isolation during the Novel Coronavirus 2019 Pandemic,</i> 228 J. Pediatrics 324 (2021)	15, 16
<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),</i> https://tinyurl.com/3mn4aadk	20
Shweta, <i>What a VPN Hides (And What It Doesn't),</i> Forbes (Oct. 19, 2023), https://tinyurl.com/bdhfw583	11
<i>The Tor Project, www.torproject.org (last visited May 12, 2024)</i>	12
<i>Usage of virtual private networks (VPN) worldwide as of 4th quarter 2023, by age and gender, Statista (Apr. 25, 2024),</i> https://tinyurl.com/5ankuf9y	13

VPN overview for Apple device deployment,
Apple (Mar. 7, 2024),
<https://tinyurl.com/3r7suznk> 12

Zachary McAuliffe, *Geo-Blocking Explained:
What to Know and How You Can Get
Around It*, CNET (Dec. 16, 2023),
<https://tinyurl.com/3tftn9sf>..... 11

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, particularly when children are involved. Serving as a protective barrier, age-verification measures can make it more challenging for children to access harmful content, acts as a deterrent against unintentional exposure, and enhances the protection of children. Laws like Texas H.B. 1181, however, which rely on website-based age verification, are an ineffective solution that will only result in

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. Counsel of record for the parties received timely notice of *amicus*'s intent to file this brief.

downstream harm to children. Instead, implementing age verification on devices themselves to support content filtering is a better solution for shielding children from harmful content online. 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). 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, lacking in any artistic or educational value, is harmful to a child’s development and should not be accessible to minors in the absence of considered parental guidance. Although shielding minors from such online content is thus 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), and *Sable Communications of California v. FCC*, 492 U.S. 115 (1989). *Amicus* agrees with the Free Speech Coalition that this Court should grant certiorari to address the Fifth

Circuit’s misstatement of controlling First Amendment law in subjecting H.B. 1181 to rational basis review. Cert. Pet. 1–3. Review by this Court is essential because, 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 will not achieve lawmakers’ aims for three reasons. *First*, it will be 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 will 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.

Content filtering is an alternative framework to website-based age verification that imposes a lesser burden on speech. Content filtering can be carried out by parents and guardians, an approach this Court has previously endorsed. *United States v. Playboy Entertainment 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 at the device level before an individual’s choice 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 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 they seek to serve. This Court should grant certiorari.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE FIFTH CIRCUIT’S MISSTATEMENT OF CONTROLLING FIRST AMENDMENT LAW.

This Court’s instruction to apply strict scrutiny to content-based restrictions has been consistent and clear. Strict scrutiny is necessary to ensure that governments do not make policy mistakes that inevitably will harm the interests they purport to protect while curtailing the general public’s First Amendment right to access speech. In *Reno*, this Court ruled that strict scrutiny applies to laws that are content-based, aimed at protecting minors, and chill speech that is protected for adults. 521 U.S. at 870, 875–878. The Court struck down the provisions of the Communications Decency Act protecting minors from “indecent” and “patently offensive” communications because the provisions were vaguely worded and overbroad, and because less restrictive and more effective alternatives were available. *Id.* at 873–879. Likewise in *Ashcroft*, the Court upheld a preliminary injunction against the Child Online Protection Act, which mandated website-based age verification for online sexual material like H.B. 1181 does, noting that more narrowly drawn, effective tools for protecting children were available. 542 U.S. at 666–669.

Strict scrutiny is the appropriate test for such content-based restrictions because it ensures that the government uses its broad, stifling power 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*

Entertainment Grp., 529 U.S. at 816; *Edenfield v. Fane*, 507 U.S. 761, 770–771 (1993).

The Fifth Circuit disregarded that precedent. Pet. App. 12a–29a. The decision below opens children up to serious harms while ignoring plausible, less restrictive alternatives to H.B. 1181 that would be more effective, a necessary inquiry this Court mandated in *Reno*, *Ashcroft*, and *Playboy Entertainment Group*. 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.

Applying strict scrutiny also ensures that government restrictions do not disproportionately chill speech—whether for children or adults. See *Ashcroft*, 542 U.S. at 666; *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2387 (2021). The Fifth Circuit’s approach wholly ignores the chilling effect on *children’s* First Amendment 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,” but it nowhere defines how the volume of a website’s content is to be measured. H.B. 1181 Tex. Civ. Prac. & Rem. Code Ann. § 129B. And children are prevented from accessing the *remainder* of content on such websites (up to two-thirds worth), all of which might have educational or artistic value.²

² 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 the up-to-

Worse, the definition of “sexual material harmful to minors” goes beyond sexually explicit material to include “descriptions” of genitals, pubic hair, or nipples. *Id.* at § 129B.001(6)(B). Taken together, the ambiguity of “one-third” combined with the overbroad definition of “material harmful to minors” means websites available for access in Texas—effectively, *all* websites on the internet—might be forced to self-censor under threat of civil penalties if they risk crossing the one-third threshold under any measure, even if a substantial portion of their content is art, sexual education material, or medical information that arguably falls within the defined proscription. Compounding that harm, the one-third threshold can be read to count unmoderated comments posted to websites by third parties, thus sweeping within the penalties of H.B. 1181 countless websites that permit user interactivity.

The Fifth Circuit’s failure to apply strict scrutiny to H.B. 1181, in contravention of controlling First Amendment precedent, meant that the law’s significant overbreadth and underinclusiveness problems went wholly unaddressed. That misstatement of law affects millions of people and websites, and counsels in favor of review.

II. THIS ISSUE IS EXCEPTIONALLY IMPORTANT BECAUSE THE PROLIFERATION OF INEFFECTIVE WEBSITE-BASED AGE-VERIFICATION MANDATES WILL CAUSE HARM TO CHILDREN.

As well-intentioned as H.B. 1181 may be, it will not serve its intended purpose—preventing children from

two-thirds of content that is, by definition, not harmful to minors. H.B. 1181 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 to children’s First Amendment rights to access non-obscene speech.

accessing sexually explicit content online—for three reasons. *First*, website-based age-verification systems can be avoided easily by using VPNs or Tor. *Second*, H.B. 1181 cannot be enforced against the many offshore websites hosting content harmful to minors. *Third*, the law will cause unintended harm by steering minors to areas of the internet rife with malware, trafficking, and predation.

These problems are not unique to H.B. 1181. Texas is one of eight existing website-based age-verification laws and at least eighteen other states have introduced or pre-filed website-based age-verification laws. See p. 5, *supra*. The proliferation of overbroad, underinclusive, and ineffective laws like H.B. 1181 threatens the future of child safety online.

A. Minors Have Easy Access to Tools That Allow Them to Evade Website-Level Controls.

Because of how easily its mandated limitations can be circumvented, H.B. 1181 does not seriously address children’s access to adult content. Instead, the law impermissibly burdens every adult’s access to adult content, thus making it both ineffective and overbroad.

H.B. 1181 limits the ability of those in Texas to access certain websites without age verification. To accomplish that purpose, Texas relies on a website’s ability to accurately infer a user’s location, which is done by approximating the geolocation of a 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 (“Sonnier Decl.”). But circumventing IP-based geolocation is easy through the

use of VPNs, the Tor network, or proxy servers designed to mask IP addresses, all of which disguise a user's location.³

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 it is the VPN server that is requesting access—not the original user—and therefore uses the VPN server's geolocation, not that of the actual user. *Ibid.* 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 could use a VPN to make it seem to an adult website that the child is in Manila or Timbuktu—places 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 masking tool. It uses even more layers, effectively 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://ti->

³ Even if a user does not use an IP-masking workaround, geolocation services using IP addresses are far from perfect, and frequently estimate a user's location within a broad radius encompassing several states. *Ibid.*

nyurl.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 Access*, SlashGear (Mar. 15, 2024), <https://tinyurl.com/5ebbh87n>. This increased 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 widely available, readily accessible, and nationally advertised. 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 May 12, 2024). According to one survey, seventy-seven percent of people use VPNs for personal use. Chauncey Crail, *VPN Statistics And Trends In 2024*, Forbes (Feb. 29, 2024), <https://tinyurl.com/yhuat44y>. Another survey found that twenty percent of females and thirty-two percent 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 ease with which such tools can be accessed, combined with their growing popularity and usage, H.B. 1181 does little in practice to limit minors' access to explicit content.

B. H.B. 1181 Will Be Hampered by Cross-Border Enforcement Problems.

Even if H.B. 1181 could be effective despite the use of masking tools, enforcing the law effectively would be impractical. For two reasons, Texas will be left playing whack-a-mole against countless adult websites, many of which are beyond Texas's jurisdiction.

First, because of the copious amount of adult content on the internet, Texas will not be able to police age verification for most websites that exceed H.B. 1181's one-third "harmful" content threshold. Although it is difficult to define obscenity or "hard core pornography," *c.f. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), according to some estimates twelve percent 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>. H.B. 1181 attempts to address *any* website whose content is more than one-third "harmful to minors." The law does not define how "one-third" is measured. Nor is the law limited to major commercial adult websites: any blog, communications platform, or plaintext website is covered. 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).

Second, 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 states such as Virginia, which 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. Thus, H.B. 1181 does not have the means to achieve its stated goals.

C. 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 that will 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*, *The 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.e2 (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 certain 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 et al. 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 et al. 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 UK government 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 (brackets in original) (citation omitted). 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 *Policy & 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. Excusing Texas from its burden of satisfying strict scrutiny blessed a law that grossly undermines its own aims of child protection.

III. CONTENT FILTERING IS AN ALTERNATIVE THAT BURDENS SPEECH LESS AND PROTECTS CHILDREN MORE.

There is a well-established, effective alternative to H.B. 1181 that is also less restrictive on adults' access to speech: content filtering. Where strict scrutiny applies (as it should here to the content-based H.B. 1181), content filtering is the “modern version of ‘blocking and filtering software’” that this Court has endorsed as constitutionally compliant. *Colmenero*, 2023 WL 5655712, at *16 (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 Entertainment Group*, 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 has also noted the effectiveness of content filtering, noting 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 would likely 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 can also 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 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 previously endorsed. *Playboy Entertainment Group*, 529 U.S. at 815, 826. Parental controls empower parents with default protections, allowing them to establish robust oversight because protections can only be bypassed 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*, 2023 WL 5655712, at *18.

Importantly, content filtering gives parents discretion to decide what their children should be able to view, and thus respects parental authority in their respective households. *Reno*, 521 U.S. at 879; *Playboy Entertainment Group*, 529 U.S. at 815; *Ginsberg v. New York*, 390 U.S. 629, 639–640 (1968). 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 v. Entertainment Merchants Association*, 564 U.S. 786, 804 (2011) (noting the importance of parents in deciding what media their children consume).

Operating Systems that Filter Content Based on Age: The government could also 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 capabilities 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. 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 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 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 circumvent. 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. 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, Tor, or websites hosted abroad. Content filtering can also filter by *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 sharing personal information with websites, which prevents websites from identifying who their users are and being able to share and monetize that data. This personal information includes the identities of children who may attempt to access such websites using their IDs. An added benefit is that third parties cannot access personal data because personal information 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, 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 websites 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.⁴ 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

⁴ 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.

identifying data.” *Colmenero*, 2023 WL 5655712, at *16.

Fifth, website-based identification systems risk 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, increasing the chances that children’s personal information could 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.

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 internet content. They are not. Content filtering is a plausible, more effective, more secure, and less burdensome alternative than website-level age verification.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JILLIAN LONDON
DANIEL R. ADLER
ROARK LUSKIN
ZACHARY MONTGOMERY
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Ave.
Los Angeles, CA 90017

KYLIE CALABRESE
GIBSON, DUNN & CRUTCHER LLP
811 Main St., Ste. 3000
Houston, TX 77002

AMER S. AHMED
Counsel of Record
IASON TOGIAS
APRATIM VIDYARTHI
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-2427
AAhmed@gibsondunn.com

Counsel for Amicus Curiae

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